Stephenson

EX LIBRIS

GILBERT THOMAS STEPHENSON

CARRIE RICH MEMORIAL LIBRARY

CAMPBELL COLLEGE

BUIES CREEK NORTH CAROLINA

Ref.
KFN
7427
.N8P4
1908
v.1
W

DR. NORMAN A. WIGGINS

DR. NORMAN A. WIGGINS

REVISAL OF 1908

OF

NORTH CAROLINA

BEING THE PUBLIC AND GENERAL STATUTES OF THE STATE, PREPARED BY AUTHORITY OF CHAPTER 522 OF THE PUBLIC LAWS OF 1907 AND ANNOTATED WITH DECISIONS OF SUPREME COURT

North Carolina. Laws, Statutes, etc.

BY

GEORGE P. PELL, LL. B.

OF THE WINSTON-SALEM (N. C.) BAR

BASED UPON THE OFFICIAL CODIFICATION BY THOMAS B. WOMACK, LL. D., NEEDHAM Y. GULLEY AND WILLIAM B. RODMAN, KNOWN AS THE REVISAL OF 1905, AND WITH THE PUBLIC LAWS OF THE SESSIONS OF 1907 AND 1908 CODIFIED THEREINTO

DR. NORMAN A. WIGGINS

VOL. I

CHARLESTON, S. C.:
WALKER EVANS & COGSWELL CO PUBLISHERS
1908

DR. NORMAN A. WIGGINS

ENTERED ACCORDING TO ACT OF CONGRESS, IN THE YEAR 1908,
BY GEORGE P. PELL, IN THE OFFICE OF THE LIBRA-
RIAN OF CONGRESS, AT WASHINGTON

TABLE OF CONTENTS.

VOLUME ONE.

CHAPTERS.

1. Administration.
2. Adoption of Minor Children.
3. Aliens.
4. Apprentices.
5. Attorneys at Law.
6. Auctioneers.
7. Banks.
8. Bastardy.
9. Bonds.
10. Boundaries.
11. Burnt and Lost Records.
12. Civil Procedure.
13. Clerk Superior Court.
14. Commissioners of Affidavits.
15. Common Law.
16. Constables.
17. Contempt.
18. Conveyances.
19. Coroners.
20. Corporation Commission.
21. Corporations.
22. Costs.
23. County Commissioners.
24. County Prisons.
25. County Revenue.
26. County Treasurer.
27. Courts—Justices'.
28. Courts—Superior.
29. Courts—Supreme.
30. Descents.
31. Divorce and Alimony.
32. Electric Companies.
33. Estates.
34. Evidence.
35. Fences and Stock Law.
35a. Flume Companies.
36. Gaming Contracts.
37. Grants.
38. Guardian.

000389

39. Habeas Corpus.
40. Hunting.
41. Idiots, Inebriates and Lunatics.
42. Innkeepers.
43. Insolvent Debtors.
44. Interest.
45. Jurors.
45a. Labor.
46. Landlord and Tenant.
47. Libel and Slander.
48. Liens.
49. Liquors.
50. Marriage.
51. Married Women.
52. Mills.
53. Names of Persons.
54. Negotiable Instruments.
55. Notaries.
56. Oaths.
57. Officers.
58. Oysters and Fish.
59. Partition.
60. Partnership.
61. Railroads.
62. Register of Deeds.
63. Religious Societies.
64. Restoration to Citizenship.
65. Roads, Bridges, Ferries.

VOLUME TWO.

CHAPTERS.

66. Salaries and Fees.
67. Sheriff.
68. Statutes, Construction of.
69. Strays.
70. Sunday and Holidays.
71. Surety.
72. Taxes, Collection of.
73. Towns.
74. Trademarks.
74a. Trusts and Monopolies.
75. Warehousemen.
76. Water Supplies.

77. Weights and Measures.
78. Widows.
79. Wills.
80. Criminal Procedure.
81. Crimes.
82. Agricultural Societies and Fairs.
83. Building and Loan Associations.
84. Bureau of Labor and Printing.
85. Charities.
86. Confederate Monuments.
87. Department of Agriculture.
88. Drainage.
89. Education.
90. Elections.
91. Embalmers.
92. Firemen's Relief Fund.
93. General Assembly.
94. Geological and Economic Survey.
95. Health.
96. Historical Commission.
97. Hospitals for Insane.
98. Impeachment.
99. Inspection.
100. Insurance.
101. Internal Improvements.
102. Militia.
103. Mines.
104. Navigation.
105. Pensions.
106. Public Buildings and Grounds.
107. Public Debt.
108. Public Libraries.
109. Public Printing.
110. Revenue.
111. Rivers and Creeks.
112. Soldiers' Home.
113. State Boundaries.
114. State Flag, etc.
115. State Officers.
116. State's Prison.
116a. Stonewall Jackson Manual Training and Industrial School.
117. Trained Nurses.
118. United States Lands.
119. Veterinary Board.
120. Wrecks.
121. Concerning this Revisal.

APPENDIX

Constitution of North Carolina.
Constitution of the United States.
Authentication of Records.
Removal of Causes.
Naturalization of Aliens.
Extradition.
Index.

PREFACE.

A proper understanding and, therefore, a proper use of the contents of these two volumes can only be had after a careful reading of these prefatory remarks, which are in a measure explanatory.

For a number of years there has been a great demand for an edition of the statute laws of the state annotated with the decisions of the supreme court. The general assembly of 1903, which provided for the codification of the laws, for some reason did not meet this demand, and hence when that codification was published as the Revisal of 1905, even though the work was most excellently done by the commissioners, the legal profession was disappointed. It is to be regretted that ample provision was not made at the time for the commissioners to do the annotating, so that this arduous and intricate work could have been placed upon older and abler shoulders.

It being apparent that, unless someone who was lacking in foresight could be found to undertake it as a private venture, an annotated edition of the general and public statutes would never be an accomplished fact, many interested themselves in finding that one, and fate named me as the victim.

The general assembly of 1907 granted to me permission "to use any or all portions of the Revisal of 1905" in the preparation of this work, and authorized the codification of the session laws into the same, requiring that they be placed under the proper chapters and subchapters of the said Revisal of 1905, and that the section numbers given them "should not conflict with or change the original section numbers of the said Revisal, or the general arrangement thereof." Under this authority, or permission, the laws of the session of 1907 and of the special session of 1908 have been codified into the Revisal of 1905, the original section numbers remaining undisturbed and the general arrangement of said Revisal being maintained. It is necessary to state, therefore, that the designation of sections by number, with a letter of the alphabet added, signifies nothing except the order in which the sections come. No subordination one to the other is intended. New sections could only be placed under the proper chapters and subchapters and in the proper order in this way, if the caution to maintain "the original section numbers of the Revisal of 1905" was to be obeyed.

Some criticisms have been advanced by those to whom several newly codified sections have been submitted, of the liberty taken with the original session laws in codifying. They seem to think that the new acts should merely be printed as a whole in this work, without having their sections distributed around under appropriate chapters, and that no liberty should be taken to can-

cel sections rendered obsolete. This would not be "codifying," and would not improve the present condition of the laws. Such a plan would have left the exemption from jury duty of contributing members of military companies in the chapter Militia where it would never have been found. It might, therefore, be well to explain here that one of the purposes of this work is to present the full general and public statute laws of this state, codified up to date, under appropriate heads. It stands entirely on its own merits. If the statute law is found to be incorrect, then the work will be of little value, save for the annotations. If found to be correct, it will become authority in the courts of its own force.

While it is of great value to the profession and to the state to have this new codification of statutes, the chief value of this work lies in the annotations. These are not as uniform in style as they should be owing to inability to calculate as to how the space allotted for them would hold out. They were made more elaborate as the assurance of having space became positive. In many cases they do not represent the actual decisions of the court, but a principle involved in the decisions boiled down for ready and practical use. In order to get both statutes and annotations within two volumes, it was necessary to discard decisions that were not strictly within the scope of the section annotated, yet in the case of very important and useful sections much collateral matter has been inserted.

It should be borne in mind that the decisions of the court are so briefly stated that they may not be readily understood standing alone, and, in order to understand them, they must be interpreted in view of the section of statute law under which they are placed, the premise in nearly every syllabus, which usually refers to the statute, being dispensed with for lack of space.

In the preparation of the annotations, which involved the search for, and consideration of, over 40,000 references, it has been my good fortune to have the assistance of Mr. William T. Wilson, a most promising young member of the Winston-Salem bar, upon the important chapters of Conveyances, Corporations, and others; also the assistance of Mr. Joseph B. Cheshire, Jr., of the Raleigh bar, a most skillful digester, and a young lawyer of acumen, upon the chapters Criminal Procedure and Crimes. Messrs. Murray Allen and Claude B. Denson, also of the Raleigh bar, rendered valuable assistance upon several chapters of importance.

While in this, as in all publications of like character, there are many defects, it is my hope that so much labor spent will shorten the labors of someone, and that these volumes may be of service to the profession and to the entire state in the promotion of justice and the protection of the rights of men. Within the next ten years I trust I shall be able to present an almost perfect work of this kind to the public. During that time I will expect the aid of all who may find errors, or who may conceive of any improvement. In the mean-

time I will perhaps learn much myself in that school exclusively reserved for those who can learn at no other.

One word as to how to use these volumes to advantage. First get thoroughly acquainted with them. Many books of value lie dusty on the shelf because the owner lacks that patience necessary to learn them. In hunting for a section or a subject, keep the eye fixed upon the page-heading which carries both the section numbers and subchapter headings. Once in the habit of doing this, and the law is easy to find. Study carefully the major-heads of the Index. They will reveal to you ways of finding the law of which you have hitherto been unaware. As an example, under the word "Forms" many sections not embracing actual forms are referred to, because they disclose material points to be kept in mind in drawing upon the specific legal paper.

In conclusion I wish to express my great appreciation of the many kindnesses shown me in the preparation of this work by different members of the profession and by certain warm personal friends. Among them should be mentioned Messrs. Alexander Stronach and Perrin Busbee, of the Raleigh bar, Gwyn L. Park, of the Jefferson bar, and Mr. W. W. Scott, Librarian of the Virginia Supreme Court of Appeals, Mr. Scott having provided me with the North Carolina Reports and other works while I was in Richmond for a month's medical treatment. And an especial acknowledgment is due to Mr. William A. Blair, a member of the Winston-Salem bar, but for whose kindly interest and timely aid the accomplishment of this great task, consuming the days and many of the nights of three years, might possibly have been despaired of.

GEORGE P. PELL.

Winston-Salem, N. C., Dec. 24, 1908.

ABBREVIATIONS EXPLAINED.

Code, s. 65, means Code of 1883, section sixty-five.
R. C. means Revised Code.
R. S. means Revised Statutes.
C. C. P. means Code of Civil Procedure.
1907, c. 5, s. 7, means Public Laws of 1907, chapter 5, section 7.

CHAPTER 1.

ADMINISTRATION.

I. Necessity for.

1. Penalty; what family may use. No person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under the penalty of one hundred dollars, one-half to the use of the informer and the other half to the state; but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary, until the widow's year's support is assigned therefrom, as prescribed by law.

Code, s. 1522; 1868-9, c. 113, s. 93. **"Administration" means management of estate:** Currie v. Currie, 90-556. **Complaint in action for penalty must show, what:** Ibid. **Effect of widow withholding too much:** Israel v. King, 69-373. **How penalty statutes construed:** Alexander v. R. R. 144-93.

2. Executor de son tort. Every person who shall receive goods or debts of any person dying intestate, or any release of a debt due the intestate, upon a fraudulent intent, or without such valuable consideration as shall amount to the value or thereabout, shall be chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released, will satisfy.

Code, s. 1494; 1868-9, c. 113, s. 67; 43 Eliz., c. 8.

WHO IS EXECUTOR DE SON TORT. One who without authority does acts properly duties of administrator: Barnard v. Gregory, 14-223. **Administrator who holds property under deed void as to creditors:** Norfleet v. Riddick, 14-221; Burton v. Farinholt, 86-267. **Intermeddler, though afterwards letters issued to him:** Norfleet v. Riddick, 14-221. **Fraudulent intermeddler after administrator appointed:** McMorine v. Storey, 20-83. **Fraudulent donee of personalty:** Sturdivant v. Davis, 31-365.

WHO IS NOT EXECUTOR D. S. T. Intermeddler, while administrator exists, except fraudulent: Francis v. Welch, 33-215; McMorine v. Storey, 20-83; Norfleet v. Riddick, 14-221. **Donee of intestate's property which was exempt from execution:** Winchester v. Gaddy, 72-115. **Intermeddler under colorable title:** Turner v. Child, 12-25; Outlaw v. Farmer, 71-31; Bailey v. Miller, 27-444. **Bailee turning money over to foreign executor, when:** Nesbit v. Stewart, 19-24.

II. To Whom Granted.

3. Order in which persons entitled. Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto

and applying for the same, in the following order:

Executor dying, administrator appointed according to this section: Little v. Berry, 94-433. **Public administrator postponed to all named in this section, even though applying after six months:** In re Bailey's Will, 141-193.

1. To the husband or widow, except as hereinafter provided.

Widow must be 21: Wallis v. Wallis, 60-78. **Infant widow may appoint:** Ibid. **Husband's rights,** In re Meyers, 113-545; Hoppiss v. Eskridge, 37-54. **See section 4.**

2. To the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, at the discretion of the clerk.

Appointee of next of kin not qualifying, clerk appoints: Williams v. Neville, 108-559. **Nonresident next of kin may appoint:** Smith v. Munroe, 23-345. **Appointment by nonresident only durante absentia:** Ritchie v. McAuslin, 2-220. **Several applicants of equal degree, clerk selects:** Garrison v. Cox, 95-353. **Brothers applying, which selected:** Moore v. Moore, 12-352. **Right to distributive share entitles one under this subsection:** Smith v. Munroe, 23-345. **Right not absolute and exclusive:** Stoker v. Kendall, 44-242. **See** Atkins v. McCormick, 49-274.

3. To the most competent creditor who resides within the state, and proves his debt on oath before the clerk.

Assignee of claim against decedent not entitled: Pearce v. Castrix, 53-71. **Creditor postponed to all of next of kin, provided next of kin apply in time:** Carthy v. Webb, 4-20, 6-268.

4. To any other person legally competent.

Those entitled not applying in six months, and public administrator not applying, who entitled: Garrison v. Cox, 95-353. **Nonresident dying, leaving insurance policy with resident, such resident entitled:** Page v. Life Ins. Co., 131-115; Shields v. Life Ins. Co., 119-380.

Code, s. 1376; C. C. P., s. 456; R. C., c. 46, ss. 2, 3; 1868-9, c. 113, s. 115.

4. Husband, on wife's estate; his interest therein. If any married woman shall die wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law.

Code, s. 1479; 1871-2, c. 193, s. 32. **Husband dying without administering, creditor can not be appointed administrator of wife:** Wooten v. Wooten, 123-219. **Wife dying testate, appointing no executor, husband administers:** In re Meyers, 113-545. **Husband can appoint:** Ibid. **Wife's property, after debts paid, goes to husband:** Bank v. Gilmer, 116-701; Whit-

aker v. Hamilton, 126-468; Colson v. Martin, 62-125; Coleman v. Hallowell, 54-204. **Where wife had an interest as distributee in whatever might be recovered for her father's death by wrongful act, and such wife died before recovery, husband gets it:** Neill v. Wilson, 145-.

5. Disqualifications. The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—

1. Is under the age of twenty-one years.

Infant feme covert can not administer but may appoint: Wallis v. Wallis, 60-78. **Such appointment durante minore,** Ibid.

2. Is a nonresident of this state; but a nonresident may qualify as executor.

Nonresident being appointed, qualifying and giving bond not disqualified: Moore v. Eure, 101-16. **Nonresident next of kin may appoint durante absentia:** Smith v. Munroe, 23-345; Ritchie v. McAuslin, 2-220. **Nonresident administrator can not sue in this state:** Hall v. Rwy., 145-.

3. Has been convicted of a felony.

4. Is adjudged by the clerk incompetent to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding.

"Incompetent" defined in Stephenson v. Stephenson, 49-472.

5. Fails to take the oath or give the bond required by law.

6. Has renounced his right to qualify.

Code, ss. 1377, 1378, 2162; C. C. P., s. 457.

6. When disqualified persons entitled. Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of nonage, or is temporarily absent from the state, such person is entitled to six months, after coming of age or after his return to the state, in which to make application for letters testamentary, or letters of administration.

Code, ss. 1379, 2165; C. C. P., ss. 452, 460; R. C., c. 46, s. 12. **Infant feme covert coming of age entitled:** Wallis v. Wallis, 60-78. **Nonresident next of kin returning to state entitled:** Smith v. Munroe, 23-345; Ritchie v. McAuslin, 2-220. **Persons deemed to have renounced may yet be entitled as against public administrator:** In re Bailey Will, 141-193.

7. Forfeiture by divorce or felonious slaying. When a marriage shall be dissolved a vinculo, the parties respectively, or when either party shall be convicted of the felonious slaying of the other, or of being accessory before the fact of such felonious slaying, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other.

Code, s. 1480; 1889, c. 499; 1871-2, c. 193, s. 42. **Foreign divorces recognized and not recognized, see cases under section 2109. Doctrine laid down in Owens v. Owens, 100-240, changed by this section.**

8. Elopement and adultery of wife forfeits right. If any married woman shall elope with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate.

Code, s. 1481; 1871-2, c. 193, s. 44. **Bigamy of wife a forfeiture to rights in property of first husband:** Gathings v. Williams, 27-487; Irby v. Wilson, 21-568; Brinegar v. Chaffin, 14-111. **See** Owens v. Owens, 100-240, **partially obsolete since amendment to section 7.**

9. How husband forfeits right as to wife's estate. If any husband shall separate himself from his wife, and be living in adultery at her death, or if she shall have obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband shall have abandoned his wife, or shall have maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate.

Code, s. 1482; 1871-2, c. 193, s. 45. **"Abandoned" defined:** State v. Hopkins, 130-647; Setzer v. Setzer, 128-170; High v. Bailey, 107-70. **As to marriages contracted prior to statute,** see Taylor v. Taylor, 93-418, 112-134.

10. Executor may renounce. Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed.

Code, s. 2163; C. C. P., s. 450. **Can renounce if he has not undertaken office or intermeddled:** Sawyer v. Dozier, 27-97. **Can not renounce after probate without leave of court:** Mitchell v. Adams, 23-298. **Can not if he has meddled with estate:** Ibid.; also Sawyer v. Dozier, 27-97. **Renouncing, administrator c. t. a. succeeds to powers:** Saunders v. Saunders, 108-327. **Renunciation must appear of record:** Springs v. Irwin, 28-27. **May retract renunciation:** Davis v. Inscore, 84-396; Wood v. Sparks, 18-389; **Can not renounce after entering on exercise of trust:** McIntyre v. Proctor, 145-288; Washington v. Blunt, 43-253; Sawyer v. Dozier, 27-97. **Executors have the right to decline the office, but after accepting and qualifying can not resign;** McIntyre v. Proctor, 145-288.

11. When renunciation required. When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk.

Code, s. 1378; C. C. P., s. 459. **Next of kin must make renunciation before clerk can appoint another within 6 months of decendent's death:** Williams v. Neville, 108-559. **Mere expressed intent to renounce will not do:** Ibid; see Hill v. Alspaugh, 72-404.

12. When person entitled deemed to have renounced. If any person, entitled to letters of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation, why he should not be deemed to have renounced. If, within the time named in the citation, he neglects to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person. If no person entitled to administer shall apply for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate.

Code, s. 1380; C. C. P., s. 460 (a); 1868-9, c. 203. **Deemed to have renounced, when:** Withrow v. DePriest, 119-541; Williams v. Neville, 108-559; Hill v. Alspaugh, 72-404; Hughes v. Pipkin, 61-4; Stoker v. Kendall, 44-242. **Renunciation not per se:** In re Bailey Will, 141-194. **Appointee of person entitled, not qualifying, so deemed:** Williams v. Neville, 108-559. **Appointment after six months not revoked at instance of one having prior right applying after six months:** Withrow v. DePriest, 119-541; In re Bailey Will, 141-195.

13. When executor deemed to have renounced. If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

Code, s. 2164; C. C. P., s. 451. **Discussed generally** in Ward v. Sparks, 18-389.

III. Will Annexed.

14. Letters with, issued when. If there is no executor appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior

court may issue letters of administration with the will annexed, to some suitable person or persons, in the order prescribed in this chapter.

Code, s. 2166; C. C. P., s. 453. **Cases generally in point:** In re Meyers, 113-545; Williams v. Neville, 108-559; Little v. Berry, 94-433; Suttle v. Turner, 53-403. **Administrator c. t. a.'s duties as trustee:** Clark v. Peebles, 120-31; Smathers v. Moody, 112-791; Saunders v. Saunders, 108-327; Creech v. Grainger, 106-213; Gay v. Grant, 101-206; Councill v. Averett, 95-131; Vaughan v. Farmer, 90-612; Hester v. Hester, 37-330; Jones v. Jones, 17-387. **Letters of administration are void unless executor has renounced:** Springs v. Irwin, 28-27; Mitchell v. Adams, 23-298.

15. Qualification of adminstrators with. Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators; but the executor of an executor shall not be entitled to qualify as executor of the first testator.

Code, s. 2167; C. C. P., s. 454; 1905, c. 286.

IV. Jurisdiction.

16. Of clerk of superior court. The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration in cases of intestacy, in the following cases:

To take proof of wills: London v. R. R., 88-584; Millsaps v. McLean, 60-80; Wallis v. Wallis, 60-79. **To appoint administrators c. t. a.:** In re Meyers, 113-545; Suttle v. Turner, 53-404. **Jurisdiction of clerk presumed, when:** Vance v. Railroad, 138-460. **Jurisdiction exhausted, when:** In re Bowman's Estate, 121-373. **Clerk has same jurisdiction of former probate judge:** Edwards v. Cobb, 95-4.

1. Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened.

See Grant v. Reese, 94-720; Johnson v. Corpening, 39-216; Collins v. Turner, 4-541.

2. Where the decedent at his death had his fixed place of domicil in more than one county, the clerk of any such county has jurisdiction.

3. Where the decedent, not being domiciled in this state, died out of the state, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk.

Page v. Ins. Co., 131-115; Morefield v. Harris, 126-626; Shields v. Life Ins. Co., 119-380; Hyman v. Gaskins, 27-267; Smith v. Munroe, 23-345.

4. Where the decedent, not being domiciled in this state, died in the county of such clerk, leaving assets in the state, or assets of such decedent thereafter come into the state

Hartness v. Pharr, 133-566; Morefield v. Harris, 126-628; Grant v. Reese, 94-720.

Code, s. 1374; C. C. P., s. 433; R. C., c 46, s. 1; 1868-9, c. 113, s. 115.

17. What clerk has exclusive. The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate.

Code, s. 1375; C. C. P., 434. Williams v. Neville, 108-563. **Where clerk is appointed executor and will proven in another county,** see Gregory v. Ellis, 82-225.

V. Public Administrator.

18. How appointed. There may be a public administrator in every county, appointed by the clerk of the superior court for the term of eight years.

Code, s. 1389; 1868-9, c. 113. **A public administrator is not such an office as the statute against holding two offices refers to:** State v. Smith, 145-476—**Quo warranto does not lie either to remove an administrator or to inquire into his appointment:** Ibid.

19. Takes and subscribes oath; gives bond. The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court, and he must give the bond required by law.

Code, ss. 1393, 1390; 1868-9, c. 113, ss. 2, 5. **Must give bond and obey all orders of court:** In re Brinson, 73-278. **Must renew bond, when:** In re Trotter, 115-193; see sections 32-34.

20. When letters issue to. The public administrator shall apply for and obtain letters on the estates of deceased persons in the following cases:

Office of public administrator a property right: Trotter v. Mitchell, 115-190.

1. When the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for and issued to any person.

Not entitled, even after six months, when: In re Bailey Will, 141-193; Withrow v. DePriest, 119-544; Hill v. Alspaugh, 72-402.

2. When any stranger, or person without known heirs, shall die intestate in any county.

3. When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator.

Code, s. 1394; 1868-9, c. 113, s. 6.

21. Powers; duties; when term expires. The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he shall have fully administered the same, if he shall then enter into a bond as required by law for administrators.

Code, s. 1395; 1868-9 c, 113, s. 7; 1876-7, c. 239. **Subject to orders of clerk:** In re Brinson, 73-278.

VI. Collectors.

22. When and how appointed. Whenever, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent.

Code, s. 1383; C. C. P., s. 463; R. C., c. 46, s. 9; 1868-9, c. 113, s. 115. **When collector appointed:** In re Palmer's Will, 117-133; Syme v. Broughton, 86-156. **As to next of kin's right to collect pending appointment,** see Whit v. Ray, 26-14.

23. Qualification; bond. Every collector shall have the qualifications and give the bond prescribed by law for an administrator.

Code, s. 1384; C. C. P., s. 464. **For bond, see section 319.**

24. Authority. Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts.

Code, s. 1385; C. C. P., s. 465; R. C., c. 46, s. 6; 1868-9, c. 113, s. 115. **Has no control of lands:** Lee v. Lee, 74-70.

25. Authority ceases, when; duty to account. When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator in his own name. Such collector must, on demand, deliver to the executor or adminis-

trator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment.

Code, s. 1386; C. C. P., s. 466; R. C., c. 46, s. 7; 1868-9, c. 113, s. 115. **Not entitled to allowance for counsel fees when he resists claim of rightful executor to funds:** Johnson v. Marcom, 121-83.

VII. Application for Letters.

26. What to contain. On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise—

1. The death of the decedent and his intestacy.

Letters upon estate of one living are void: State ex rel v. White, 29-116; Springer v. Shavender, 118-33. **Letters issued pending contest over will void:** Slade v. Washburn, 25-557.

2. That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled.

3. The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same can not, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residence of such guardians, if known. Such affidavit or other proof must be recorded and filed by the clerk.

Code, s. 1381; C. C. P., s. 461.

27. How contest over, instituted. Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings.

Code, s. 1382; C. C. P., s. 462. **What are issues of fact hereunder:** In re Tapp's Estate, 114-248. **Letters already issued can not be collaterally attacked:** Plemmons v. R. R., 140-286; Lyle v. Siler, 103-261; Granbery v. Mhoon, 12-456. **Letters may be revoked at same term granted:** Moore v. Moore, 12-352. **Clerk can not appoint, pending appeal:** Williams v. Neville, 108-559.

28. Executor gives bond, when. Executor shall give bond as prescribed by law in the following cases:

For actions on bond, see section 30. Bond only guarantees good faith: Moore v. Eure, 101-11; Atkinson v. Whitehead, 66-296. **Clerk has power to compel:** Barnes v. Brown, 79-401; see section 32. **Bond required when executor, uses estate:** McFayden v. Council, 81-195; Gray v. Gaither, 74-237. **Not required because of insolvency alone, when insolvency known to testator:** Neighbors v. Hamlin, 78-42.

acts 1404 p 1267

1. Where the executor resides out of the state. And no foreign executor has any authority to intermeddle with the estate until he shall have entered into bond, which must be done within the space of one year after the death of the testator, and not afterwards.

2. When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other party interested in the estate, shall revoke the letters issued to the wife and grant letters of administration with the will annexed to some other person.

Executrix of husband marrying again: Godwin v. Watford, 107-168.

3. Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinafter provided, the court or clerk to whom application is made shall require, before granting any order of sale, such executor to enter into bond.

For conditions and penalties of bond, see section 319.

Code, s. 1515; R. C., c. 46, ss. 12, 13.

29. Oath taken; bond given. Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk.

Code, ss. 1387, 1388, 2169; C. C. P., ss. 467, 468; 1870-1, c. 93. **For bond, see section 319. Letters not void because bond not justified:** Garrison v. Cox, 95-353—**or because bond lacks securities,** Jones v. Gordon, 55-352. **Oath taken and bond given:** Armstrong v. Stowe, 77-362. **Amount of bond,** see Williams v. Neville, 108-565.

30. Persons injured may sue on bond. Every person injured by the breach of any bond given by an executor, administrator or collector, may put the same in suit and recover such damages as he may have sustained.

Code, s. 1516; 1868-9, c. 113, s. 87. **See also section 319. Bonds of administrators only guarantee good faith:** Smith v. Patton, 131-397; Moore v. Eure, 101-11.

WHO PARTIES PLAINTIFF. Must be "State ex rel": Norman v. Walker, 101-24; Carmichael v. Moore, 88-29. **Administrator d. b. n. as relator:** Neagle v. Hall, 115-415; Brown v. McKee, 108-387; Clement

v. Cozart, 107-695; Tulburt v. Hollar, 102-406; Wilson v. Pearson, 102-290; Grant v. Rogers, 94-755; Merrill v. Merrill, 92-657; Neal v. Becknell, 85-299; Lansdell v. Winstead, 76-366; Goodman v. Goodman, 72-508; Carlton v. Byers, 70-691; Latham v. Bell, 69-135; Badger v. Jones, 66-305; Latta v. Russ, 53-111; Ferrabee v. Baxter, 34-64; State v. Britton, 33-110; State v. Johnston, 30-31; State v. Moore, 33-160. **Party aggrieved as relator:** Lafferty v. Young, 125-296; Alexander v. Wolfe, 88-398; Allison v. Robinson, 78-227; State v. McKay, 28-397. **See also cases under next section.**

NO NECESSITY OF JUDGMENT AGAINST ADMINISTRATOR TO CHARGE BONDSMEN. Bratton v. Davidson, 79-423; Strickland v. Murphy, 52-242; Chairman, etc., v. Moore's Admr., 6-22; Williams v. Hicks, 5-437.

CERTAIN ACTS HELD TO BE COVERED BY THE BOND. Administrator d. b. n.'s liability measured by administrators, when: Roper v. Burton, 107-526. **His collecting from administrator's estate:** Grant v. Reese, 94-720. **Administrator collecting debt from himself:** Gay v. Grant, 101-206.

PROPERTY COVERED BY BOND. Lafferty v. Young, 125-296; Shuffler v. Turner, 111-297; Reaves v. Davis, 99-425; Grant v. Reese, 94-720; Morton v. Ashbee, 46-312; Governor v. Williams, 25-152.

BREACH OF BOND; WHAT IS AND WHAT IS NOT. Good faith as a test; Smith v. Patton, 131-397; Moore v. Eure, 101-11. **See** Settle v. Settle, 141-553; Caviness v. Fidelity Co., 140-58; Gill v. Cooper, 111-311; Gay v. Grant, 101-206; Lee v. Beaman, 101-294; Roper v. Burton, 107-526; Summers v. Reynolds, 95-404; Grant v. Edwards, 92-442; Worthy v. Brower, 93-344; Syne v. Badger, 92-706; Grant v. Bell, 90-558; Hawkins v. Carpenter, 88-403; McLean v. McLean, 88-394; Ruffin v. Harrison, 81-212; Pratton v. Davidson, 79-423; Williams v. Williams, 73-413; Green v. Green, 69-25; Hagans v. Huffsteller, 65-443; Finger v. Finger, 64-183; Ramsay v. Hanner, 64-668; Womble v. George, 64-759; Nelson v. Hall, 58-32; Holderness v. Palmer, 57-107; Cain v. Hawkins, 50-192; Fanshaw v. Fanshaw, 44-166; Beall v. Darden, 39-76; Williams v. Britton, 33-110; Green v. Collins, 28-139; McLean v. Peoples, 20-133; Harrison v. Ward, 14-417; Washington v. Hunt, 12-475; Smith v. Fagan, 13-292. **See also section 167.**

SURETIES. Released: Atkinson v. Farmer, 6-291; Tulburt v. Hollar, 102-406. **Not released:** Clancy v. Carrington, 14-529. **Though released, property mortgaged to them to secure them can be taken:** Hooker v. Yellowley, 128-297. **Bonds being cumulative, sureties on all bonds held.** Pickens v. Miller, 83-543. **When surety responsible for debt due estate by administrator:** Moseley v. Johnson, 144-257.

VENUE. Administrator must be sued as such in the county in which he took out letters, if he or any of his sureties live there: Foy v. Morehead, 69-512. **See section 421.**

31. Letters revoked, bond liable to successor for default. Whenever the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons suc-

ceeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them.

Code, s. 1517; 1868-9, c. 113, s. 88. **For actions by administrator d. b. n. as relator, see under preceding section "Who parties plaintiff." Actions for waste brought by administrator d. b. n., see under section 167. Assets must be recovered from prior administrator before any land sold:** Carlton v. Byers, 70-691; Latham v. Bell, 69-135. **See generally:** Brittain v. Dickson, 104-547; Grant v. Reese, 94-720; University v. Hughes, 90-537; Ham v. Kornegay, 85-119; Duke v. Ferebee, 52-10; Hackney v. Steadman, 46-207.

32. When new bond or new sureties required. If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time.

Code, s. 1518; 1868-9, c. 113, s. 89. **Can not give in lieu of bond mortgage on intestate's property even though an heir:** In re Sellars, 118-573. **Clerk passes upon necessity for renewal:** Ibid. **Executor converting funds may be compelled to give bond:** McFayden v. Council, 81-195; see also Neighbors v. Hamlin, 78-42; Hunt v. Sneed, 64-180; Barnes v. Brown, 79-401. **Public administrator offering to renew, after notice clerk must accept:** In re Trotter, 115-193.

33. Remedy of surety in danger of loss. Any surety on the bond of an executor, administrator or collector, who is in danger of sustaining loss by his suretyship, may exhibit his petition on oath to the clerk of the superior court wherein the bond was given, setting forth particularly the circumstances of his case, and asking that such executor, administrator or collector be removed from office, or that he give security to indemnify the petitioner against apprehended loss, or that the petitioner be released from responsibility on account of any future breach of the bond. The clerk shall issue a citation to the principal in the bond, requiring him, within ten days after service thereof, to answer the petition. If, upon the

hearing of the case, the clerk deem the surety entitled to relief, he may grant the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releasing the surety from liability on the bond for any subsequent act, default or misconduct of the principal.

Code, s. 1519; 1868-9, c. 113, s. 90. **New bond to save former sureties taken:** Governor v. Gowan, 25-342. **See** Barnes v. Brown, 79-406.

34. Failing to give new bond, letters revoked. If any person required to give a new bond, or further security, or security to indemnify, under the two preceding sections, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease.

Code, s. 1520; 1868-9, c. 113, s. 91. **Revocation void unless notice issued to show cause,** Trotter v. Mitchell, 115-190; in re Palmer's Will, 117-133. **Generally discussed:** Edwards v. Cobb, 95-4. **See** Barnes v. Brown, 79-406; Neighbors v. Hamlin, 78-42; Hunt v. Sneed, 64-180; McIntyre v. Proctor, 145-

35. Letters revoked; successor appointed; estate protected. In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate.

Code, s. 1521; 1868-9, c. 113, s. 92. **Clerk must immediately appoint successor, and may order settlement:** In re Brinson, 73-278; Taylor v. Biddle, 71-1.

36. Form of letters. All letters must be issued in the name of the state, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office, and shall have attached thereto copies of sections forty-two and ninety-nine.

Code, ss. 1399, 2172; C. C. P., ss. 471, 478; 1871-2, c. 46.

VIII. Revocation.

37. On proof of will. If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or, if after letters testamentary are issued, a revocation of the will, or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon,

the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid.

Code, s. 2170; C. C. P., s. 469. **Case supporting section:** Shober v. Wheeler, 144-403. **Jurisdiction of clerk generally as compared with probate judge:** Edwards v. Cobb, 95-4. **Practice under this section discussed:** Ibid; Daniel v. Bellamy, 91-78. **See** Slade v. Washburn, 25-557; Ralston v. Telfair, 22-414. **Cited** in In re Palmer's Will, 117-139.

38. For disqualification or default. If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in the due execution of his office, or that the issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease.

Code, s. 2171; C. C. P., s. 470.

JURISDICTION. McLaurin v. McLaurin, 106-331; Tulbert v. Hollar, 102-406; Edwards v. Cobb, 95-4; Battle v. Duncan, 90-550; Merrill v. Sandlin, 86-54; Barnes v. Brown, 79-401; Taylor v. Riddle, 71-1. **This power exists for the good of the estate and should never be exercised for convenience of parties such as to allow executor to resign:** McIntyre v. Proctor, 145-288. **Must be exercised with caution:** Smith v. Collier, 20-60; County Court v. Bissell, 47-388. **Superior Court's powers on appeal in removal cases discussed** in Pearce v. Lovinier, 71-248.

PROCESS AND PLEADINGS. **Without order to show cause, removal void:** In re Palmer's Will, 117-133; Trotter v. Mitchell, 115-190. **Complaint and answer:** Patterson v. Wadsworth, 94-538; Neighbors v. Hamlin, 78-42.

"DEFAULT OR MISCONDUCT." Generally construed in McFayden v. Council, 81-195. **Motion to remove for fraud not entertained in application to set aside sale of land for assets:** McLaurin v. McLaurin, 106-331. **Failure to account:** Barnes v. Brown, 79-401; Armstrong v. Stowe, 77-360. **Poverty of executor no ground:** McFayden v. Council, 81-195; Wilkins v. Harris, 60-592. **Failure to give or renew bond, see section 32. Failure to defend action when his interest adverse to estate:** Simpson v. Jones, 82-323. **Disagreement between executors no reason per se to remove:** Fairbairn v. Fisher, 57-390.

IX. Advertisement for Creditors.

39. Advertisement for claims, when and how made; cost. Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against

the decedent to exhibit the same to such executor, administrator or collector, at or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six weeks in a newspaper, if any there be published in the county. If there shall be no newspaper published in the county, then the notice shall be posted at the court house and four other public places in the county. The cost of publishing in a paper shall in no case exceed two dollars and fifty cents.

Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2. **Claims presented within one year and admitted, statute of limitations suspended:** Turner v. Shuffler, 108-642. **Legal effect on claims not presented within one year:** Mallard v. Patterson, 108-255; Morris v. Syme, 88-453; Rogers v. Grant, 88-440. **Certain advertisements sufficient under old statute:** McLin v. McNamara, 22-84; Blount v. Porterfield's admrs., 3-161; see also Gilliam v. Willey, 54-128; Lee v. Patrick, 31-125. **Cited** in Morrisey v. Hill, 148-358; Love v. Ingram, 104-602; Valentine v. Britton, 127-59. **See section 367.**

40. How proved. A copy of the advertisement directed to be posted or published in pursuance of the preceding section with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices were posted shall be filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this state.

Code, s. 1423; 1868-9, c. 113, s. 31. **Creditor need not show presentment of claim unless administrator avers and proves notice:** Valentine v. Britton, 127-57; Love v. Ingram, 104-600. **Proving the notice:** Gilliam v. Willey, 54-128; Lee v. Patrick, 31-135. **See under section 367 for effect on pleading statute of limitations.**

41. Notice may be served on creditor personally. The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon.

Code, s. 1424; 1868-9, c. 113, s. 32; 1885, 96. Morrissey v. Hill, 142-357. **See dissenting opinion** in Andres v. Powell, 97-163.

X. Inventory.

42. Taken and returned within three months. Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect

inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk.

Code, s. 1396; R. C., c. 46, s. 16; 1868-9, c. 113, s. 8. Grant v. Rogers, 94-762. **Executor's imperfect account of sale:** Nichols v. Dunn, 22-287. **Inventory prima facie evidence against representative, when:** Grant v. Reese, 94-720; Hoover v. Miller, 51-79; Graham, admr, v. Davidson, 22-155; Yarborough v. Harris, 14-40; but see Gay v. Grant, 101-206. **Need not embrace debts owing deceased in another state, when:** Grant v. Reese, 94-720. **Failing to file inventory not entitled to commissions:** Ibid; also Stonestreet v. Frost, 123-640. **Two co-executors filing joint inventory; effect:** Graham, admr., v. Davidson, 22-155. **Where one of several wards who are tenants in common dies, duty of administrator to have partition:** Calvert v. Peebles, 71-274.

43. How compelled. If the inventory and account of sale specified in the preceding section are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector.

Code, s. 1397; 1868-9, c. 113, s. 9. **Clerk vacates office for failure to file inventory:** Armstrong v. Stowe, 77-360; Barnes v. Brown, 79-401. **Cited** in Atkinson v. Ricks, 140-420. **See generally:** Edwards v. Cobb, 95-4; also see section 38.

44. New assets inventoried. Whenever further property of any kind, not included in any previous return, shall come to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory.

Code, s. 1398; 1868-9, c. 113, s. 10.

XI. What are Assets.

45. Distinction between legal and equitable abolished. The distinction between legal and equitable assets is abolished, and all

assets shall be applied in the discharge of debts in the manner prescribed by this chapter.

Code, s. 1406; 1868-9, c. 113, s. 14.

WHAT ARE ASSETS. Rents from devised land, when: Shell v. West, 130-171; Wilcoxon v. Donnelly, 90-245; Young v. Young, 115-105. **Proceeds from land devised to be sold:** Mills v. Harris, 104-626; McBee ex parte, 63-332; but see Newby v. Skinner, 21-488. **Proceeds from partnership settlement:** Allison v. Davidson, 21-46. **Personal property exemption:** Johnson v. Cross, 66-167. **Distinction between personalty and realty as to rights of creditors:** Baker v. Webb, 2-43. **All chattels of which administrator might have possessed himself:** Gray v. Swain, 9-15. **Rents accrued before death:** Wilcoxon v. Donnelly, 90-245; Fleming v. Chunn, 57-422.

WHAT ARE NOT ASSETS. State pension warrant: In re Smith, 130-638. **Land unsold:** Wilson v. Bynum, 92-717; Hawkins v. Carpenter, 88-403; Vaughan v. DeLoatch, 65-378; Fike v. Green, 64-665. **Proceeds of land sold for partition:** Allison v. Robinson, 78-222; Latta v. Russ, 53-113. **Partnership assets before business liquidated:** Mendenhall v. Benbow, 84-646. **Rents accrued after death:** Baptist University v. Borden, 132-476; Young v. Young, 115-105; Wilcoxon v. Donnelly, 90-245; Rogers v. McKenzie, 65-218; Fleming v. Chunn, 57-422. **Insurance policy payable to third person:** Simmons v. Biggs, 99-236; Conigland v. Smith, 79-303.

46. Trust estate in personalty. If any trustee, or any person interested in any trust estate, shall die leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets.

Code, s. 1403; 1868-9, c. 113, s. 11.

47. Crops ungathered at death. The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will.

Code, s. 1407; 1868-9, c. 113, s. 15. **Cases having a bearing on section:** Parker v. Brown, 136-280; State v. Crook, 132-1053; Thomas v. Lines, 83-191; Flynt v. Conrad, 61-190. **Using part of crop to pay for the gathering does not subject administrator to penalty:** McDaniel v. Johns, 53-414.

48. What proceeds of real estate deemed personal assets. All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate.

Code, s. 1404; 1868-9, c. 113, s. 12. Lafferty v. Young, 125-300; Wilson v. Bynum, 92-717; Vaughan v. DeLoatch, 65-378.

49. What proceeds of real estate deemed real assets. All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold.

Code, s. 1405; 1868-9, c. 113, s. 13. **Administrator dying, his personal representative may be sued by heir for such proceeds:** Alexander v. Wolfe, 88-398. **See generally:** Denton v. Tyson, 118-542; Thomas v. Connelly, 104-342; Latta v. Russ, 53-111. But see Neagle v. Hall, 115-415.

50. Personalty fraudulently conveyed recovered. If there be not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in anywise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fradulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns.

Rev. 1905.

51. Debt of executor not discharged by appointment. The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator.

Code, s. 1431; 1868-9, c. 113, s. 40. **Construed:** Moore v. Miller, 62-359.

52. Heirs jointly liable for debts, when. All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent.

Code, s. 1528; 1868-9, c. 113, s. 99. **Only liable after personalty exhausted:** Badger v. Daniel, 79-372. **Creditor can pursue property in hands of heirs or of others taking after two years, when:** Hooker v. Yellowley, 128-297; Badger v. Daniel, 79-372; Hinton v. Whitehurst, 71-66; Winfield v. Burton, 79-388; Syme v. Badger, 96-197; Atkinson v. Farmer, 6-294. **Can not subject property sold after two years even though purchaser has**

notice of unpaid debts, when: Brandon v. Phelps, 77-44. **Each heir a surety of the other heirs, when:** Badger v. Daniel, 79-372. **Creditor can sue heir before administrator settles, when:** Syme v. Badger, 96-197. **Statute bars creditor, when, see section 392.**

53. Limit of liability of heir. No person shall be liable under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable.

Code, s. 1529; 1868-9, c. 113, s. 100. **Generally discussed** in Badger v. Daniel, 79-372. **Mentioned** in Andres v. Powell, 97-160.

54. Recovery apportioned among heirs. In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them.

Code, s. 1530; 1868-9, c. 113, s. 101.

55. Priority of debts as affecting liability of heir. Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others.

Code, s. 1531; 1868-9, c. 113, s. 102. **See sections 95 and 162.**

56. Defense, other debts of equality or priority. The defendants in such action may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit.

Code, s. 1532; 1868-9, c. 113, s. 103. **See** Heilig v. Foard, 64-710.

57. Debts paid, estimated as unpaid in suit against heir, when. If any debts of a prior class to that in which the suit is brought, or of the same class, has been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to

be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the preceding section.

Code, s. 1533; 1868-9, c. 113, s. 104.

58. Contribution among devisees, where heir is liable. The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees and heirs also of the decedent, if any part of the real estate be undevised, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court.

Code, s. 1534; 1868-9, c. 113, s. 106. **Merely referred to** in Andres v. Powell, 97-166; Wharton v. Wilkerson, 92-413.

XII. Wrongful Death.

59. Action for wrongful death; recovery not assets. Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

147-234
148-567
149-108
151-546

Code, ss. 1498, 1500; 1868-9, c. 113, ss. 70, 72, 115; R. C., c. 46, ss. 8, 9. **[The law of negligence not being wholly within the scope of this section, only important points and general definitions treated.]**

ACTION FOR DEATH BY WRONGFUL ACT. There was none at common law: Bolick v. R. R., 138-370; Hartness v. Pharr, 133-569; Killian v. R. R., 128-261; Harper v. Comrs., 123-119; Bradley v. R. R., 122-973; Howell v. Comrs. 121-363. **Such action is transitory and can be brought in this state for death in another state, when:** Harrill v. R. R., 132-655; also see Lassiter, v. R. R., 136-89—**but foreign administrator can not bring action:** Hall v. Rwy., 146 345, and cases cited. **A cause of action is sufficient ground for the appointment of an administrator:** Vance v. R. R., 138-460. **Widow can not sue as widow:** Howell v. Comrs., 121-362. **Father can not sue as father:** Killian v. R. R., 128-261. **Actions barred after one year:** Meekins v. R. R., 131-1; Williams v. Building and Loan Asso., 131-269; Best v. Kinston, 106-205; Taylor v. Cranbery Iron Co., 94-525. **Person beginning action for injury subsequently causing death, effect:** Bolick v.

R. R., 138-370. **Complaint must specifically set out negligence:** Black v. R. R., 115-667; Emry v. Nav. Co., 111-94; Conley v. R. R., 109-692; Warner v. R. R., 94-250. **Administrator may maintain for death of infant:** Davis v. R. R., 136-115; Russell v. Steamboat Co., 126-961. **Administrator may sue in forma pauperis, when:** Christian v. R. R., 136-321; Allison v. R. R., 129-344; Hamlin v. Neighbors, 75-66. **Cause of action for personal injuries abates upon death of plaintiff, though injuries subsequently result in death:** Bolick v. R. R., 138-370; overruling Peebles v. R. R., 63-238 and Collier v. Arrington, 61-356.

ACTIONABLE NEGLIGENCE DEFINED. Actionable negligence is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done: Fuller v. R. R., 140-480; Turrentine v. Wellington, 136-308; Carter v. Lumber Co., 129-209—or the failure to exercise proper care in the performance of a legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed: Foot v. R. R., 142-52; Ramsbottom v. R. R., 138-38—or the omission to use means reasonably necessary to avoid injury to others, Bradley v. R. R., 126-741; Norton v. R. R., 122-920—or the want of ordinary care, and failure to exercise that care, which a man of ordinary prudence would have exercised under the circumstances; a failure to perform some duty imposed by law, Jones v. Warehouse Co., 138-546—which omission of duty or commission of wrongful act is the proximate cause of injury done, Sibbert v. Cotton Mills, 145-308; Bowers v. R. R., 144-684; Britt v. R. R., 144-242; Crenshaw v. Street Rwy., 144-314; Horne v. Power Co., 144-375; Miller v. Rwy., 144-545; Harton v. Tel. Co., 141-455; Jones v. Tob. Co., 141-202; Byrd v. Express Co., 139-273; Ramsbottom v. R. R., 138-38; Hendrix v. Cotton Mills, 138-171; Phillips v. R. R., 138-12; Stewart v. Van Deventer Carpet Co., 138-60; Quantz v. R. R., 137-136; Peoples v. R. R., 137-96; Whisenhant v. R. R., 137-349; Brewster v. Elizabeth City, 137-392; Lassiter v. R. R., 137-152; Drum v. Miller, 135-204; Meekins v. R. R., 134-217; Butts v. R. R., 133-82; Henderson v. Durham Traction Co., 132-779; Watkins v. Mnfg. Co., 131-536; Curtis v. Rwy., 130-439; Edwards v. R. R., 129-78; McArver v. R. R., 129-386. Norton v. R. R., 122-911; Pickett v. R. R., 117-616; Basnight v. R. R., 111-596; Chalk v. R. R., 85-428—but no omission or action, though resulting in damage, can be deemed actionable negligence unless the one responsible, a prudent man, could, by the exercise of ordinary care, under all the circumstances have foreseen that it would naturally or probably result in damage to someone, Hudson v. R. R., 142-198; Jones v. R. R., 142-207; Harton v. Tel. Co., 141-455; Fuller v. R. R., 140-484; Ramsbottom v. R. R., 138-38; Raiford v. R. R., 130-597; Frazier v. Wilkes, 132-437; Drum v. Miller, 135-204; Carter v. Lumber Co., 129-203. **The difference between "accident" and "negligence" pointed out:** Crutchfield v. R. R., 76-322.

INSTANCES OF NEGLIGENCE MOST USUALLY ASSIGNED AS CAUSE OF DEATH IN ACTIONS HEREUNDER. Not stopping train, if possible, to avoid accident: Sawyer v. R. R., 145-24; Baker v. R. R., 144-36; Harris v. R. R. 132-160; Wright v. R. R., 127-225; Brinkley v. R. R.,

126-88; McLamb v. R. R., 122-862; Pharr v. R. R., 119-751; Styles v. R. R., 118-1084; Lloyd v. R. R., 118-1010; Baker v. R. R., 118-1015; Bottoms v. R. R., 114-699; Clark v. R. R., 109-430. **Blasting without warning:** Gates v. Latta, 117-189, 111-151. **Defective railroad crossing:** Goforth v. R. R., 144-569; Raper v. R. R., 126-563; Tankard v. R. R. 117-558. **Engineer not keeping on lookout:** Sawyer v. R. R., 145-24; Brown v. Rwy., 144-634; Cooper v. R. R., 140-209; Smith v. R. R., 132-819; Jeffries v. R. R., 129-239; Whitesides v. R. R., 128-229; Bradley v. R. R., 126-740; Arrowood v. R. R., 126-629; Pharr v. R. R. 119-756; Baker v. R. R., 118-1015; Lloyd v. R. R., 118-1010; Deans v. R. R., 107-686; Pickett v. R. R., 117-616. **Not signalling crossing:** Butts v. R. R., 133-82; Johnson v. R. R., 122-957; Willis v. R. R., 122-905; Cox v. R. R., 123-606; Russell v. R. R., 118-1098; Gilmore v. R. R., 115-660; Henkle v. R. R., 109-472; Randall v. R. R., 104-410. **Collisions:** Davis v. R. R., 145-95; Hough v. Rwy. Co., 144-692; Holland v. R. R., 143-435; Bird v. Leather Co., 143-283; Hollingsworth v. Skelding, 142-246; Stewart v. R. R., 137-687, 141-253; Moore v. Rwy., 128-455; Mendenhall v. R. R., 123-275; Kinney v. R. R., 122-961; Weeks v. R. R., 119-740. **Failure to carry headlight at night:** Willis v. R. R., 122-905. **Telling passengers to jump from moving train:** Gordon v. R. R., 132-565; Cook v. Rwy., 128-333; Rickert v. R. R., 123-255; Cable v. R. R., 122-892; Lambeth v. R. R., 66-494. **Violating speed ordinances:** Davis v. Traction Co., 141-134; Duval v. R. R., 134-331; Smith v. R. R., 132-819; Edwards v. Rwy., 129-78; Neal v. R. R., 126-635; Norton v. R. R., 122-910. **Rotten crossties used:** Wright v. R. R., 122-959, 123-280, 128-77, **Cars not equipped with air brakes:** Greenlee v. R. R., 122-979; Troxler v. R. R., 124-189. **Cutting loose a car and allowing it to roll on uncontrolled across a crossing:** Wilson v. R. R., 142-333. **Backing train without signals:** Gerringer v. R. R., 146-337; Reid v. R. R., 140-146; Lassiter v. R. R., 133-244; Cox v. R. R., 123-604; McIlhaney v. R. R., 122-995. **Not using proper automatic couplers:** Hairston v. Leather Co., 143-512; Liles v. Lumber Co., 142-39; Elmore v. R. R., 130-506, 131-569, 132-865; Harden v. R. R., 129-354; Troxler v. R. R., 124-189; Short v. Gill, 126-803; Mason v. R. R., 111-487. **Excavating without bracing;** McDougald v. Lumberton, 129-200. **Defective street:** Austin v. Charlotte, 146-336; Neal v. Marion, 129-345; Sheldon v. Asheville, 119-606; see "defective sidewalks" below. **Not protecting dangerous machinery:** Sibbert v. Cotton Mills, 145-308; Jones v. Tob. Co., 141-202; Creetch v. Cotton Mills, 135-680; Ausley v. Tob. Co., 130-34; Sims v. Lindsay, 122-678. **Failure to use modern appliances:** Marks v. Cotton Mills, 135-290; Orr v. Tel. Co., 132-691; Dorsett v. Mnfg. Co., 131-254; Troxler v. R. R., 124-191, 122-902; Greenlee v. R. R., 122-977; Witsell v. R. R., 120-557; also see cases hereunder on "Not using proper automatic couplers" and "Cars not equipped with air brakes." **No warning ropes at overhead bridge:** Hedrick v. R. R., 136-510. **Defective sidewalks:** Austin v. Charlotte, 146-336; Brown v. Durham, 141-249; Foy v. Winston, 126-381; Sheldon v. Asheville, 119-606; Willis v. Newbern, 118-132; Russell v. Monroe, 116-720. **Suddenly moving or jerking the train:** Darden v. R. R., 144-1; Snipes v. R. R., 144-18; Miller v. Rwy., 144-545; Shaw v. R. R., 143-312; Clark v. Trac-

tion Co., 138-77; Whisenhant v. R. R., 137-349; Davis v. R. R., 132-291; Smith v. R. R. 129-374; Parlier v. R. R., 129-262; Asbury v. R. R., 125-568; Morrison v. R. R., 123-414; Whitley v. R. R., 122-987; Tillett v. R. R., 118-1031; Wallace v. R. R., 101-454; Nance v. R. R., 94-619. **Medicine sent by express not delivered:** Byrd. v. Express Co., 139-273. **Insufficiency or defect of brakes:** Johnson v. R. R., 81-453; Forbes v. R. R., 76-454. **Physician's malpractice:** Gray v. Little, 127-304. **Defective bumpers on cars:** Cowles v. R. R., 84-309. **Defective car platform,** DeBerry v. R. R., 100-310. **Cross-ties piled on street:** Kramer v. R. R., 127-328. **Escaping steam:** Gruber v. R. R., 92-1. **Open switches:** Haynes v. R. R., 143-154; Hancock v. R. R., 124-224. **Live electric wire on public street:** Haynes v. Gas Co., 114-203; Mitchell v. Electric Co., 129-166. **Defective appliances:** Cotton v. Mnfg. Co., 142-528; Hicks v. Mnfg. Co., 138-320; Pressly v. Yarn Mills, 138-410; Walker v. R. R., 135-741; Cogdell v. R. R., 129-401; Coley v. R. R., 128-534; Troxler v. R. R., 122-902; Turner v. R. R., 119-387; Leak v. R. R., 124-455; Mason v. R. R., 111-482; Hudson v. R. R., 104-491; Warner v. R. R., 94-250; Cowles v. R. R., 84-312; see also under this paragraph defective appliances specified. **Defective railroad bed:** Wright v. R. R., 122-959, 128-77; Wilkie v. R. R., 127-203; Bean v. R. R., 107-731; Owens v. R. R., 88-502; Hardy v. R. R., 74-734, 76-5. **Unhealthy prisons:** Shields v. Durham, 116-394; Lewis v. Raleigh, 77-229. **Loosened rock left after blasting:** Bean v. R. R., 107-731. **Incompetent firemen:** Brazil v. R. R., 93-313. **Derailment of train:** Overcash v. Electric Co., 144-572; Marcom v. R. R., 126-200. **Employing infant in factory unlawfully:** Leathers v. Tob. Co., 144-330; Rolin v. Tob. Co., 141-301. **Directing section hand to remove hand car running on schedule of belated train in the face of approaching train:** Johnson v. R. R., 122-955. **Wanton blowing of whistle frightening team:** Stewart v. Cary Lumber Co., 146-47; Everett v. Receivers, 121-521; Brendle v. Spencer, 125-478. **Failure to keep proper lookout at railroad crossings:** Cooper v. R. R., 140-209; Bradley v. R. R., 126-740; Pharr v. R. R., 119-756; Deans v. R. R., 107-686. **"Kicking off" cars without proper lookout on end:** Allen v. R. R., 145-214; Wilson v. R. R., 142-333; Peoples v. R. R., 137-96; Bradley v. R. R., 126-735. **Failing to give employee proper warning of danger:** Turner v. Lumber Co., 119-387. **Forcing trespasser off of moving train:** Hayes v. R. R., 141-195; Lewis v. R. R., 132-383; Cook v. R. R., 128-333; Pierce v. R. R., 124-63. **Falling of elevator:** Fearington v. Tob. Co., 141-80; Womble v. Gro. Co., 135-474. **Obstructing public crossing:** Duffy v. R. R. Co., 144-26. **Not protecting passenger from assault:** Penny v. R. R., 133-223; Seawell v. R. R., 132-859, 133-515; Daniel v. R. R., 117-592; Britton v. R. R., 88-536; see also Cogdell v. R. R., 124-306; Hansley v. R. R., 115-602; Tillett v. R. R., 115-662; but see Bowden v. R. R., 144-28; Owens v. R. R., 126-138. **Employee asaulting passenger:** Seawell v. R. R., 132-859; 133-515; Palmer v. R. R., 131-250; Daniel v. R. R., 117-592; see also Cogdell v. R. R., 124-306; Tillett v. R. R., 115-662. **Failing to repair telephone pole after notice:** Harton v. Tel. Co., 146-; **Failing to keep station premises safe for passengers:** Mangum v. R. R., 145-152. **Failing to take precaution against injuring persons allowed to trespass upon tracks:** Beck v. Rwy., 14[illegible]-445

HOW AMOUNT RECOVERED DISTRIBUTED: According to the statute of distributions of state: Neill v. Wilson, 146-345; Vance v. R. R., 138-460; Davis v. R. R., 136-115; Hartness v. Pharr, 133-566; Baker v. R. R., 91-308. University gets it, if no next of kin: Warner v. R. R., 94-250. The provision that the recovery shall not be liable to the debts of decedent refers to decedent's debts and not the debts of distributees: Neill v. Wilson, 146-345 As to husband's rights in the portion of recovery which would have gone to his wife as distributee had she lived, see Ibid. The rights of claimants of the fund are determined as of the time of intestate's death: Ibid. This section does not authorize a foreign executor to sue on the theory that he is a trustee of an express trust: Hall v. Rwy., 146-345

60. Measure of damages in wrongful death. The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

Code, s. 1499; 1868-9, c. 113, s. 71; R. C., c. 1, s. 10.

WHAT IS "THE PECUNIARY INJURY." Poe v. R. R., 141-525; Carter v. R. R., 139-499; Byrd v. Express Co., 139-273; Pickett v. R. R. Co., 117-616; Kesler v. Smith, 66-154; Burton v. W. & W. R. R., 82-504; Coley v. Statesville, 121-301; Meekins v. R. R., 134-217; Mendenhall v. R. R., 123-275; Bradley v. R. R., 122-972; Gray v. Little, 127-304; Russell v. Steamboat Co., 126-961; Burns v. R. R., 125-304; Watson v. R. R., 133-188; Benton v. R. R., 122-1007; McLamb v. R. R., 122-862; Warner v. R. R., 94-259; Collier v. Arrington, 61-356. **Mental anguish not considered:** Byrd v. Express Co., 139-273.

XIII. Sales of Personalty.

61. By collector, only on order of court. All sales of personal property by collectors, shall be made only upon order obtained, by motion, from the clerk of the superior court, who shall specify in his order a descriptive list of the property to be sold.

Code, s. 1409; 1868-9, c. 113, s. 17.

62. As soon as practicable. Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as practicable, all the personal estate of his decedent.

Code, s. 1408; 1868-9, c. 113, s. 16. **Power to sell at common law;** Gray v. Armistead, 41-74; Bradshaw v. Simpson, 41-243; Polk v. Robinson, 42-235; Tyrrell v. Morris, 21-559; see generally, Wooten v. R. R., 128-124 and cases below. **Sale and pledge of intestate's property for benefit of administrator, effect:** Cox v. Bank, 119-302; Weisel v. Cobb, 118-23; Liles v. Rogers, 113-202; Dickson v. Crawley, 112-632; Hendrick v. Gidney, 114-543; Dancy v. Duncan, 96-117; Latham v. Moore, 59-167; Wilson v. Doster, 42-231.

63. Public, how made. All sales of personal estate by an executor, administrator or collector shall be publicly made, on credit or for cash, after twenty days' notification posted at the courthouse and four other public places in the county. When any person interested, either as creditor or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk.

Code, ss. 1410, 1411; 1868-9, c. 113, ss. 18, 19. **Publicly made:** Davis v. Marcum, 57-189; Pate v. Kennedy, 104-234; Dickson v. Crawley, 112-629; but see McDaniel v. Johns, 53-414. **Statute is directory:** Tyrrell v. Morris, 21-559; Cannon v. Jenkins, 16-422; Wynns v. Alexander, 22-58; Dickson v. Crawley, 112-629. **Administrator can not purchase:** Gay v. Grant, 101-206; Britton v. Browne, 4-332; Ryden v. Jones, 8-497; Cannon v. Jenkins, 16-423; Villines. v. Norfleet, 17-167; Ford v. Blount, 25-519; Tate v. Dalton, 41-562; Froneberger v. Lewis, 70-456; 79-426; Tayloe v. Tayloe, 108-69; Gordon v. Finlay, 10-239—**not even through a third party,** Summers v. Reynolds, 95-404; Joyner v. Conyers, 59-78; Ford v. Blount, 25-516; but see Ryden v. Jones, 8-497—**but if he does purchase may be ratified by party in interest,** Villines v. Norfleet, 17-167; Lyon v. Lyon, 43-201. **Creditor consenting to inadaquate price estopped:** Cain v Hawkins, 50-192. **Sale conducted fairly administrator not chargeable with inadequate prices:** Woody v. Smith, 65-116.

64. Private, how made. When personal property shall consist of cotton, tobacco, goods, wares and merchandise; state, national or municipal bonds, or the stocks in incorporated companies, the executor or administrator may, upon application to the clerk of the superior court, obtain an order to sell and may sell such personal property at private sale for the best price that can be obtained, and shall report such sale to the clerk for confirmation.

1893, c. 346. **In action on bond of administrator, the price specified as the price received at the sale of securities is not conclusive:** Moseley v. Johnson, 144-257.

65. On credit; how proceeds secured. The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security; and such proceeds shall be collected as soon as practicable, otherwise the executor, administrator or collector shall be answerable for the same.

Code, s. 1413; 1893, c. 346, s. 2; 1868-9, c. 113, s. 21. **Penalty if administrator does not comply:** Pate v. Kennedy, 104-234. **"Real property" here means leasehold estates belonging to intestate:** Reeves v. McMillan, 101-479; Lee v. Lee, 74-70. **Degree of care in taking security:** Torrence v. Davidson, 92-437; Davis v. Marcum, 57-109; Deberry v. Ivey,

55-370; Nelson v. Hall, 58-32; Patterson v. Wadsworth, 89-407. **Gross negligence to take only bond of purchaser:** Roseman v. Pless, 65-374. **Sale rescinded when surety insolvent:** Bland v. Hartsoe, 65-204.

66. Public, hours of; penalty. All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until the hour of ten o'clock p. m.; and every executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same.

Code, s. 1414; 1893, c. 346, s. 3; 1868-9, c. 113, s. 22. **This section does not apply to private sales:** Odell v. House, 144-647. **How penalty statutes construed:** Alexander v. R. R., 144-93. **Penalty for wrongly selling:** Pate v. Kennedy, 104-234; but see McDaniel v. Johns, 53-414. **See cases under section 63.**

67. Evidences of debt, when and how sold. Every executor, administrator and collector, at any time after one year from the grant of letters, shall be authorized to sell at public auction, in the manner prescribed in this chapter, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets.

Code, s. 1412; 1868-9, c. 113, s. 20. **This statute only directory:** Odell v. House, 144-647. **Sales of solvent credits for less than value; effect.** Weisel v. Cobb, 118-11; Grant v. Reese, 94-720. **Private sale valid, if in good faith:** Dickson v. Crawley, 112-629; Gray v. Armistead, 41-74.

XIV. Sales of Realty.

68. To pay debts when personalty insufficient. When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

Code, s. 1436; 1868-9, c. 113, s. 42.

CONSTRUED. Personalty "insufficient:" Mahoney v. Stewart, 123-106; Clement v. Cozart, 107-695, 705; Syme v. Badger, 96-197; Speer v. James, 94-417; Sanderson v. Overman, 98-235; Lilly v. Wooley, 94-412;

Blount v. Pritchard, 88-445; Shields v. McDowell, 82-137; Knight v. Knight, 59-134. **"Debts:"** Long v. Oxford, 108-280; Brittain v. Dickson, 104-547; Robinson v. McDowell, 133-182; Smith v. Brown, 99-377; Bevers v. Park, 88-456; Syme v. Riddle, 88-463; Williams v. Williams, 17-69; Sanders v. Sanders, 17-262—**heirs concluded as to validity of, when:** Stainback v. Harris, 115-100; Woodlief v. Bragg, 108-571; Long v. Oxford, 108-280; Lassiter v. Upchurch, 107-411; Proctor v. Proctor, 105-222; Brittain v. Dickson, 104-547; Smith v. Brown, 101-347; Speer v. James, 94-417; but see Tilley v. Bivens, 112-348; Person v. Montgomery, 120-111; Austin v. Austin, 132-262. **Administrator "may apply:"** Clement v. Cozart, 109-181; Mfg. Co. v. Brower, 105-440; Pelletier v. Saunders, 67-261—**"at any time,"** Clement v. Cozart, 109-173; Brittain v. Dickson, 104-551. **"Real property:"** Bruton v. McRae, 125-206; Hinsdale v. Williams, 75-430; Gamble v. Watterson, 83-573; Dickens v. Long, 112-311; see section 72; **"Superior Court" defined in cases following, which consider along with section 129 et seq:** Johnson v. Futrell, 86-124; Moore v. Ingram, 91-376; Pelletier v. Saunders, 67-264; Springer v. Shavender, 118-42; Brittain v. Mull, 91-504; Haywood v. Haywood, 79-42; Hyman v. Jarnigan, 65-96; McAdoo v. Benbow, 63-461; Hudson v. Cobb, 97-260; Wilson v. Bynum, 92-717—**"of county where land or some part thereof situated,"** Ellis v. Adderton, 88-472.

CASES BEARING GENERALLY UPON STATUTE. Creditor need not be notified: Thompson v. Cox, 53-311. **Creditors may apply for sale:** Baker v. Carter, 127-94; Lee v. McKoy, 118-518; Clement v. Cozart, 112-412, 109-173; Wilson v. Pearson, 102-290; Wilson v. Bynum, 92-717; Fike v. Green, 64-667—**but can not be joined with administrator, he representing all creditors,** Strickland v. Strickland, 129-84; Webb v. Atkinson, 122-683; Dickey v. Dickey, 118-956; Rawls v. Carter, 119-596. **Creditors may show devistavit of personalty,** Sanderson v. Overman, 98-235; Bland v. Hartsoe, 65-204; Wiley v. Wiley, 63-182; but see Finger v. Finger, 64-183; see also section 104, et seq. **Heirs may apply for sale:** Settle v. Settle, 141-553—**may oppose sale,** Person v. Montgomery, 120-111; Rogers v. Clements, 92-81—**may pay off debts to prevent sale,** James v. Withers, 126-715. **Administrator guilty of devistavit, remedy first on bond before selling:** Clement v. Cozart, 107-695; Lee v. Beaman, 101-294; Latham v. Bell, 69-135; Carlton v. Byers, 70-691; **but see** Brittain v. Dickson, 104-547. **Real estate the secondary fund liable to payment of debts:** Hinton v. Whitehurst, 68-316, 71-66; Badger v. Daniel, 79-384; Tuck v. Walker, 106-288; Lee v. McKoy, 118-525. **Statute does not apply when will directs sale:** Baptist Female University v. Borden, 132-476; Wiley v. Wiley, 61-131—**when personalty has been lost by executor:** Ibid. **No devise to persons not in esse can be made that can prevent a sale to pay debts of testator:** Carraway v. Lassiter, 139-145. **Other cases that merely refer to section;** Rhem v. Tull, 35-57; Reade v. Hamlin, 62-131; Evans v. Singletary, 63-205; Wadsworth v. Davis, 63-251; Hardee v. Williams, 65-56; Vaughn v. DeLoatch, 65-378; Stafford v. Harris, 72-198; Allison v. Robinson, 78-222; Williams v. Williams, 85-313; Tillett v. Aydlett, 90-551; Garrison v. Cox, 99-482; Jennings v. Copeland, 90-572; Gilchrist

v. Middleton, 108-715; Brittain v. Dickson, 111-531; Coggins v. Flythe, 113-119; Boyd v. Redd, 118-686; Thompson v. Cox, 53-311.

69. Undevised first sold. When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator.

Code, s. 1430; 1868-9, c. 113, s. 39. **The will should be disturbed as little as practicable:** Tillett v. Aydlett, 90-553. **Land undevised sold first:** Camp Mfg. Co. v. Liverman, 123-7.

70. Conveyances by heir within two years of letters. All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to bona fide purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors.

Code, s. 1442; 1868-9, c. 113, s. 105. **See generally:** Arrington v. Arrington, 114-151; Miller v. Shoaf, 110-319; Gilchrist v. Middleton, 108-705; Davis v. Perry, 96-260; Murchison v. Whitted, 87-465; Badger v. Daniel, 79-372; Winfield v. Burton, 79-388; Hinton v. Whitehurst, 71-66; Donnoho v. Patterson, 70-649.

CONVEYANCES HELD VALID. Those made before two years, when: Davis v. Perry, 96-260. **Those made after two years, when:** Francis v. Reeves, 137-269; Bunn v. Todd, 115-138; Brandon v. Phelps, 77-44.

CONVEYANCES HELD INVALID. Those made before two years, when: Camp Mnfg. Co. v. Liverman, 128-52; Renan v. Banks, 83-483. **Those made after two years, when:** Hooker v. Yellowley, 128-297; McArtan v. McLauchlin, 88-391.

CASES MERELY CITING STATUTE. Smith v. Brown, 99-388; Andres v. Powell, 97-166; Syme v. Badger, 96-210; Thompson v. Cox, 53-311.

71. Conveyed to personal representative; power of successor. Whenever land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; which sale shall be public, after due advertisement, as for judicial sales, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his life or term of office his successor may sell and convey such land as if the title had been made to him: Provided, if the predecessor has contracted in writing to

sell said lands, but fails to convey same, his successor in office may do so upon payment of the purchase price.

1905, c. 342.

72. Conveyed in fraud of creditors. The real estate subject to sale under this chapter shall include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interests in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud.

Code, s. 1446; 1868-9, c. 113, s. 51. **Land conveyed to third person by direction of decedent not within statute:** Clement v. Cozart, 109-173; Rhem v. Tull, 35-57; compare Egerton v. Jones, 107-284. **Land conveyed to wife and children while insolvent:** Webb v. Atkinson, 122-683, 124-447. **Complaint in action to sell land fraudulently conveyed:** Sullivan v. Field, 118-358. **Bearing upon statute:** McCaskill v. Graham, 121-190; Clement v. Cozart, 107-700; Tuck v. Walker, 106-285; Harrington v. Hatton, 129-146; Nadal v. Britton, 112-188; Heck v. Williams, 79-437; Mannix v. Ihrie, 76-300; Waugh v. Blevins, 68-167; Paschal v. Harris, 74-335. **See also under section 960.**

73. Fraudulent grantee, selling innocent purchaser, liable. Whenever an executor, administrator or collector shall file his petition to sell land, which may have been fraudulently conveyed, and of which there may have been a subsequent bona fide sale, whereby he can not have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against all persons who may have fraudulently purchased the same; and if the whole recovery shall not be necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made. 152-183

Code, s. 1447; 1868-9, c. 113, s. 52. **Cited** in Webb v. Atkinson, 122-688.

74. Heirs and devisees necessary parties to proceeding. No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law.

Code, s. 1438; 1868-9, c. 113, s. 44. **Heirs necessary parties:** Webb v. Atkinson, 122-683; Dickens v. Long, 109-165; Wadsworth v. Davis, 53-251; Thompson v. Cox, 53-313. **Decree void as to heirs or devisees not served:** Card v. Finch, 142-140; Harrison v. Harrison, 106-282; Perry v.

Adams, 98-171; Stancill and Gay v. Gay, 92-462. **As to infants, see next section.**

75. Infants defend by guardian; must answer. Infant defendants must appear by guardian, either general or special, who shall file an answer to the petition, either admitting or denying the allegations thereof, and where such answer is filed by a guardian ad litem the costs and expenses thereof, if any, may be directed to be paid, if the court thinks proper, out of the proceeds of the sale, in case one is ordered.

Code, s. 1439; 1868-9, c. 113, s. 45. **Infants appear, how:** Settle v. Settle, 141-553; Carraway v. Lassiter, 139-145. **Appointment of guardian ad litem by clerk,** Ibid. **Failure to comply strictly with statute, effect discussed,** Carraway v. Lassiter, 139-145; Stancill and Gay v. Gay, 92-462; Hare v. Holloman, 94-14; Stradley v. King, 84-635; Cates v. Pickett, 97-21; Harrison v. Harrison, 106-282; Chambers v. Penland, 78-53. **Infant heir estopped by recitals in record, when:** Morrison v. Craven, 120-327; Sledge v. Elliott, 116-712. See generally, Harris v. Brown, 123-419; Morrisett v. Ferebee, 120-6.

76. Adverse claimant may be heard. Whenever the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly.

Code, s. 1441; 1868-9, c. 113, s. 47. **See generally:** Perry v. Peterson, 98-63; Gibson v. Pitts, 69-155. **Adverse claimant being party to action, estopped by confirmation of sale:** Smith v. Huffman, 132-600.

77. What petition for, must show. The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained:

1. The amount of debts outstanding against the estate.
2. The value of the personal estate, and the application thereof.
3. A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.
4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent.

Code, s. 1437; 1868-9, c. 113, s. 43. **Petition must show that personalty insufficient:** Clement v. Cozart, 107-695; Blount v. Pritchard, 88-445; Shields v. McDowell, 82-137—**need not show that bond of former administrator was exhausted,** Monger v. Kelly, 115-294—**may state that it will be necessary to sell land fraudulently conveyed,** Sullivan v. Field, 118-358—**must show value and disposition of personalty,** McNeill v. McBryde, 112-408—**must show amount of debts,** Austin v. Austin, 132-265. **Effect**

of failure to verify petition: Stradley v. King, 84-635. **Other cases that may throw light on section:** Wilson v. Bynum, 92-717; Hinton v. Whitehurst, 68-316; Haywood v. Haywood, 79-42; Thompson v. Cox, 53-311.

78. Issue joined, cause transferred to term. When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings.

Code, s. 1440; 1868-9, c. 113, s. 46. Person v. Montgomery, 120-111; Stainback v. Harris, 115-100; Perry v. Peterson, 98-63; Jones v. Hemphill, 77-42; McBryde v. Patterson, 73-479.

79. Petition not denied, order made. As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily, and to decree a sale.

Code, s. 1443; 1868-9, c. 113, s. 48. **As to order, see next section.**

80. What order contains; what title made. The court may decree a sale of the whole or any specified parcel of the premises, in such a manner as to size of lots, place of sale, terms of credit, and security for payment of purchase money, as may be most advantageous to the estate, and upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession.

Code, s. 1444; 1868-9, c. 113, s. 49.

ORDER. May direct sale of any portion: Tillett v. Aydlett, 90-551, 93-15. **Made erroneously:** Hyman v. Jarnigan, 65-96.

SALE. Cases holding no fraud in Coffin v. Cook, 106-376. **Purchaser not entitled to order for possession when:** Marcon v. Wyatt, 117-129. **Administrator can not purchase:** Highsmith v. Whitehurst, 120-123; Howell v. Tyler, 91-207; Roberts v. Roberts, 65-27; Froneberger v. Lewis, 70-456; see under section 63. **Title to land offered presumed good:** Shields v. Allen, 77-375. **Administrator not reporting sale, remedy:** Mason v. Osgood, 64-467. **Purchaser compelled to complete purchase:** Hudson v. Coble, 97-260.

CONFIRMATION OF SALE. Harrell v. Blythe, 140-415; Joyner v. Futrell, 136-301; Smith v. Hoffman, 132-600; Shute v. Austin, 120-440; Marcom v. Wyatt, 117-129; Foushee v. Durham, 84-56; Stradley v. King, 84-635; Shearin v. Hunter, 72-493; Thompson v. Cox, 53-311; Evans v. Singletary, 63-205.

PURCHASER'S TITLE. Made, when: Joyner v. Futrell, 136-301; Foushee v. Durham, 84-56; Mason v. Osgood, 64-467; but see Hyman v. Jarnigan, 65-96; Godley v. Taylor, 14-178. **Validity of title discussed:** Carraway v. Lassiter, 139-145; Highsmith v. Whitehurst, 120-123; Piercy

v. Watson, 118-976; Sledge v. Elliott, 116-712; Lictie v. Chappell, 111-347; Grimes v. Taft, 98-193; Perry v. Peterson, 98-63; McLean v. Patterson, 84-427.

CASES IN WHICH PROCEEDINGS ATTACKED: Settle v. Settle, 141-553; Carraway v. Lassiter, 139-145; Morrow v. Cole, 132-678; Murray v. Southerland, 125-175; McNeill v. Fuller, 121-209; Morrison v. Craven, 120-327; Rawls v. Carter, 119-596; Springer v. Shavender, 118-33; Smith v. Gray, 116-311; Sledge v. Elliott, 116-712; Wilson v. Deweese, 114-653; Adams v. Howard, 110-15; Dickens v. Long, 109-165; Harrison v. Harrison, 106-282; Coffin v. Cook, 106-376; McLaurin v. McLaurin, 106-331; McIver v. Stephens, 101-255; Edwards v. Moore, 99-1; McGlawhorn v. Worthington, 98-199; Perry v. Peterson, 98-63; Ward v. Lowndes, 96-367; Hare v. Holloman, 94-14; Sumner v. Sessoms, 94-371; Fowler v. Poor, 93-466; Simonton v. Brown, 72-46; Lovinier v. Pearce, 70-168; Hyman v. Jarnigan, 65-96; Overton v. Crawford, 52-415.

81. How advertised. Notice of sale under this proceeding shall be the same as for the sale of real estate by sheriffs on execution.

Code, s. 1445; 1868-9, c. 113, s. 50.

82. Lands devised to be sold by executor, who may sell. When any or all of the executors of a person making a will of lands to be sold by his executors shall die, fail or for any cause refuse to take upon them the administration; or, after having qualified, shall die, resign, or for any cause be removed from the position of executor; or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors as survive or retain the burden of administration, or the administrator with the will annexed, or the administrator de bonis non, may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold.

Code, s. 1493; 1889, c. 461. **Cited** in Duckworth v. Jordan, 138-526; Saunders v. Saunders, 108-331; Creech v. Grainger, 106-220; Hester v. Hester, 37-330. **Land converted into personalty:** Mills v. Harris, 104-626 —**and administrator with will annexed can make valid title,** Orrender v. Call, 101-399. **Surviving executor executes powers:** Simpson v. Simpson, 93-373. **Power to sell does not include power to option:** Trogden v. Williams, 144-192. **Where two or more executors appointed to sell, all of them must execute the power:** Trogden v. Williams, 144-192; Wasson v. King, 19-262; Debow v. Hodge, 4-36. **Foreign executors cannot convey land here unless they qualify in this state:** Scott v. Lumber Co., 144-44. **A waiver by one executor does not bind the other:** Trogden v. Williams, 144-192. **See section 1031.**

83. Land sold by decedent, who makes deed. When any deceased person shall have bona fide sold any lands, and shall have

given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract hath been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: Provided, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract.

Code, s. 1492; 1868-9, c. 113, s. 65; 1874-5, c. 251. **Contracts within the statute:** Hodges v. Hodges, 22-72. **Personal representative conveys:** Overman v. Jackson, 104-4. **Equitable defenses against bond set up against deed:** McCraw v. Gwin, 42-55. **Conveyance before contract registered and money paid inoperative:** Taylor v. Hargrove, 101-145. **Heirs can not enjoin personal representative from conveying:** White v. Hooper, 59-152. **Title conveyed with covenant of quiet enjoyment, effect:** Osborne v. McMillan, 50-109. **Purchaser must show consideration paid before getting deed:** Lindsay v. Coble, 37-602. **Cases merely citing section:** Taylor v. Gooch, 110-390; Grubb v. Lookabill, 100-270; Twitty v. Lovelace, 97-54. See also Earle v. McDowell, 12-16.

84. Under will, may be public or private. Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein.

Code, s. 1503; 1868-9, c. 113, s. 75.

85. Realty bought for estate, when. At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate, when, in his opinion, this is necessary to prevent a loss to the estate.

Code, s. 1505; 1868-9, c. 113, s. 77. Ramsay v. Hanner, 64-668.

86. Specifically devised, devisee entitled to contribution. If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decree a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees; according to the principles of equity in respect to contribution among legatees. And the children

and issue provided for in this chapter shall be regarded as specific devisees in such contribution.

Code, s. 1535; 1868-9, c. 113, s. 107. Miller v. Shoaf, 110-325; Lilly v. Wooley, 94-412; Badger v. Daniel, 79-372.

XV. Debts, Proved and Paid.

87. Order of payment. The debts of the decedent must be paid in the following order:

First class. Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses.

Third class. Taxes assessed on the estate of the deceased previous to his death.

Fourth class. Dues to the United States and to the state of North Carolina.

Fifth class. Judgments of any court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease.

Seventh class. All other debts and demands.

150-154

Code, s. 1416; 1868-9, c. 113, s. 24. **Where valid lien upon property sold, administrator must use first moneys to discharge lien:** Pate v. Oliver, 104-458; see also Chemical Co. v. Edwards, 136-78; Moore v. Dunn, 92-63; Creasy v. Pearce, 69-67. **Foreign and domestic creditors are on same footing as to assets:** Findley v. Gidney, 75-395. **In second class, funeral expenses of no one but intestate included:** Baker v. Dawson, 131-227—**paid anyone who of necessity has to advance costs of burial,** Ray v. Honeycutt, 119-510; see also Parker v. Lewis, 13-22; Ward v. Jones, 44-127; Barbee v. Green, 92-471. **Debts of third class:** James v. Withers, 126-715. **Cases as to debts of fifth class:** Mauney v. Holmes, 87-428; Galloway v. Bradfield, 86-163; Murchison v. Williams, 71-135; Jenkins v. Carter, 70-500; Dancy v. Pope, 68-147. **As to debt to child for services performed for parent:** Winkler v. Killian, 141-575; and cases therein cited. **Debt for purchase money of land is not preferred:** Moore v. Ingram, 91-376. **No debt of the estate can be created after the death of intestate:** Lindsay v. Darden, 124-307. **Cases merely citing statute:** Atkinson v. Ricks, 140-421; Cobb v. Rhea, 137-298; Cowles v. Hall, 113-361; State and Guilford v. Georgia Co., 112-42; Lee v. Eure, 82-428.

88. No preference in the class. No executor, administrator or collector shall give to any debt any preference whatever, either by

paying it out of its class or by paying thereon more than a pro rata proportion in its class.

Code, ss. 1417, 1418; 1868-9, c. 113, ss. 25, 26. Coggins v. Flythe, 113-114; Worthy v. Brower, 93-344; Moore v. Byers, 65-240; Moye v. Albritton, 42-62. **See sections 96 and 167.**

89. Debts due executor not preferred. No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts.

Code, s. 1420; 1868-9, c. 113, s. 28.

90. Debts not due, how paid. Debts not due may be paid on a rebate of interest thereon for the time unexpired.

Code, s. 1419; 1868-9, c. 113, s. 27.

91. Affidavit as to debt may be required. Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit.

Code, s. 1425; 1868-9, c. 113, s. 33. Hinton v. Pritchard, 126-8.

92. Disputed debt may be referred. If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it.

Code, s. 1426; 1868-9, c. 113, s. 34; 1872-3, c. 141. **Cited** in McLeod v. Graham, 132-473; Dunn v. Beaman, 126-766; Lassiter v. Upchurch, 107-411; Morris v. Morris, 94-613; Fleming v. Fleming, 85-127.

93. Disputed debt not referred, barred in six months. If a claim is presented to and rejected by the executor, administrator

or collector, and not referred as provided in the preceding section, the claimant must, within six months after due notice of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

Code, s. 1427; 1868-9, c. 113, s. 35. **Cases merely citing section:** Morrisey v. Hill, 142-356; Whitaker v. Whitaker, 138-208; Andres v. Powell, 97-167; Fleming v. Fleming, 85-129.

94. Claims not presented in twelve months, administrator not liable. In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector.

Code, s. 1428; 1868-9, c. 113, s. 37. Morrissey v. Hill, 142-357; Mallard v. Patterson, 108-255. **See also cases under section 367.**

95. No lien by suit against representative. No lien shall be created by the commencement of a suit against an executor, administrator or collector.

Code, s. 1432; 1868-9, c. 113, s. 41. **Effect of taking a judgment:** Grant v. Bell, 91-495; Holmes v. Foster, 78-35; Vaughn v. Stephenson, 69-212; Dunn v. Barnes, 73-273. **See also sections 55 and 162.**

96. Payment of debts out of class, when valid. Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the emancipation of the slaves, or the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, or when any creditor has refused to accept payment of his debt in Confederate currency, and such currency was afterwards used by the executor or administrator in payment of debts of the estate, or it became of no value by the termination of the war, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof without regard to the dignity of the debt thus paid, or on which such suit may be brought.

Code, s. 1496; 1869-70, c. 150. **Cited** in Coggins v. Flythe, 113-114. **See** also Coltraine v. Spurgin, 31-52; Roundtree v. Sawyer, 15-44; **and cases cited under sections 88 and 167.**

97. Costs against executors, when allowed. No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which cases the court may award such costs against the defendant personally, or against the estate, as may be just.

Code, s. 1429; 1868-9, c. 113, s. 38. **See section 115. See** Whitaker v. Whitaker, 138-205; Morris v. Morris, 94-613; Fleming v. Fleming, 85-127; May v. Darden, 83-237. **Cited merely** in Valentine v. Britton, 127-59; Woodlief v. Bragg, 108-572; Long v. Oxford, 108-281.

98. Bonds which bind heir. Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter.

Code, s. 1404; 1868-9; c. 113, s. 12. **See** Pate v. Oliver, 104-458; Earle v. McDowell, 12-16.

XVI. Accounts.

99. Annual. Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, and inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness.

Code, s. 1399; C. C. P., s. 478; 1871-2, c. 46. **"Account" defined** in State v. Dunn, 134-668. **Account prima facie correct:** Bean v. Bean, 135-92; Coggins v. Flythe, 113-102; Allen v. Royster, 107-282; Grant v. Hughes 94-231. **Rents and profits of certain land are assets:** Lafferty v. Young, 125-296. **Case in which annual and final account distinguished;** Burgwyn v. Daniel, 115-115. **Referred to** in Stonestreet v. Frost, 123-292; Turner v. Turner, 104-572; Grant v. Rogers, 94-762; Gregory v. Ellis, 82-228; McFayden v. Council, 81-195; Heilig v. Foard, 64-710.

100. Failure to file, how compelled. If any executor, administrator or collector omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office.

Code, s. 1400; C. C. P., s. 479. **"Account" defined** in State v. Dunn, 134-668. See Atkinson v. Ricks, 140-420; Bean v. Bean, 135-92. **Cited merely in** Edwards v. Cobb, 95-8; Battle v. Duncan, 90-548.

101. Vouchers presumptive evidence. Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character.

Code, s. 1401; C. C. P., s. 480. **What voucher must show:** McLean v. Breese, 109-564; Costen v. McDowell, 107-546—**effect of failure to impeach at proper time,** Drake v. Drake, 82-443.

102. Vouchers for gravestones; when cost exceeds $100. It shall be lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The cost thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose, and same shall be approved by the resident judge of the district.

1905, c. 444.

103. Final account. An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any

person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk.

Code, s. 1402; C. C. P., s. 481. **"Account" defined** in State v. Dunn, 134-668. **"Final account" defined** in Vaughan v. Hines, 87-445; Burgwyn v. Daniel, 115-115; Collins v. Smith, 109-468. **Prima facie correct:** Jones v. Sugg, 136-144; Allen v. Royster, 107-278; Turner v. Turner, 104-566. **See generally:** Woody v. Brooks, 102-334. **Section merely cited in** Atkinson v. Ricks, 140-420; Bean v. Bean, 135-93; Edwards v. Lemmond, 136-330; Self v. Shugart 135-189; Stonestreet v. Frost, 123-292; Brawley v. Brawley, 109-525; Woody v. Brooks, 102-341; Reaves v. Davis, 99-429; Andres v. Powell, 97-165. **In a petition for final settlement, administrator can correct his annual accounts by showing them erroneous:** Medlin v. Simpson, 144-397. **Other cases of interest:** Hodges v. Council, 86-184; Heilig v. Foard, 64-714; Rowland v. Thompson, 65-110.

XVII. Accounting Compelled.

104. By special proceeding by creditor. Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively.

Code, s. 1448; 1871-2, c. 213; 1876-7, c. 241, s. 6. **Any creditor can become plaintiff:** Long v. Bank, 85-354. **Summons and complaint:** Isler v. Murphy, 76-52. **Effect of suit brought by one creditor for all:** Dobson v. Simonton, 93-268. **Difference between action under this section and creditor's bill in equity:** Patterson v. Miller, 72-516. **Jurisdiction:** Clement v. Cozart, 107-695; Hester v. Lawrence, 102-319; Warden v. McKinnon, 94-378; Pegram v. Armstrong, 82-326; Bratton v. Davidson, 79-423; Haywood v. Haywood, 79-42; Herring v. Outlaw, 70-334; Jerkins v. Carter, 70-500. **Creditors cannot become defendants in action by administrators for settlement:** Carlton v. Byers, 93-302. **Where plea in bar set up, it must be tried before accounting ordered:** Oldham v. Rieger, 145-254; see cases under section 519. **Actions and proceedings brought under this section wherein section not construed:** Atkinson v. Ricks, 140-420; Jones v. Sugg, 136-143; Dunn v. Beaman, 126-764, 766; Clement v. Cozart, 107-695; Love v. Ingram, 104-600; Perkins v. Berry, 103-131; Hester v. Lawrence, 102-319; Brooks v. Brooks, 97-136; Warden v. McKinnon, 94-378; Speer v. James, 94-417; Grant v. Hughes, 94-231; Dobson v. Simonton, 93-268; Moore v. Edwards, 92-43; Moore v. Ingram, 91-376; Daniel v. Laughlin, 87-433; Mauney v. Mauney, 87-428; Long v. Bank, 85-354; Bacon v. Berry, 85-124; Graham v. Tate, 77-120; Isler v. Murphy, 76-52; Wordsworth v. Davis, 75-159; Patterson v. Miller, 72-516; Ballard v. Kilpatrick, 71-281; Overman v. Grier, 70-693. **Cases where mere reference is made to section:** Valentine v. Britton, 127-59; Dickey v. Dickey,

118-956; Cowles v. Hall, 113-361; Clement v. Cozart, 109-181; Wilson v. Pearson, 102-314; Andres v. Powell, 97-165; Carlton v. Byers, 93-302. **See cases under sec. 129.**

105. What rules govern. The said special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter.

Code, s. 1449; 1871-2, c. 213, s. 2. Isler v. Murphy, 76-53; Warden v. McKinnon, 94; 388.

106. When and where summons returnable. The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof.

Code, s. 1450; 1871-2, c. 213, s. 3. Brooks v. Brooks, 97-141; Isler v. Murphy, 76-52.

107. Clerk to advertise for creditors, when. On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims.

Code, s. 1451; 1871-2, c. 213, s. 4. Hester v. Lawrence, 102-319; Warden v. McKinnon, 94-388.

108. How advertisement published. The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication.

Code, s. 1452; 1903, c. 134; 1871-2, c. 213, s. 5. Hester v. Lawrence, 102-319; Warden v. McKinnon, 94-388.

109. Creditors to file claims; appoint agent. The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place

within the town in which the court is held, upon whom or where notices in the cause may be served or left, otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office.

Code, s. 1453; 1871-2, c. 213, s. 6. **Creditor filing claim has standing in court:** Warden v. McKinnon, 94-378; Moore v. Edwards, 92-43.

110. How claims proven. If the evidence of the demand be other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or if he be non-resident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given.

Code, s. 1454; 1871-2, c. 213, s. 7. Warden v. McKinnon, 94-388; Isler v. Murphy, 76-52; Long v. Bank, 85-354.

111. Representative to file claims; notice to creditors. On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named shall have failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address.

Code, s. 1455; 1871-2, c. 213, s. 8. Fleming v. Fleming, 85-130.

112. Clerk to exhibit claims to representative. On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office with the evidences thereof.

Code, s. 1456; 1871-2, c. 213, s. 9. Fleming v. Fleming, 85-130.

113. Representative denying claim, notice to creditor. Within five days thereafter the defendant shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases.

Code, s. 1457; 1871-2, c. 213, s. 10. **Practice in case of administrator denying claim:** Warden v. McKinnon, 94-378; Graham v. Tate, 77-124; Moore v. Edwards, 92-43. **Creditor can dispute claim of other creditor, when:** Oates v. Lilly, 84-643; Wordsworth v. Davis, 75-159; Overman v. Grier, 70-693. **Referred to** in Atkinson v. Ricks, 140-420; Fleming v. Fleming, 85-130; Isler v. Murphy, 76-54.

114. Issues joined, cause docketed for hearing. If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issues shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial.

Code, s. 1458; 1871-2, c. 213, s. 11. Atkinson v. Ricks, 140-420; Warden v. McKinnon, 94-388; Graham v. Tate, 77-124. **No accounting ordered until pleas in bar tried:** Oldham v. Rieger, 145-254; **see also cases** cited under section 519.

115. Costs paid by representative personally, when. If any personal representative shall deny the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue shall finally be decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless it shall appear that he had reasonable cause to contest the claim and did so bona fide.

Code, s. 1459; 1871-2, c. 213, s. 12. **See section 97. Referred to** in Valentine v. Britton, 127-59.

116. Representative failing to appear, procedure. If the personal representative shall fail to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just.

Code, s. 1460; 1871-2, c. 213, s. 13.

117. Clerk to state an account. Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court.

Code, s. 1461; 1871-2, c. 213, s. 14. Atkinson v. Ricks, 140-420.

118. Account stated; examined; excepted to; signed. After the clerk shall have stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice.

Code, s. 1462; 1871-2, c. 213, s. 15. **Cited** in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-234.

119. Either party may appeal; security given for costs. Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with

surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor shall appeal and give such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking.

Code, s. 1464; 1871-2, c. 213, s. 17.

120. Papers filed; cause docketed for trial. On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term.

Code, s. 1465; 1871-2, c. 213, s. 18.

121. Certain creditors may docket judgments, when. If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon.

Code, s. 1466; 1871-2, c. 213, s. 19.

122. Judgment, if assets sufficient to pay a class. If upon taking the account it shall be admitted, or be found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class be in litigation, the amount of such claim, with the probable costs of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended.

Code, s. 1467; 1871-2, c. 213, s. 20. **Cited** in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-324.

123. Judgment, if assets insufficient to pay a class. If the assets be insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class.

Code, s. 1468; 1871-2, c. 213, s. 21. **Cited** in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-324.

124. What judgment contains; execution. All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

1. The certain amount of the creditor's demand.

2. The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs.

Code, s. 1469; 1871-2, c. 213, s. 22. Warden v. McKinnon, 94-391. **Cited** in Hester v. Lawrence, 102-324, 325.

125. When judgment to fix with assets. No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets.

Code, s. 1470; 1871-2, c. 213, s. 23. Grant v. Bell, 91-495; Brooks v. Headen, 88-449; Holmes v. Foster, 78-35; Dunn v. Barnes, 73-273. **Effect of executor paying the judgment:** Perkins v. Berry, 103-131. **Cited** in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-325.

126. Form and effect of execution. All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally.

Code, s. 1471; 1871-2, c. 213, s. 24. **Cited** in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-325.

127. Report evidence of assets only as of its date. The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates.

Code, s. 1472; 1871-2, c. 213, s. 25.

128. Assets subsequent to report, how shown. Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, may sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary.

Code, s. 1473; 1871-2, c. 213, s. 26. **Cited** in Atkinson v. Ricks, 140-420.

129. Suit for accounting or debt brought to term. In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it shall be competent for the court in which said actions shall be pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require.

Code, ss. 215, 1511; 1876-7, c. 241, s. 6. **Jurisdiction:** Shober v. Wheeler, 144-403; Fisher v. Trust Co., 138-90; Jones v. Sugg, 136-143; Pegram v. Armstrong, 82-326; Devereux v. Devereux, 81-12; Bratton v. Davidson, 79-423; Haywood v. Haywood, 79-42. **No accounting ordered until pleas in bar tried:** Oldham v. Rieger, 145-254; also see cases under section 519. **Other actions brought under this section:** Mann v. Baker, 142-235; Brooks v. Holton, 136-306; Royster v. Wright, 118-152; Collins v. Smith, 109-468; Godwin v. Watford, 107-168; Perkins v. Berry, 103-131; Dobson v. Simonton, 93-268; Daniels v. Fowler, 123-35; Woody v. Brooks, 102-334; Rountree v. Britt and Vinson, 94-104. See Smith v. Brown, 101-347. **Referred to** in Atkinson v. Ricks, 140-420; Andres v. Powell, 97-166; Cassidy ex parte, 95-225; Tillett v. Aydlett, 93-22; Ballinger v. Cureton, 104-477; Atkinson v. Ricks, 140-420. **Consider cases cited under section 104.**

130. Personal assets insufficient, land proceeded against. If it shall appear at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it shall be the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets.

Code, s. 1474; 1871-2, c. 213, s. 27. Lee v. McKoy, 118-518; Clement v. Cozart, 109-173. **Referred to** in Godwin v. Watford, 107-168; Brooks v. Brooks, 97-140, 141; Warden v. McKinnon, 94-378; Dickey v. Dickey, 118-958; Atkinson v. Ricks, 140-420. **Heirs and devisees must be parties before judgment rendered:** Perkins v. Berry, 103-131; Wilson v. Pearson, 102-314. **Power of judge in ordering sale limited:** Moore v. Ingram, 91-376. See Pegram v. Armstrong, 82-326.

131. Proceedings to sell real estate, how conducted. Upon the return of the summons the proceeding shall be as is directed in other like cases.

Code, s. 1475; 1871-2, c. 213, s. 28. **Cited** in Brooks v. Brooks, 97-140.

XVIII. Distribution.

132. Order of distribution. The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

Distributed according to law of domicile at death: Jones v. Layne, 144-600; Cade v. Davis, 96-139; Medley v. Dunlap, 90-527; Jones v. Gerock, 59-190—**excepting when death by wrongful act:** Davis v. R. R., 136-115. **Recovery in action for wrongful death, how distributed:** Vance v. R. R., 138-462; Davis v. R. R., 136-115; Hartness v. Pharr, 133-566; Baker v. R. R., 91-308—**University gets if no next of kin:** Warner v. R. R., 94-250. **Widow dissenting from will, how share ascertained:** Arrington v. Dortch, 77-367; Worth v. McNeil, 57-272; Credle v. Credle, 44-225; Hunter v. Husted, 45-97. **Infants in ventre sa mere:** Grant v. Bustin, 21-77; Hill v. Moore, 5-233. **Where will leaves proceeds of sale of land to heirs, grandchildren take per stirpes:** Lee v. Baird, 132-755, and cases cited.

1. If there are not more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate and such persons as legally represent such children as may then be dead.

Case where "child's share" in will interpreted: Eller v. Lillard, 107-486—**"child's part" in will interpreted:** McKrow v. Painter, 89-440. **"Child's part" in statute interpreted:** Headen v. Headen, 42-162.

2. If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part.

3. If there be no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

Baptist University v. Borden, 132-501. **Who are "next of kin:"** Peterson v. Webb, 39-56.

4. If there be no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead.

As to grandchildren: Ellis v. Harrison, 140-444; Skinner v. Wynne, 55-41.

5. If there be neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them.

Consider: Nelson v. Blue, 63-659; Johnston v. Chesson, 59-147; Gillespie v. Foy, 40-280. **As to mother receiving part of recovery for death of child along with father, open question:** Davis v. R. R., 136-115. **"Next of kin:"** Peterson v. Webb, 39-56.

6. If, after the death of the father and in the lifetime of the mother, any of his children shall die intestate, without wife or children, every brother or sister, and the representatives of them, shall have an equal share with the mother of the deceased child.

7. If there be no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there be one, shall be entitled to all the personal estate of such intestate.

"Next of kin:" Peterson v. Webb, 39-56.

Code, s. 1478; 1893, c. 82; 1868-9, c. 113, s. 53.

133. Advancements accounted for. Children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same in the distribution of the estate in the manner as provided by the second rule in the chapter entitled Descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate.

Code, s. 1483; 1868-9, c. 113, s. 54. **The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of partition among their children:** Griffin ex parte, 142-116. **Grandchildren taking in their own right need not account for advancements to parents:** Skinner v. Wynne, 55-41; Lee v. Baird, 132-755; Headen v. Headen, 42-159; Daves v. Haywood, 54-253. **Child's part under a certain will discussed in** Eller v. Lillard, 107-486; McKrow v. Painter, 89-440; Headen v. Headen, 42-162. **Case defining advancements in general:** Meadows v. Meadows, 33-148. **Advancement by mother as well as father must be put in hotchpot:** Daves v. Haywood, 54-253. **A delivery necessary to constitute advancement of personalty:** Meadows v. Meadows, 33-148. **Children must account to widow, when:** Eller v. Lillard, 107-486; Arrington v. Dortch, 77-367; Worth v. McNeill, 57-272; Credle v. Credle, 44-225; Headen v. Headen, 42-162. **Will bequeathing personalty to children, less advancements, one child dying, how construed:** Scroggs v. Stevenson, 100-354. **Gifts are presumed to be advancements:** Griffin ex parte, 142-116; Harper v. Harper, 92-300; Bradsher v. Cannady, 76-445—**but intention of parent governs,** Kiger v. Terry, 119-458; Harper v. Harper, 92-300; Barbee v. Barbee, 109-299; Melvin v. Bullard, 82-33; Bradsher v. Cannady, 76-445—**presumed not to be advancement when father owes child,** Haglar v. McCombs, 66-345. **Where in will bequest states it is not an advancement:** James v. James, 76-331. **Agreements between children as to advancements:** Bason v. Harden, 72-281—**between child and father,** Webb v. Lyon, 40-67. **Parol evidence competent to rebut presumption as to an advancement arising upon the face of a deed and to show parent's real intention:** Griffin ex parte, 142-116.

GIFTS HELD TO BE ADVANCEMENTS. Slaves, even though afterwards emancipated: Banks v. Shannonhouse, 61-284. **Furniture to start**

child out in life: Hollister v. Attmore, 58-373; Shiver v. Brock, 55-137. **Personalty to son-in-law:** Bridgers v. Hutchins, 33-68; **Services of a slave loaned by father to son:** Hanner v. Winburn, 42-142. **Slave that dies before intestate does:** Walton v. Walton, 42-138. **Slave to son-in-law an advancement to daughter:** Hicks v. Forrest, 41-528. **An estate per autre vie:** Dixon v. Coward, 57-354. **Land to daughter and son-in-law:** Jones v. Spaight, 6-89.

GIFTS HELD NOT TO BE ADVANCEMENTS. Land to son-in-law: Banks v. Shannonhouse, 61-284. **Land to child, where land in father's possession but really devise from aunt:** Hollister v. Attmore, 58-373. **Money to supply child with necessities:** Meadows v. Meadows, 33-148; see also Walker v. Brooks, 99-207.

In dividing residue in a will, no advancements regarded: Donnell v. Mateer, 40-7; Richmond v. Vanhook, 38-581; Hurdle v. Elliott, 23-174; Jerkins v. Mitchell, 57-207; Johnston v. Johnston, 39-9; Brown v. Brown, 37-309; Croom v. Herring, 11-393—**unless will says distribution of residue must be as if testator died intestate,** Raiford v. Raiford, 41-490. **From what date advancement reckoned:** Shiver v. Brock, 55-137. **Interest calculated on advancements when and how:** Daves v. Haywood, 54-253; Tayloe v. Bond, 45-5; Scroggs v. Stevenson, 100-360.

134. Children advanced to render schedule. Where any parent shall die intestate, who had in his or her lifetime given to, or put in the actual possession of, any of his or her children, any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime.

Code, s. 1484; 1868-9, c. 113, s. 55. **Referred to** in Kiger v. Terry, 119-458. **Consider cases under preceding section.**

135. Children refusing to account for advances not to share. In case any child who had, in the lifetime of the intestate, received a part of said estate, shall refuse to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share.

Code, s. 1485; 1868-9, c. 113, s. 56. Scroggs v. Stevenson, 100-354; Bradsher v. Cannady, 76-446.

136. Illegitimate children next of kin to mother. Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter.

Code, s. 1486; 1868-9, c. 113, s. 57. Coor v. Starling, 54-243; Kimborough v. Davis, 16-71.

137. Illegitimate children next of kin to each other. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock.

Code, s. 1487; 1868-9, c. 113, s. 58. Coor v. Starling, 54-243; Kimborough v. Davis, 16-71.

XIX. After-Born Children.

138. Share in realty, in what allotted. The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there be enough for that purpose; and if there be none undevised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient, as will make the proper share of such child.

Code, s. 1536; 1868-9, c. 113, s. 108. **For all the beneficial purposes of heirship a child in ventre sa mere is considered absolutely born:** Deal v. Sexton, 144-158. **Presumption as to legitimacy,** Johnson v. Chapman, 45-213. **Inheritance of after-born children:** Watkins v. Flora, 30-374; Graves v. Barrett, 126-267; King v. Davis, 91-142; Deal v. Sexton, 144-157.

139. Share in personalty, in what allotted. The share of an after-born child in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there be enough for that purpose; and if there be none undisposed of, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child.

Code, s. 1537; 1868-9, c. 113, s. 109. Johnson v. Chapman, 45-213, 54-130. **Right to share in personalty:** Grant v. Bustin, 21-77; Hill v. Moore, 5-233.

140. Share in personalty, when allotted in proceeds of realty. If, after satisfaction of the child's share of real estate out of undivised lands, there be a surplus of such lands, and there be no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undevised land, or as much as may be necessary, shall be sold and the proceeds applied to

making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there be a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant non compos or feme covert.

Code, s. 1538; 1868-9, c. 113, s. 110.

141. Decree of contribution for share in realty, effect of. Upon the allotment to such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee-simple; and the court shall give judgment severally, in favor of such of the devisees and legatees, of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees, of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies.

Code, s. 1539; 1868-9, c. 113, s. 111.

142. When deemed legatee or devisee. An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisees and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit.

Code, s. 1540; 1868-9, c. 113, s. 112.

143. If no petition filed, how estate settled. In case no petition shall be filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next

of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly.

Code, s. 1541; 1868-9, c. 113, s. 113. Johnson v. Chapman, 45-213; 54-130.

XX. Settlement.

144. Legacies and distributive shares; how recovered. Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceedings therein conducted as prescribed in other cases of special proceedings.

Code, s. 1510; 1868-9, c. 113, s. 83. **Jurisdiction:** Williams v. Williams, 71-427; Hendrick v. Mayfield, 74-626; Bidwell v. King, 71-287. **Parties to proceeding:** Carlton v. Byers, 93-302; Hagler v. McCombs, 66-345; Mitchell v. Mitchell, 132-350; see also section 154. **Section referred to in:** Self v. Shugart, 135-196; Woody v. Brooks, 102-341; Andres v. Powell, 97-165; Cassidy ex parte, 95-225. **As to interest on legacies and shares:** Hart v. Williams, 77-426; Grant v. Edwards, 92-442; Peyton v. Smith, 22-325; Finch v. Ragland, 17-137; Evans v. Smith, 84-146; Pickens v. Miller, 83-543; Smith v. Smith, 101-461; Roper v. Burton, 107-526; Coggins v. Flythe, 113-102. **As to costs in such actions:** Smith v. Smith, 101-461. **See generally:** Jones v. Wooten, 137-421; Allen v. Royster, 107-278; Redfearn v. Austin, 88-413; Turnage v. Turnage, 42-127; Hobbs v. Craige, 23-332; Nance v. Powell, 39-297; Ellison v. Andrews, 34-188; Badger v. Daniel, 79-372.

145. Distributive shares paid to clerk, when. It shall be competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid.

Code, s. 1543; 1881, c. 305, s. 1. **Section not mandatory:** Moore v. Eure, 101-11. **Clerk responsible officially for monies:** Cassidy ex parte, 95-

225; Moore v. Eure, 101-11; Brown v. Coble, 76-391; Greenlee v. Sudderth, 65-470; Broughton v. Haywood, 61-380. **Referred to** in Presson v. Boone, 108-78; Thomas v. Connelly, 104-345; Woody v. Brooks, 102-341.

146. Clerk to give receipt under seal. It shall be the duty of the clerk, in the cases provided for in the preceding section, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office.

Code, s. 1544; 1881, c. 305, s. 3. Cassidey ex parte, 95-225. **Referred to** in Presson v. Boone, 108-78.

147. Must be made at end of two years. No executor, administrator or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased.

Code, s. 1488; 1868-9, c. 113, s. 59. **Time of settlement:** Caviness v. Fidelity Co., 140-58; Turner v. Turner, 104-566; Brittain v. Dickson, 104-547; Grant v. Edwards, 92-446; Turnage v. Turnage, 42-127; Hobbs v. Craige, 23-332; Whitted v. Webb, 22-442. **Cases indirectly touching upon section:** Allen v. Royster, 107-278; Edwards v. Lemmond, 136-329; Gilchrist v. Middleton, 108-715; Woody v. Brooks, 102-341; Clements v. Rogers, 91-66; McKinder v. Littlejohn, 23-66; State v. McAleer, 27-632.

148. What may be retained. If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim.

Code, s. 1489; 1868-9, c. 113, s. 60. **Character of claim that "exists:"** Miller v. Shoaf, 110-319. **Referred to** in Woody v. Brooks, 102-341; Jackson v. Shields, 87-437; Andres v. Powell, 97-165.

149. Commissions allowed; proviso. The clerks of the superior court are authorized and directed to allow commissions to executors, administrators and collectors on filing their final accounts for settlement, not exceeding five per cent. upon the amount of receipts and expenditures, which shall appear to be fairly made in the course of administration; and such allowance may be retained out

of the assets against creditors and all other persons claiming an interest in the estate. And the clerk, in making such allowance, shall consider the trouble and time expended in the management of the business: Provided, that in sales of land for payment of debts, commissions shall not be allowed on any larger amount of the proceeds than the sum actually applied in payment of debts: Provided further, that nothing in this section contained shall prevent any executor, administrator or collector from retaining a reasonable sum for necessary charges and disbursements in the management of the estate. And any judge of the superior court or any commissioner appointed by said court to take and state an account of the assets of any deceased person in the hands of an executor, administrator or collector, upon any plea of fully administered, shall have power and be authorized and directed to allow such executor, administrator or collector not exceeding five per cent. upon the amount of receipts and expenditures which shall appear upon the trial of said cause or taking of such account to have been fairly made in the course of administration.

Code, s. 1524; 1868-9, c. 113, s. 95; 1869-70, c. 189.

AS TO ALLOWANCES. **Of counsel fees:** Lindsay v. Darden, 124-307; Kelly v. Odum, 139-278; Johnson v. Marcom, 121-83; Burke v. Turner, 85-500; McKay v. Royall, 52-426; Love v. Love, 40-204; Fairbairn v. Fisher, 58-385; Young v. Kennedy, 95-265; Stonestreet v. Frost, 123-640; Allen v. Royster, 107-278—**of expenses attending sales,** etc., Whitted v. Webb, 22-442; Morris v. Morris, 54-326; Poindexter v. Gibson, 54-44—**of expenses in carrying out provisions in will,** Lambertson v. Vann, 134-108; Edwards v. Love, 94-365—**of taxes paid on lands descending to heirs,** Young v. Kennedy, 95-265—**of expenses of prosecuting suit begun by intestate,** Clapp v. Coble, 21-177—**for personal services over actual expenses,** Wilson v. Lineberger, 88-416.

AS TO COMMISSIONS. **Can not be retained until allowed:** Hodges v. Armstrong, 14-253. **Clerk personally interested in commissions, has no jurisdiction to allow:** Barlow v. Norfleet, 72-535. **Pleading commissions as counterclaim in action against personal representative,** Ibid. **Commissions will not be reduced by Supreme Court unless amount is excessive,** Green v. Barbee, 84-69. **Amount of commissions allowed on final settlement:** Bank v. Bank, 126-531; Hahn v. Mosely, 119-76; Scroggs v. Stevenson, 100-358; Grant v. Edwards, 92-442; Parker v. Grant, 91-338; Drake v. Drake, 82-443; Graves v. Graves, 58-280; Washington v. Emery, 57-32; Whitted v. Webb, 22-442; Bond v. Turner's Exrs., 4-690, 6-331; Potter v. Stone, 9-30. **Whether allowed or not where will is subsequently defeated or probate recalled,** Ralston v. Telfair, 22-414—**where administrator fails to show that receipts and disbursements have been fairly made,** Grant v. Reese, 94-720—**where executor is tenant for life of testator's estate,** Blount v. Hawkins, 57-162—**where executor keeps no accounts,** Finch v. Ragland, 17-137—**where executor assumes control**

of funds of minor children willed to them by his testator, Haglar v. McCombs, 66-345; but see Perry v. Maxwell, 17-488—**where good faith is exercised by administrator, though loss results,** Perkins v. Caldwell, 79-441—**where set-off allowed in reducing a debt due estate,** Spruill v. Cannon, 22-400; Walton v. Avery, 22-405—**where there are co-executors,** Grant v. Pride, 16-269—**where decedent's lands sold,** Scroggs v. Stevenson, 100-354—**where administrator failed to account for funds he should have accounted for,** Allen v. Royster, 107-278—**where administrator collects his own debt to estate,** Arnold v. Byars, 17-1—**where administrator failed to file inventory and mixes estate with his own,** Stonestreet v. Frost, 123-640; Grant v. Reese, 94-720; Burke v. Turner, 85-500—**where specific things are delivered to next of kin,** Scroggs v. Stevenson, 100-354; Shepard v. Parker, 35-103; Walton v. Avery, 22-405—**where money used by administrator, but he at all times makes regular returns to clerk,** Carr v. Askew, 94-194—**where disbursements are made to legatees and distributees,** Potter v. Stone, 9-30; Arnold v. Byar, 17-1; Clarke v. Cotton, 17-51; Peyton v. Smith, 22-325—**where permanent improvements made by executor on land of testator,** Lambertson v. Vann, 134-108—**where estate goes through several administrations,** Scroggs v. Stevenson, 100-354; Hodge v. Hawkins, 21-564—**where slaves are received in payment of debt owing testator and delivered over specifically to next of kin,** Sellars v. Ashford, 37-104.

150. Petition may be filed for. An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right.

Code, s. 1525; 1868-9, c. 113, s. 96. Medlin v. Simpson, 144-397; Kirkman v. Phipps, 86-428; Carlton v. Byers, 93-302. **Referred to merely** in Self v. Shugart, 135-196; Gay v. Grant, 101-218; Bumpass v. Chambers, 77-357.

151. Fund due absent party or infant without guardian paid to court; party not heard of in seven years, procedure. When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant. When the party entitled to the money

has not been heard of for seven years or more the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and such other evidence as may be required by the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either in term or at chambers.

Code, s. 1526; 1893, c. 317; 1868-9, c. 113, s. 97.

152. Liability and compensation of clerk. Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow.

Code, s. 1527; 1868-9, c. 113, s. 98. Presson v. Boone, 108-78; Smith v. Patton, 131-396; see under sections 145, 295.

153. When paid to university. All sums of money, or other estate of whatever kind, which shall remain in the hands of any executor, administrator or collector for five years after his qualification, unrecovered or unreclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator or collector to the trustees of the university of North Carolina; and the said trustees are authorized to demand, sue for, recover and collect such moneys or other estate of whatever kind, and hold the same without liability for profit or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto; and if no such claim shall be preferred within ten years after such money or other estate be received by the said trustees, then the same shall be held by them absolutely.

Code, s. 1504; 1868-9, c. 113, s. 76. University v. Hughes, 90-537; Warner v. R. R., 94-250. **Suit to recover property unlawfully paid university:** Oliver v. University, 62-69. **Cited but not construed** in Woody v. Brooks, 102-341.

154. Who parties to proceeding for settlement. In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative die or be removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in

other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record.

1893, c. 206. **Administrator d. b. n. must be party, when:** Neagle v. Hall, 115-415; Jarratt v. Lynch, 106-422; Brittain v. Dickson, 104-547; Brawley v. Brawley, 109-526; Gilliam v. Watkins, 104-180; Grant v. Reese, 94-720; Merrill v. Merrill, 92-657; Hardy v. Miles, 91-131; University v. Hughes, 90-537. **See** Carlton v. Byers, 93-302.

155. Legacies ordered paid within two years, when. It shall be in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court shall deem proper, when there shall be no necessity for retaining the fund.

Code, s. 1512. Clements v. Rogers, 91-63; Turnage v. Turnage, 42-127; Godwin v. Watford, 107-168; Hobbs v. Craige, 23-332. **Complaint in actions hereunder:** Allen v. Royster, 107-278. **Refunding bonds required of legatees or distributees:** State v. McAleer, 27-632; McKinder v. Littlejohn, 23-66.

XXI. Actions by and against Representative.

156. Right of action survives to, and against. Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.

Code, s. 1490; 1868-9, c. 113, s. 63. **For action for wrongful death, see sections 59, 60. Actions for damages to land:** Mast v. Sapp, 140-533; Rippey v. Miller, 33-247; Howcott v. Warren, 29-20. **Rights of action for breach of contract or other duty:** Miller v. Leach, 95-229; Allen v. Baker, 86-92; Shuler v. Millsaps, 71-297. **Injury to or conversion of property:** Butner v. Keehln, 51-60; Sledge v. Reid, 73-440; Shields v. Lawrence, 72-43. **Cited merely** in Harper v. Comrs., 123-119; Hannah v. R. R., 87-351; Wallace v. McPherson, 139-298.

157. Actions which do not survive. The following rights of action do not survive:

1. Causes of action for libel and for slander, except slander of title.

2. Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party.

Bolick v R. R., 138-370; Morton v. Telegraph Co., 130-299; Strauss v.

City of Wilmington, 129-100; Killian v. R. R., 128-261; Harper v. Comrs., 123-118; Scarlett v. Norwood, 115-286; Hannah v. R. R., 87-351.

3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death.

No vindictive damages recovered against estate of decedent for trespass by him during life time: Rippey v. Miller, 33-247; Butner v. Keehln, 51-60. **Action against Register of deeds for penalty:** Wallace v. McPherson, 139-297. **Consider:** Peebles v. R. R., 63-238, and Collier v. Arrington, 61-356; **both overruled in some particular by Bolick v. R. R., 138-370;** see Shields v. Lawrence, 72-43; Mast v. Sapp, 140-537.

Code, s. 1491; 1868-9, c. 113, s. 64.

158. Right of action survives to successor. Executors and administrators shall have actions in like manner as the first testator or intestate might have had against any person, his executors and administrators, in all cases, except where such actions, being commenced, are not allowed by statute to be revived on the death of any party.

Code, s. 1497; 1868-9, c. 113, s. 69; 1905, c. 286. **See cases under two preceding sections. This section mentioned** in Mast v. Sapp, 140-537.

159. May maintain any appropriate action to recover assets. Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent.

Code, s. 1501; 1868-9, c. 113, s. 73. Hendrick v. Gidney, 114-543; Smathers v. Moody, 112-795; Coleman v. Howell, 131-129. **An administrator in another state can not maintain an action in this state; administration must be taken out here:** Person v. Leary, 126-506; Morefield v. Harris, 126-626.

160. Must be in representative capacity. All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity.

Code, s. 1507; 1868-9, c. 113, s. 79. Mitchell v. Mitchell, 132-350; Byrd v. Byrd, 117-525; Rogers v. Gooch, 87-442; Ballinger v. Cureton, 104-474.

161. Appearance by, or service on, one binds all. In actions against several executors, administrators or collectors they are all to be considered as one person, representing the decedent; and if

the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all.

Code, s. 1508; 1868-9, c. 113, s. 81.

162. Action against, when; execution issues, how. An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted.

Code, s. 1509; 1868-9, c. 113, s. 82. **Cited** in Hester v. Lawrence, 102-325; Andres v. Powell, 97-165. **See generally** Rountree v. Britt, 94-110; Hoover v. Berryhill, 84-134; Vaughan v. Stephenson, 69-212; Heilig v. Foard, 64-710. **See also under section 95.**

163. Service by publication, when. Whenever process may issue against an executor who has not given bond, and the same can not be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions.

Code, s. 1523; 1868-9, c. 113, s. 94.

164. Successor may issue execution, when. Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done.

Code, s. 1513; 1868-9, c. 113, s. 84.

165. Letters revoked, action continues. In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death.

Code, s. 1514; 1868-9, c. 113, s. 85. **Cited** in Turlburt v. Hollar, 102-409.

XXII. Miscellaneous Provisions.

166. How personal representatives hold. Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy.

Code, s. 1502; 1868-9, c. 113, s. 74. Cameron v. Hicks, 141-21.

167. Personal representative liable. The executors and administrators of persons, who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been.

Code, s. 1495; 1868-9, c. 113, s. 68. **"Conversion" defined:** University v. Bank, 96-280. **"Waste," what does and does not constitute:** Caviness v. Fidelity Co., 140-62; Moore v. Eure, 101-11; Lee v. Beaman, 101-294; University v. Bank, 96-280; Worthy v. Brower, 93-344; Grant v. Edwards, 92-442; Syme v. Badger, 92-706; Grant v. Bell, 90-558; Lansdell v. Winstead, 76-368; Green v. Green, 69-25; Nelson v. Hall, 58-32; Cain v. Hawkins, 50-192; Fanshaw v. Fanshaw, 44-166; Green v. Collins, 28-139; Smith v. Fagan, 13-298. **See also under section 30.**

168. Bona fide administration under act of 1868-9 validated. If any person shall have bona fide administered any estate or any part of the estate of any deceased person whereof original administration was granted prior to the first day of July, under the said act of one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, he shall not be deemed guilty of a devastavit.

Code, s. 1434; 1869-70, c. 58, s. 2.

169. Time in which act to be done may be extended. If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk.

Code, s. 1463; 1871-2, c. 213, s. 16.

170. Powers under will not affected; proviso. Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will: Provided, creditors be not delayed thereby, nor the order changed in which by law they are entitled to be paid.

Code, s. 1415; 1868-9, c. 113, s. 23; R. C., c. 46, ss. 12, 13. **Cited** in Pate v. Oliver, 104-469.

171. Causes transferred to superior court, when. All cases for the sale of real estate for assets heretofore in the county courts,

in which final orders for collection and application or distribution of purchase money and making titles were not made before the adoption of the present constitution, may, at the instance of any person interested, be transferred, as other cases, to the superior court of the county where such proceeding was pending, and such court shall have full authority to make all necessary orders to complete the same.

Code, s. 1542; 1871-2, c. 161.

172. Estates prior to certain dates. This chapter shall apply to the estates of such deceased persons only whereof original administration has been granted subsequent to the first day of July, one thousand eight hundred and sixty-nine, and all estates whereon administration was granted prior to the said first day of July, one thousand eight hundred and sixty-nine shall be dealt with, administered and settled according to the law as it existed just prior to said date, and it is hereby declared that such is the true intent and meaning of this chapter: Provided, that nothing herein shall be construed to prevent the application of this chapter so far as it relates only to the courts having jurisdiction of any action or proceeding for the settlement of an administration or to the practice and procedure therein.

Code, s. 1433; 1869-70, c. 58, s. 1. **Cited merely** in Brittain v. Dickson, 104-550; Wilson v. Pearson, 102-310; Glover v. Flowers, 101-141; Smith v. Brown, 99-386; Gaither v. Sain, 91-307; Little v. Duncan, 89-418. **Debts of estate administered since July 1, 1869, must be paid pro rata in their class:** Moore v. Byers, 65-240. **The powers of probate court both as to jurisdiction and procedure extend to estates administered both prior and subsequent to July 1, 1869:** Taylor v. Biddle, 71-1. **Administrator d. b. n. appointed after July 1, 1869, where original administration began prior thereto, must comply with law existing prior to such date:** Brandon v. Phelps, 77-44; Brittain v. Dickson, 104-550. **Where petition to sell land for assets prior and subsequent to July 1, 1869. See sections 68 and 129 et seq.**

173. To what estates this chapter applicable. This chapter shall apply only to cases where the grant of letters of collection or of probate or of administration shall have issued on or after the first day of July, one thousand eight hundred and sixty-nine, except in case of administrations de bonis non upon estates where the former letters of administration or letters testamentary were granted prior to the first of July, one thousand eight hundred and sixty-nine, in all which cases estates shall be administered, closed up and settled according to the law as it existed just prior to the first of July, one thousand eight hundred and sixty-nine.

Code, s. 1476; 1871-2, c. 213, s. 29; 1872-3, c. 179. **Administrators d. b. n. administer how:** Brittain v. Dickson, 104-547. **Cited** in Brown-

McKee, 108-392; Wilson v. Pearson, 102-310; Smith v. Brown, 99-386; Gaither v. Sain, 91-307. **Administrators d. b. n. of estates appointed since July 1, 1869, where administration began prior to July 1, 1869, close up estates according to law prior to July 1, 1869:** Brittain v. Dickson, 104-550, and cases there cited; Brandon v. Phelps, 77-44.

CHAPTER 2.

ADOPTION OF MINOR CHILDREN.

174. Petition filed before clerk, what to contain. Any person desiring to adopt any minor child may file a petition in the superior court of the county wherein such child resides, setting forth the name and age of such child and the name of its parents, whether the parents or either of them be living, and if there be no living parent, the name of the guardian, if any, and if there be no guardian, the name of the person having charge of the child or with whom such child resides, the amount and nature of the child's estate, if any, and especially if the adoption is for the minority or for the life of the child.

Code, s. 1; 1872-3, c. 155.

175. Parties to proceeding. The parent or guardian, or the person having charge of such child, or with whom it may reside, must be a party of record in this proceeding.

Code, s. 6; 1872-3, c. 155, s. 6.

176. Letters of, when granted. Upon the filing of such petition, and with the consent of the parent or parents, if living, or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, the court may, if the petitioner be a proper and suitable person, sanction and allow such adoption by an order granting letters of adoption.

Code, s. 2.

177. Effect of order; child to inherit, when; name changed. Such order, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate,

such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it; Provided, such child shall not so inherit and be so entitled to the personal estate, if the petitioner specially set forth in his petition such to be his desire and intention: Provided further, for proper cause shown in said petition the court may decree that the name of such child may be changed to that of the petitioner.

Code, s. 3; 1885, c. 390; 1872-3, c. 155, s. 3. **Child inherits, how:** King v. Davis, 91-142. **Question of whether parental relation relates back to birth of child:** Ibid.

178. Bond to secure orphan's property. If such child be an orphan and without guardian, and shall be possessed of any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians.

Code, s. 4.

179. Clerk to record order; revocation. The order granting letters of adoption shall be recorded in the office of the clerk of the superior court of the county in which it is made, and may be revoked at any time by the court for good cause shown.

Code, s. 5; 1872-3, c. 155, s. 5.

Adv 1904 P. 1821

180. Right to custody forfeited by abandonment. In all cases where the surviving parent of any orphan child shall have wilfully abandoned the care, custody, nurture and maintenance of any orphan child to kindred, relatives or other persons, such parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child.

1885, c. 120, s. 1. **When no abandonment proven, court must still find facts entitling one to child's restoration:** Newsome v. Bunch, 142-19, 144-15.

181. Restoration of rights and privileges. The rights and privileges of such parent may be restored by the voluntary surrender of such child by the person in whose care and custody such child may be, or by order of any judge of the superior court in the district in which such child may be, when it shall appear to the satisfaction of such judge that the interest and welfare of such child will not be materially prejudiced by such restoration. The person having the care and custody of any such child shall have at least ten days' notice of the time and place of the hearing of the application for such order of restoration, and shall be permitted to resist the same.

1885, c. 120, ss. 2, 3. **For contests over custody of children, see section 1853. For effect of divorce on children see section 1570. For right of parent to determine custody of children by deed or will, see section 1762. For small allowance paid to indigent children by clerk, in certain cases, see section 924. Facts to be passed upon in determining if child shall be restored:** Newsome v. Bunch, 142-19, 144-15. **Where father of good character had left child with grandparents, but subsequently desired it; held entitled:** Newsome v. Bunch, 144-15; Latham v. Ellis, 116-30. **Father entitled to custody, except when parted with it by deed or is unfitted to care for child:** Ibid.

CHAPTER 3.

ALIENS.

182. May take and hold lands. It shall be lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding.

Code, s. 7; 1870-1, c. 255. **As to alien holding land which he acquires by grant, see section 692.**

183. Prior contracts validated. All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes.

Code, s. 8; 1870-1, c. 255, s. 2.

CHAPTER 4.

APPRENTICES.

I. Power of Clerk.

184. To apprentice, or send to orphanage. Upon complaint made in writing by three reputable citizens to the clerk of the superior court of any county that there is any infant in such county subject to any of the conditions enumerated in this chapter, it shall be the duty of the said clerk of the superior court upon ten days' notice to the complainants, and the parents or persons with whom

such infant resides, to examine into the allegations of the said complaint, upon oath, and if the said clerk of the superior court shall find upon such examination that the conditions set forth in such complaint are true, it shall be the duty of said clerk in his discretion to procure for said infant admission into some orphan asylum in the state, or to bind out the said infant as an apprentice.

1889, c. 169, s. 2; 1901, c. 628. **Mother entitled to child, even though another more suitable:** Mitchell v. Mitchell, 67-307; Ashby v. Page, 106-328—**unless mother disreputable,** Ashby v. Page, 106-328. **Facts necessary to be found:** Ashby v. Page, 106-328. **Under former statutes, held to be prudent for child to be present when bound,** see Ambrose v. Ambrose, 61-91; but see Owens v. Chaplain, 48-323. **Under former statutes, relation of court to master and apprentice discussed** in Beard v. Hudson, 61-180.

185. To determine incapacity, desertion or drunkenness. Incapacity, desertion or drunkenness shall be decided before the clerk of the superior court upon application, as in special proceedings, when necessary.

1889, c. 169, s. 19. **Desertion defined:** Stout v. Woody, 63-37.

186. Must examine persons as to circumstances; tradesmen of useful art preferred. On application of any person to have an apprentice bound to him, it shall be the duty of the clerk to inform himself of the circumstances of the case, and for this purpose he may cite before him the relatives of the orphan or infant for examination on oath, and he may examine also such other persons as he may deem proper. In the selection of an employer, he shall prefer, so far as may be consistent in other respect with the comfort and interest of the apprentice, some tradesman of a useful art or mystery. No white child shall be apprenticed to any other than a white person.

1889, c. 169, ss. 1, 8. **Kind of employer required under former statutes,** see Allison v. Norwood, 44-414.

187. May modify; discharge apprentice and re-apprentice. The clerk shall have power, when circumstances require it, upon application of either the employer or the apprentice, to modify the indentures of an apprentice or to discharge him from his apprenticeship; and in case any money or other thing of value has been paid by either party in relation to such apprenticeship, the clerk shall make such order concerning the same as shall be just and reasonable; and he shall have power where an apprentice is discharged to re-apprentice him, when such a course shall seem proper and practicable.

1889, c. 169, s. 13. **Cancellation of indenture under former statutes reviewed** in Owens v. Chaplain, 48-323.

188. May direct disposition of wages. When money, wages or other thing of value is agreed to be paid to the apprentice, the clerk is empowered to direct such disposition of the same as shall seem to him just and proper; and in the case of money, he may either direct that so much be placed at the disposal of the apprentice as shall be proper, or so much paid to the parents of the apprentice for their use, or so much paid into the clerk's office to the credit of the said apprentice.

1889, c. 169, s. 5.

189. Guardian to be appointed when $100 in clerk's hands. Whenever as much as one hundred dollars shall come into the hands of any clerk of the superior court belonging to an apprentice by reason of the preceding section, it shall be his duty to appoint and qualify a guardian for the estate of said apprentice, and turn the said funds over to said guardian for investment; and the said guardian shall be appointed and qualified and be governed by the same rules and regulations as guardians of said estate.

1889, c. 169, s. 6. **For payment by clerk to indigent child of estate less than twenty dollars, see section 924.**

II. The Apprentice.

190. Who may be apprenticed. Children who may be apprenticed shall include:

1. All orphans whose estates are of so small value that no person will educate and maintain them for the benefit thereof.

2. All infants whose fathers have deserted their families and been absent six months, leaving them without sufficient support.

3. Any poor child who is or may be chargeable to the county or shall beg alms.

4. Any child who has no father, and the mother is of bad character, or suffers her children to grow up in habits of idleness, without any visible means of obtaining an honest livelihood.

5. All infants whose parents do not habitually employ their time in some honest, industrious occupation.

6. All indigent infants under sixteen years of age who, on account of the neglect, crime, drunkenness, lewdness or other vice of the parents, or person with whom such infants reside, are in circumstances exposing such infants to lead an idle and dissolute life.

1889, c. 169, s. 2; 1901, c. 628.

191. May make complaint of ill usage, violation of indenture; duty of clerk. Upon the complaint of any apprentice that his

employer is guilty of cruelty or ill usage toward said apprentice, or refuses him necessary provisions or clothing, or violates any other stipulation of the indenture or of the law toward such an apprentice, the clerk may, by order, compel the appearance of the said employer before him, when he shall examine and determine the complaint, and if the same is well founded, he shall cancel the indenture and discharge such apprentice from his obligation of service, and may proceed to apprentice the discharged infant to some other employer.

1889, c. 169, s. 10; 1762, c. 69, ss. 19, 20. **Master criminally liable for punishing apprentice from motives of malice:** State v. Dickerson, 98-708.

192. Compelled to serve. If an apprentice refuses to serve as required by the indenture or by law, the clerk may, on application of the employer, compel him by citation or otherwise to appear for inquiry into the facts and if the complaint is well founded and the apprentice persists in such refusal, the clerk may commit him by warrant to the house of correction or to the common jail of the county until he consents.

1889, c. 169, s. 9.

193. Person enticing away apprentice, penalty. If any person shall entice away an apprentice from his employer, he shall pay therefor three dollars for every day the apprentice shall remain out of the service of the said employer; and any person who shall knowingly conceal, harbor or employ such an apprentice shall in like manner pay the employer therefor three dollars per day for every day such apprentice shall be concealed, harbored or employed.

1889, c. 169, s. 15. **Enticing away apprentice of another, damages for, under prior statute,** see Stout v. Woody, 63-37; McKay v. Bryson, 27-216; Hiatt v. Gilmer, 28-450; Hooks v. Perkins, 44-21; Ferrell v. Boykin, 61-9.

III. The Employer.

194. Shall provide, what. Whenever an indigent child shall be apprenticed, his employer shall, in the indenture, agree to provide (1) diet, clothes, lodging and accommodations fit and necessary; (2) that the apprentice be taught to read and write and the rules of arithmetic to the double rule of three; (3) six dollars in cash, a new suit of clothes and a new Bible at the end of the apprenticeship; (4) such other education as may be agreed upon and inserted in the indenture by the clerk; (5) the clerk shall also insert in the indenture the amount of money or other thing of value to be paid to the apprentice by his employer annually during the continuance

of the apprenticeship, so that the indenture will show the compensation to be paid the apprentice for each year's service.

1889, c. 169, s. 4. **Under former statute if apprentice could not learn, when properly taught, covenant to teach was not violated,** see Wyatt v. Morris, 19-108. **Death of master, effect of, under former statute as to covenants treated** in Goodbread v. Wells, 19-476. **Employer has entire term to comply:** Ibid.

195. Annual report made by, to clerk. Employers of apprentices shall be required in the indentures made before the clerk to make a report annually to him as to whether the stipulations in the indenture have been performed or not, as required in the same, in which shall be set forth the amount to be paid, and the amount actually paid said apprentice, and also the progress and general condition of the apprentice, including his moral, mental and physical condition; which report shall be required under the same pains, penalties and regulations as is required of guardians. The said employer shall also, at the end of the apprenticeship, make a final report to the clerk as to the apprenticeship as guardians are required to do.

1889, c. 169, s. 7.

196. Shall not remove apprentice from state; indenture cancelled, when. It shall not be lawful for an employer to remove an apprentice out of this state, and whenever any employer of an apprentice shall wish to remove out of this state, or to quit his trade or business, he shall appear with his apprentice before the clerk of the proper county, and if the clerk be satisfied the employer has done justice to the said apprentice for the time he has had charge of him, he shall have power to discharge such apprentice from the service of such employer and again bind him, if necessary, to some other person.

1889, c. 169, s. 14.

IV. The Indenture.

197. In name of clerk and employer. Indigent children when apprenticed shall be indentured in the name of the superior court clerk of the county where they reside, of the first part, and the employer to whom apprenticed, of the other part.

1889, c. 169, s. 1.

198. For what time apprenticed. Indigent male children may be apprenticed till the age of twenty-one, and females till the age of eighteen; but said children shall be apprenticed for a less number of years, whenever in the opinion of the clerk the best interests

of the apprentice will be subserved thereby. The age of children when apprenticed shall always be inserted in the indenture.

1889, c. 169, s. 3. **Effect of recital of age in indenture under former statute reviewed** in Hooks v. Perkins, 44-21.

199. Relator in action on indenture; limitation. The apprentice may bring an action on the indenture in the name of the clerk and his successors in office and recover any damages sustained by reason of the breach of the covenants contained in said indenture; but no action on an indenture shall be commenced after two years from the expiration of the term of service.

1889, c. 169, s. 11. **Under prior statute action brought in name of clerk,** see Creech v. Creech, 98-155.

200. Indentures to be registered by register of deeds. Every indenture binding an apprentice to be effectual shall be proved and recorded in the register of deeds office of the county where the parties thereto reside, as deeds and conveyances, and shall be subject to the same rules of evidence as deeds and conveyances.

1889, c. 169, s. 20.

V. To Learn a Trade.

201. Who may be apprenticed. Minor children above the age of fourteen and under twenty-one years being males, and eighteen being females, whether indigent or not, may be apprenticed to learn the art or mystery of any trade or craft by their father, or in case of his death, incompetency, or where he shall have wilfully abandoned his family for six months without making suitable provisions for their support, or has become an habitual drunkard, by their mother or by their legal guardian; and if illegitimate, they may be bound by their mother, and if they have no parent competent to act and no guardian, they may bind themselves with the approbation of the superior court clerk of the county where they reside; but the power of a mother to bind her children, whether legitimate or illegitimate, shall cease upon her subsequent marriage and shall not be exercised by herself or her husband at any time during such marriage. But no white child shall be bound to any other than a white person, and no negro child shall be bound to any white person if a competent and suitable negro can be found in the county who desires such child bound to him.

1889, c. 169, s. 17. **"Abandoned" (deserted) defined** in Stout v. Woody, 63-37.

202. Apprentices over fourteen to sign indenture. When an apprentice is bound who is over fourteen years of age, as provided

in the foregoing section, his or her consent shall be expressed in the indenture and testified to by signing the same, and the age of said apprentice shall also be inserted in said indenture.

1889, c. 169, s. 18.

203. Orphan asylum may execute indentures. Any orphan asylum, or charitable institution organized and incorporated for the purpose of taking care of indigent children under any general or special law of this state, is hereby authorized and empowered to execute indentures apprenticing children in their charge for the purpose of learning trades, the said children being fourteen years of age, and they shall have the same rights and assume the same liabilities thereunder as in case of natural persons.

1889, c. 169, s. 21.

204. What indenture to contain. All indentures apprenticing minors to learn trades shall contain the following covenants and provisions:

1. That said minor shall be bound to serve his employer for a term of not less than three nor more than five years.

2. That said minor so indentured shall not leave his said employer during the term for which he shall be indentured, and if any apprentice so indentured as aforesaid shall leave his employer except as hereinafter provided, the said employer may compel the return of said apprentice under the penalties of this chapter.

3. That said employer shall covenant and agree in said indenture as to the compensation which is to be given the apprentice annually, specifying board, medical attention, lodging and clothes, when they are to be given, and also the wages to be paid in money and at what periods to be paid, and to whom.

4. That the said employer shall teach, or cause to be carefully and skillfully taught, to said apprentice every branch of the business to which he is indentured.

Indenture under statute not binding master to teach a certain trade valid as to person enticing apprentice away: Dowd v. Davis, 15-61. **Under former statute covenant not violated when apprentice can not learn,** see Wyatt v. Morris, 19-108. **Under former statute death of employer discharged obligation to teach,** see Goodbread v. Wells, 19-476. **Employer has the entire term to comply:** Ibid.

5. That said employer shall, at the expiration of said apprenticeship, give to said apprentice a certificate in writing stating that said apprentice has served a full term of apprenticeship of not less than three nor more than five years at such trade or craft as may be specified in said indenture.

6. That if either the employer or the apprentice, during the continuance of the apprenticeship, shall be unavoidably prevented from performing any of the conditions of the indenture and a settlement with respect to the same can not be made by the parties to the indenture, the matter shall be referred to arbitrators for settlement, one to be selected by the employer and one on the part of the apprentice, and if they can not decide the controversy, the two arbitrators chosen to select a third, and the decision of any two of said arbitrators to be final as to the matters in controversy.

1889, c. 169, s. 22.

205. Apprentice compelled to serve, how. Any apprentice, so indentured, who shall leave his employer without his consent, or without sufficient cause, and shall refuse to return, may be arrested upon complaint of said employer and taken before any justice of the peace of the county where the employer resides, and said justice of the peace may order said indentures cancelled, and on conviction may commit said apprentice to the house of correction or county jail until said apprentice agrees to abide by the indenture, which shall not exceed thirty days; and in case said apprentice so indentured shall still wilfully neglect or refuse to perform his portion of the contract as specified in said indenture, then said indenture may be cancelled in the manner aforesaid, and said apprentice so violating said indenture shall forfeit all back pay and all claims against said employer: Provided, either party shall have right to appeal.

1889, c. 169, s. 23.

206. Employer failing to teach apprentice liable for damages and a penalty. Should any employer neglect or refuse to teach or cause to be taught to said apprentice the art or mystery of the trade or craft to which said apprentice has been indentured, or fail to perform any of the stipulations of the indenture, said apprentice, by his parent, guardian or next friend, may bring an action against said employer to recover damages sustained by reason of said neglect or refusal; and if proved to the satisfaction of the court, said court shall direct said indenture to be cancelled and may impose a penalty on said employer not exceeding three hundred dollars and not less than fifty dollars, and said penalty shall be collected and paid over to said apprentice or his parent or guardian for his sole use and benefit.

1889, c. 169, s. 24. **Under former statutes, cases somewhat in point** are Wyatt v. Morris, 19-108; Goodbread v. Wells, 19-476.

CHAPTER 5.

ATTORNEYS AT LAW.

I. How Licensed.

207. Examination. No person shall practice law without first obtaining license so to do from the supreme court. Applicants for license shall be examined only on the first Monday of each term of the supreme court. All examinations shall be in writing, and based upon such course of study, and conducted under such rules, as the court may prescribe. All applicants who shall satisfy the court of their competent knowledge of the law and upright character shall receive license to practice in all the courts of this state.

Code, s. 17; R. C., c. 9, s. 1; 1818, c. 963, s. 3; 1907, c. 70. **Nonresident can not practice habitually:** Manning v. R. R., 122-824. **Question as to whether an unnaturalized foreigner can be licensed reviewed at length** in Ex parte Thompson, 10-355. **"Practice" defined:** State v. Bryan, 98-644. **Legislature can establish the qualification to be required of one to become a practicing attorney:** In re Applicants for License, 143-1—**for the power to so establish qualifications is not inherent in the supreme court, though the court has power to say whether such qualifications are met:** Ibid.

208. Conditions precedent to examination. Before being allowed to stand an examination each applicant must comply with the following conditions:

1. He must be at the time twenty-one years of age, or will arrive at that age before the time for the next examination.

2. He must file with the clerk of the court a certificate of good moral character signed by two attorneys who practice in that court. An applicant from another state may have such certificate signed by any state officer of the state from which he comes.

This certificate, prior to the amendment in Chap. 70, of the Laws of 1907, all that was required as to character: In re Applicants for License, 143-1.

3. He must deposit with the clerk twenty-one dollars and fifty cents. Of this sum one dollar and fifty cents shall be retained by the clerk. If the applicant obtains license the remaining twenty dollars shall be paid by the clerk to the librarian for use of the supreme court library. If the applicant fails on examination the twenty dollars shall be repaid him.

Code, ss. 18, 20, 21; R. C., c. 9, s. 2; 1777, c. 115, s. 8.

209. Oath taken in open court. Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior.

Code, s. 19; R. C., c. 9, s. 3; 1777, c. 115, s. 8. **Relation of attorneys to the court interestingly discussed** in Robins, ex parte, 63-309. **See** Ex Parte Thompson, 10-355.

210. Persons disqualified. No clerk of the superior or supreme court, nor deputy or assistant clerk of said courts, nor sheriff, nor any justice of the peace, nor county commissioner shall practice law.

Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424. **Practicing law is habitually or customarily holding ones self out to the public as a lawyer or the demanding of compensation for services as such:** State v. Bryan, 98-644.

II. Debarred.

211. No disbarment except for crime or for causes mentioned. No person who shall have been duly licensed to practice law as an attorney shall be debarred or deprived of his license and right so to practice law, either permanently or temporarily, unless he shall have been convicted, or in open court confessed himself guilty, of some criminal offense showing him to be unfit to be trusted in the discharge of the duties of his profession, and unless he shall be debarred according to the provisions of this chapter.

Code, s. 26; 1870-1, c. 216, s. 4. **[This section was not expressly repealed by chap. 941, Laws of 1907.] Statute constitutional:** Ex parte Schenck, 65-353. **Fine and imprisonment is not the appropriate remedy against an attorney in cases stated in statute, but disbarment:** Kane v. Haywood, 66-1. **Question of disbarment fully reviewed:** Ibid; see also reference to the subject in In Re Applicants for License, 143-1.

211a. When must be debarred. An attorney at law must be disbarred and removed for the following causes by the superior court:

1. Upon his being convicted of a crime punishable by imprisonment in the penitentiary.

2. When any judgment is rendered against him for money collected by him as an attorney and retained by him without any bona fide claim thereto or to any part thereof.

1907, c. 941.

211b. When, debarred in discretion of court. An attorney at law may be disbarred or suspended at the discretion of the court:

1. Upon its being found by a jury that he has been guilty of any conduct in the practice of his profession involving wilful deceit or fraud.

2. That he has by himself or another solicited professional business.

1907, c. 941, ss. 2.

212. Failure to account to client. Whenever a final judgment has been recovered against an attorney at law for property received or money collected for his client, the clerk of the court shall retain such cause on the trial docket until the next term of such court beginning not less than ninety days after the rendition of such final judgment. If such judgment be not then satisfied, the judge presiding shall make an order, which shall be entered on the records of the court, for such attorney to show cause, at a time and place to be named in such order, and upon the return thereof may make an order debarring such attorney at law from practicing law in any of the courts, and he shall thereby be debarred from so practicing. When any such judgment shall be rendered in the court of a justice of the peace, and it is thereupon sought to debar an attorney at law under this section, the cause shall be docketed on the civil issue docket of the superior court, and written notice served on such attorney ninety days before action by the court.

Code, ss. 24, 25; 1881, c. 129. **[This section was not expressly repealed by chap. 941, Laws of 1907.] See famous case under former statute where attorney collected money for client, got drunk, but swore he never used it:** Kane v. Haywood, 66-1. **Demand before suit brought must be made on attorney for money collected, unless attorney was unauthorized:** Bryant v. Peebles, 92-176. **Attorney collecting money for heirs can not defend on ground that it belongs to administrator:** Means v. Hogan, 37-525.

212a. Proceedings instituted by bar association committee. Proceedings for the disbarment or suspension of an attorney under sections 211(a) and 211(b) shall be instituted and prosecuted only by the committee on grievances of the North Carolina state bar association.

1907, c. 941, s. 3.

212b. Accusation formulated and sent to solicitor; served on accused. The accusation as formulated by the committee on grievances of said State Bar Association shall be signed by the chairman of said committee and attested by the secretary of said association, accompanied by the written affidavit of any person or persons who make charges against such attorney, if any, duly

verified and setting forth the facts upon which the same may be based, and shall be delivered by the secretary of said association or by the chairman of said committee to the solicitor of the judicial district in which such attorney resides, and thereupon the said solicitor shall draw up such accusation, citing the accused to appear before the superior court of the county in which he resides or in some adjoining county thereto, on a day named therein, and moving the court for the disbarment or suspension of such attorney, and have the same served by the sheriff of said county by delivering a copy thereto to the accused, and the original thereof, with the return of the sheriff, shall be delivered to the judge holding the court of the district.

1907, c. 941, s. 4.

212c. Judge may order accused to appear and answer; returnable and trial had, when. The judge of said superior court must, if of opinion that the accusation would, if true, warrant the disbarment or suspension of the accused attorney, make an order requiring the accused to appear and answer the same at a specified day during the next term of said court in which the proceeding is instituted, or at any other time when the court can hear and determine the same, a copy of which, together with a copy of the accusation, must be duly served upon the accused as aforesaid: Provided, that if such order is made as much as ten days before any term of said court, such accusation must be made returnable and be heard during such term, unless continued for good cause by said court upon such terms as it may impose; and if such proceeding is begun less than ten days before a term of such court, it shall stand for hearing at the succeeding term unless the court shall order otherwise.

1907, c. 941, s. 5.

212d. Answer, what contains; verified. The accused attorney may answer such accusation either by objecting in writing to its sufficiency or by denying the truth of the facts alleged, or setting forth the facts of his defense, which said answer as to facts by denial or otherwise must be in writing, signed by the accused and duly verified by him; and thereupon the accusation, objections and answer are hereby made a part of the records of said court as in other civil actions therein pending.

1907, c. 941, s. 6.

212e. Trial; special finding of facts; judgment; trial stopped if attorney surrenders license. If the accused pleads guilty or fails or refuses to answer the accusations, the court must proceed to

judgment of disbarment or suspension; and if he answers the accusation, the court must at such time as it may appoint proceed to try the same. The jury or judge finding the facts must make a special finding of the facts upon issues of facts submitted to them, and the court must, upon such facts found, thereupon render judgment of acquittal or of disbarment or of suspension, as such facts may warrant: Provided, however, such accused attorney may at any time stop or prevent the prosecution of said proceeding by a surrender of his license as an attorney at law, and record of such surrender shall be made in the supreme court of the state.

1907, c. 941, s. 7.

212f. Solicitor prosecutes; court may require bar association to secure costs. The proceeding must be conducted in the name of the state, and in all cases the solicitor of said district shall appear and prosecute such accusation and be responsible for the faithful discharge of such duty or of other official duties required of him by law, and he may be assisted by other counsel: Provided, however, the court may, upon the motion of said solicitor, and upon good cause shown at any time, require the North Carolina state bar association to give security for the costs of such proceedings, to be approved by the court within ten days after notice thereof, and the hearing of said cause shall be postponed for that time unless such security be given.

1907, c. 941, s. 8.

212g. Appeal. Either party may appeal to the supreme court of North Carolina from an adverse judgment rendered by said superior court in the manner now prescribed by law for appeals in civil actions.

1907, c. 941, s. 9.

III. Relation to Client.

213. Authority filed or produced if requested. Every attorney who shall claim to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he shall claim to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney shall claim to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it shall

be necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket.

153-443

Code, s. 29; R. C., c. 31, s. 57 (16). **As to whether appearance special or general,** see section 356. **An appearance by attorney without authority is regular upon its face and binds clients in some cases:** England v. Garner, 90-197; Allen v. Allen, 44-60; Williams v. Johnson, 112-424; see Harrill v. Rwy., 144-542. **Attorney once appearing, continues until judgment satisfied, unless relieved by court:** Ladd v. Teague, 126-544; Branch v. Walker, 92-87; Newbern v. Jones, 63-606; Walton v. Sugg, 61-98. **Client not allowed to dispute attorneyship two or three years after judgment, after acquiescing in and getting benefit of services:** Ladd v. Teague, 126-544. **Letter conferring authority upon attorney, requirements of:** Day v. Adams, 63-254; Arrington v. Arrington, 102-491. **Attorney is agent of client and an act exceeding authority is binding when ratified:** Christian v. Yarboro, 124-72. **Whether a person is attorney for another is a question of fact:** Alspaugh v. Jones, 64-29. **Attorney can not appear on both sides of adversary proceeding:** Marcom v. Wyatt, 117-129; Arrington v. Arrington, 116-170; Gooch v. Peebles, 105-411; Cotton Mills v. Cotton Mills, 116-647. **Parties about to acquire rights under judgment need not inquire as to authority of attorney in case:** Williams v. Johnson, 112-424. **Where attorney of record opposes motion of his client's attorney under seal,** see Newbern v. Jones, 63-606. **The fact that attorney misunderstood his authority and signed an agreed statement of facts without any authority is no ground to set aside judgment:** Harrill v. R. R., 144-542. **Motion by defendant's attorney claiming authority to strike out name of a plaintiff, plaintiff's attorney objecting, clash as to authority,** see Petteway v. Hinsdale, 64-450. **Case where one attorney employs another,** see Rogers v. McKenzie, 81-164. **Client bound where associate attorney receipts the judgment:** Ibid. **Demand for power of attorney must be made before attorney has been recognized in order to be in apt time:** Reece v. Reece, 66-377. **Effect on the judgment where a lawyer was marked as attorney, when no authority,** reviewed in Koonce v. Butler, 84-221. **Power of attorney given by married woman to dismiss action concerning her land need not be registered:** Hollingsworth v. Harman, 83-153. **Solvent attorney appearing without authority, judgment not set aside:** University v. Lassiter, 83-38. **Attorney, without authority, can not compromise case:** Moye v. Cogdell, 69-93; Lewis v. Blue, 110-420; but see Locheimer v. Weil, 113-181. **Attorney can not collect debt except in money without authority:** Moye v. Cogdell, 69-93; Bank v. Grimm, 109-93. **Where attorney transferred for value a bond which his client had endorsed in blank and delivered to him for collection, transferee protected:** Bradford v. Williams, 91-7. **See** Sherrill v. Clothing Co., 114-436; Hines v. Butler, 38-307; Earp v. Richardson, 81-5. **Client bound by acts and agreements of counsel in management of his case:** Greenlee v. McDowell, 39-481; Beck v. Bellamy, 93-129. **Power of attorney may be revoked by parol:** Brookshire v. Brookshire, 30-74. **Where minors were represented**

in partition proceedings by attorney without authority: England v. Garner, 90-201. **Attorney can not accept service of summons:** Starr v. Hall, 87-381. **In lunatic's suit by next friend, question whether power of attorney given to defendant by plaintiff to dismiss suit is valid:** Smith v. Smith, 106-498. **Appearance by attorney though unauthorized gives jurisdiction:** Hackett v. McMillan, 112-513; Williams v. Johnson, 112-424. **Associate counsel of city attorney may continue in case after resignation of city attorney:** Wilmington v. Stolter, 122-395. **Attorney can consent to judgment and client bound:** Hairston v. Garwood, 123-345. **Attorney can not have debtor arrested without special authority:** Moore v. Cohen, 128-345; West v. Grocery Co., 138-166.

214. Failure to file complaint makes attorney liable for costs. When a plaintiff shall be compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim.

Code, s. 22; R. C., c. 9, s. 5; 1786, c. 253, s. 6. **Attorney can not sever from client without notice:** Gooch v. Peebles, 105-411. **Courts can order attorneys to pay costs where guilty of gross negligence:** Robins ex parte 63-309.

215. Fraud renders liable for double damages. If any attorney shall commit any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

Code, s. 23; R. C., c. 9, s. 6; 1743, c. 37. **Attorney can not appear on both sides:** Marcon v. Wyatt, 117-129; Cotton Mills v. Cotton Mills, 116-647; Arrington v. Arrington, 116-170; Gooch v. Peebles, 105-432. **Fraud presumed where attorney gains advantage of client in trading with him:** Egerton v. Logan, 81-172. **Case where lawyer collected client's money, got drunk and couldn't tell what went with it, but did not use it:** Kane v. Haywood, 66-1.

IV. Arguments.

216. Number of speeches; judge limits time. In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies when there shall be no limit as to number. The judges of the superior court are also authorized to limit the time of argument on the trial of all actions, civil and criminal, except in capital felonies, but in no instance shall the time be limited to less than one hour on each side in misdemeanors, or to less than three hours on each side in other causes. Where any greater number of addresses or any extension of time shall be desired,

motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

1903, c. 433. **The refusal to interfere with comment of counsel is in judge's discretion and not reviewable, unless discretion abused:** State v. Carawan, 142-575; Smith v. R. R., 142-21; State v. Exum, 138-599; **discussed in other cases hereunder. Judge's discretion must not be exercised to deprive litigant of counsel's argument:** Puett v. R. R., 141-332. **Judge must stop counsel, however, whenever he abuses privilege:** State v. Williams, 65-505; **see also cases recited as to abuse of privilege hereunder. Right to open and close argument,** see Brown v. R. R., 140-154; In re Peterson, 136-13; Banking Co. v. Walker, 121-115; Austin v. Secrest, 91-214; Cheek v. Watson, 90-302; Brooks v. Brooks, 90-142; Love v. Dickerson, 85-5; McRae v. Lawrence, 75-289; Churchill v. Lee, 77-341; Hudson v. Wetherington, 79-3; Syme v. Broughton, 85-367; State v. David, 49-354; Stronach v. Bledsoe, 85-473. **Counsel's use of cases in his argument:** Horah v. Knox, 87-483; State v. Smallwood, 78-560; State v. Whit, 50-224. **Pleadings can not be commented on unless introduced in evidence:** Smith v. Smith, 106-498. **Judge may limit arguments on motions and questions arising on trial:** State v. Jones, 117-768. **Cases where counsel abused his privilege:** State v. Harrison, 145- ; Moseley v. Johnston, 144-257; State v. Braswell, 82-693; State v. Williams, 65-505; Jenkins v. Ore Co., 65-563; Greenlee v. Greenlee, 93-278; Goodman v. Sapp, 102-477; Holly v. Holly, 94-96; Horah v. Knox, 87-486; State v. Noland, 85-576; State v. Smith, 75-306; State v. Underwood, 77-502; Cannon v. Morris, 81-139; Denning v. Gainey, 95-528; Houser v. Beam, 111-501; Cawfield v. Railroad, 111-597; Byrd v. Hudson, 113-203; Pearson v. Crawford, 116-756; State v. Tuten, 131-701; Hopkins v. Hopkins, 132-25; State v. Tyson, 133-692; Perry v. R. R., 128-471. **Cases in which question arises as to whether certain matters should be allowed to be argued:** Davis v. Hill, 75-224; In re Burns's Will, 121-336; Fowler v. Ins. Co., 74-89; Smith v. Nimocks, 94-243; Smith v. Smith, 106-498; Gwaltney v. Timber Co., 115-579—**as to whether comments allowed upon certain persons not testifying,** State v. Harrison, 145-; Devries v. Phillips, 63-53; Gragg v. Wagner, 77-246; Goodman v. Sapp, 102-477; Peebles v. Horton, 64-374; State v. Williams, 65-505; State v. Bryan, 89-531; State v. Suggs, 89-527; Guy v. Manuel, 89-83; State v. Rogers, 94-860; Chambers v. Greenwood, 68-274; Wilson v. White, 80-280; Greenlee v. Greenlee, 93-278; Kerchner v. McRae, 80-219; Tobacco Co. v. McElwee, 96-71; Bank v. Bridgers, 114-383; State v. Costner, 127-566. **When objections made to language of attorney, judge should note down the language at the time with the exception, to avoid any question thereafter:** Moseley v. Johnson, 144-257.

CHAPTER 6.

AUCTIONEERS.

217. How appointed. Any citizen of the state, desiring to exercise the business of an auctioneer, shall apply to the board of county commissioners of the county in which he proposes to carry on such business, and, upon his giving bond payable to the state of North Carolina, to be approved by said commissioners or other authority, conditioned that he will perform faithfully all the duties required of auctioneers, the sheriff shall issue to him a license to act as an auctioneer in said county for twelve months from the date of the license. The bond shall in no case be less than five hundred dollars, and if the applicant reside in an incorporated town or city having not less than thirty-five hundred nor more than five thousand inhabitants, said bond shall be one thousand dollars, and one thousand dollars additional for every additional five thousand inhabitants or fraction thereof amounting to thirty-five hundred and above.

Code, s. 2281; 1889, c. 40; 1891, c. 576; R. C., c. 10, s. 1. **Auctioneer agent for buyer and seller:** Russell v. Roberts, 121-322; Proctor v. Finley, 119-536; Gwathmey v. Cason, 74-7; Cherry v. Long, 61-466. **Liability on bond for moneys not turned over to employer under prior statutes:** Comrs. v. Holloway, 10-234.

218. Duties; semi-annual accounts. It shall be the duty of such auctioneers, on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any goods, wares, or merchandise may have been sold at auction, and also at private sale, where the price of the goods, wares and merchandise sold at private sale was fixed or agreed upon or governed by any previous sale at auction, of any goods, wares and merchandise of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the goods, wares and merchandise sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. Which statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it shall be their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made.

Code, s. 2282; R. C., c. 10, s. 2.

219. Penalty, acting without appointment. No person shall exercise the trade or business of an auctioneer, by selling any goods, wares or merchandise by auction or by any other mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person shall be appointed an auctioneer pursuant to this chapter, on pain of forfeiting to the state for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district.

Code, s. 2283; R. C., c. 10, s. 5.

220. To sales of what articles applicable. Nothing in this chapter shall extend to any sale by auction of goods, wares and merchandise made pursuant to and in execution of any order, decree or judgment of the courts of the United States or of this state; or made in consequence of any assignment of property and estate for the benefit of creditors; or made by executors, administrators, collectors or guardians; or made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods; or to any article the product of the agriculture of this state, in its natural or unmanufactured state; or to any species of stock or domestic animals; or to any articles of household furniture, or farming utensils which have been in use; but shall extend only to such articles of goods, wares and merchandise as are the ordinary subject of traffic and sale by merchants and traders.

Code, s. 2284; R. C., c. 10, s. 6.

221. Commissions; pay one per cent. to town. Auctioneers shall be entitled to such compensation as may be agreed upon, not exceeding two and a half per cent. on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent. of the gross amount of sales to the commissioners or other authority of their respective towns.

Code, s. 2285; R. C., c. 10, s. 7. **Trustee must pay auctioneer out of his commissions:** Duffy v. Smith, 132-38.

CHAPTER 7.

BANKS.

I. Creation.

222. How incorporated. Any number of persons, not less than three, who may be desirous of forming a company, and engaging in the business of establishing, maintaining and operating banks of discount and deposit to be known as commercial banks, or of engaging in the business of establishing, maintaining and operating offices of loan and deposit to be known as savings banks, or of establishing, maintaining and operating banks having departments for both classes of business, or operating banks engaged and doing a trust, fiduciary and surety business, shall be incorporated in the manner following, and in no other way; that is to say, such persons shall, by a certificate of incorporation, under their hands and seals, set forth:

1. The name of the corporation; no name shall be assumed already in use by another existing corporation organized under the laws of this state or of the Congress, or so nearly similar thereto as to lead to uncertainty or confusion.

2. The location of its principal office in the state.

This does not give power by implication to establish branches: Banking Co. v. Tate, 122-316. **State only can complain if branch established:** Ibid. **Where authority given by legislature to establish branches, relation of home bank to branch is as parent to child:** Worth v. Bank, 122-397.

3. The nature of its business, whether that of commercial bank, or savings bank, or both.

4. The amount of the total authorized capital stock, the number of shares into which it is divided, and the par value of each share, which shall be either fifty dollars or one hundred dollars; the amount of capital stock with which it will commence business, which shall not be less than five thousand dollars in cities and towns of fifteen hundred population or less; nor less than ten thousand dollars in cities and towns whose population exceeds fifteen hundred but does not exceed five thousand; nor less than twenty-five thousand dollars in all other places; the population to be ascertained by the last preceding national census; and if there be more than one class of stock, a description of the different classes, with the terms on which the respective classes of stock are created.

5. The names and postoffice addresses of the subscribers for stock and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital stock with which the company will commence business.

6. The period, if any, limited for the duration of the company.

1903, c. 275, ss. 1, 2; 1901, c. 769; 1907, c. 829.

223. Certificates of incorporation; how signed, proved and filed. The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved, or acknowledged, before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. Such certificate of incorporation, when so proved, shall be filed in the office of the secretary of state, who shall, if the same shall be in accordance with law, thereupon cause the same to be recorded in his office in a book to be kept for that purpose, and known as the Corporation Book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall, or is to be, established, in a book to be known as the Record of Incorporations, and the other certified copy shall be filed in the office of the corporation commission, and thereupon the said persons shall become a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof duly certified by the secretary of state or by the clerk of the superior court of the county in which the same is recorded, or by the clerk of the corporation commission, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established.

1903, c. 275, s. 3; 1901, c. 2, s. 9; 1903, c. 343.

224. Payment of capital stock. At least fifty per cent. of the capital stock of every bank shall be paid in in cash before it shall be authorized to commence business and the remainder of the capital stock of such bank shall be paid in monthly instalments of at least ten per cent. in cash of the whole of the capital, payable at the end of each succeeding month from the time it shall be authorized by the corporation commission to commence business, and the payment of each instalment shall be certified to the corporation commission, under oath, by the cashier or president of the bank.

1903, c. 275, s. 10.

225. Statement filed before beginning business. Before such company shall begin the business of banking, or banking and trust, fiduciary or surety business, there shall be filed with the corporation commission a statement under oath, by the cashier or president, containing the names of all of the directors and officers, with the date of the election or appointment, term of office, residence and postoffice address of each, the amount of capital stock of which each is the owner in good faith, and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. 152-802

1903, c. 275, ss. 5, 10; 1907, c. 829.

226. Authorized to begin business, when and how. If from such statement, or upon an examination, if such examination appears necessary, it appears to the corporation commission that such corporation is lawfully entitled to commence the business of banking, banking and trust, fiduciary or surety business, it shall, within thirty days after the filing of the certificate required by law, give to such corporation a certificate signed by the chairman of the corporation commission, attested by the secretary of the commission, that such corporation has complied with all the provisions required to be complied with before commencing the business of banking and that such corporation is authorized to commence such business.

1903, c. 275, s. 7; 1907, c. 829, s. 3. **Failure to commence business in two years can be taken advantage of only by state:** Boyd v. Redd, 120-335.

227. Authority to begin business withheld, when. The corporation commission may withhold from any bank, banking and trust, fiduciary or surety company, its certificate authorizing the commencement of business whenever it has reason to believe that the stockholders have formed the same for any other purpose than the legitimate objects contemplated by this chapter.

1903, c. 275, s. 6, 1907, c. 829, s. 4.

II. Powers and Duties.

228. Powers. In addition to the powers conferred by law upon private corporations, banking corporations, banking and trust companies doing a fiduciary and surety business shall have power—

1. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of

debts, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security or real or personal property. Such corporation at the time of making loans or discounts may take and receive in advance such interest as may be agreed upon not exceeding the legal rate.

2. To purchase, hold and convey real estate for the following purposes:

1st. Such as shall be necessary for the convenient transaction of its business, including with its banking offices other apartments to rent as a source of income, which investment shall not exceed twenty-five per cent. of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and three.

2d. Such as is mortgaged to it in good faith by way of security for loans made or money due to such bank.

3d. Such as is conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as it acquires by sale under execution or judgment of any court in its favor.

Any and all power and privileges granted and given to any person, firm or corporation doing a banking business in connection with a fiduciary and surety business or the right to deal to any extent in real estate inconsistent with this chapter are hereby repealed.

1903, c. 275, ss. 8, 9; 1907, c. 829, ss. 5, 12.

228a. Banking and trust companies dealing in real estate, limitation on investment. Such bank and trust company doing a general banking and trust, fiduciary and surety business, and dealing in real estate, shall not invest more than twenty-five per cent. of the capital stock and permanent surplus in real estate, unless to protect its loans, debts contracted in the course of the dealings or acquired by sale under execution or judgment of any court in its favor.

1907, c. 829, s. 6.

229. When bank may purchase its stock. No bank shall be the holder as pledgee or as purchaser of any portion of its capital stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.

1903, c. 275, s. 1. **Discussion of question of lien granted by former statute to bank on stock of stockholder indebted to bank:** Boyd v. Redd, 120-335. **Stock pledged under charter allowing a bank to accept pledge of**

its own stock must be released by payment of the debt before it can share in the assets of a bank winding up business: Bank v. Riggins, 124-534.

230. Reorganization. Whenever any bank, under the laws of this state or of the United States, is authorized to dissolve and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon the authority in writing of the owners of two-thirds of its capital stock, with the approval of the corporation commission, to execute articles of incorporation as provided in this chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such dissolved national bank or state bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this state, and thereupon all assets, real and personal, of the dissolved national bank shall by operation of law be vested in and become the property of such state bank, subject to all liabilities of such national bank not liquidated under the laws of the United States before such reorganization.

1903, c. 275, s. 17.

231. Reserve fund. Every bank, or banking and trust company doing and engaging in a banking, trust, fiduciary or surety business and dealing in real estate, shall at all times have on hand as a reserve in available funds an amount equal to at least fifteen per cent. of the aggregate amount of its deposits. Two-fifths of such fifteen per cent. shall be cash in the vaults of the bank. Savings banks shall have on hand at all times, as a reserve in available funds, an amount equal to at least five per cent. of their aggregate deposits.

1903, c. 275, s. 28; 1907, c. 829, s. 7.

232. Available funds; when below reserve; no new loans or dividends. The available funds shall consist of cash on hand and balances due from other solvent banks. Cash shall include lawful money of the United States, and exchange for any clearing-house association. Whenever the available funds of any bank shall fall below the reserve herein required, such bank shall not make any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight; nor shall such bank make any dividends of its profits until it has on hand the available funds required by this chapter.

1903, c. 275, s. 29.

233. Loans to one person not to exceed ten per cent. of capital. The total liabilities to any bank or banking institution, or bank-

ing or trust company doing a fiduciary and surety business and dealing in real estate, of any person, or of any company, corporation or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such bank or banking institution actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed. This section shall not apply to banks with a paid-up capital of one hundred thousand dollars or less.

1897, c. 298, s. 3; 1897, c. 432; 1907, c. 829, s. 8.

233a. Deposits by infants; must be paid to their order. Whenever any deposit shall be made by or in the name of any person who is a minor of the age of fifteen years and upwards, in any state bank in this state or in any national bank in this state, the same shall be held for the exclusive right and benefit of such minor, free from the control of all persons whatsoever; and it shall be paid, together with the interest thereon, if there be any interest, to the person in whose name the deposit shall be made, and the receipt, check or acquittance of such minor to the said state bank or national bank shall be a valid and sufficient relief and discharge for such deposit or any part thereof to the corporation, state bank or national bank in which said deposit was made: Provided, this section shall not apply to deposits prior to the eighth day of March, nineteen hundred and seven.

1907, c. 750. **For married woman's right to make deposits and draw checks, see section 2095.**

234. Chapter on corporations applicable. All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled Corporations, not inconsistent with this chapter, or with the business of banking, shall be applicable to banks.

1903, c. 275, s. 4.

III. Stockholders.

235. Individual liability of. The stockholders of every bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein at par value thereof, in addition to the amount

invested in such shares. The term "stockholder," when used in this chapter, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person; but shall not apply to a person who may hold the stock as collateral security for the payment of a debt.

1903, c. 275, s. 13; 1897, c. 298. **Procedure in enforcing the double liability of stockholders of an insolvent bank,** see Smathers v. Bank, 135-410. **Statute of limitations begins to run in favor of stockholders, when bank suspends specie payment:** Long v. Bank, 90-405.

236. Exemptions in special charters repealed. Any exemption from the individual liability imposed upon stockholders by the preceding section contained in the charter of any bank incorporated prior to the first day of January, one thousand nine hundred and five, is repealed.

1903, c. 275, s. 17.

237. Executors, trustees, etc., not personally liable. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name.

U. S. Rev. Stat., s. 5152.

238. Transferer not liable, when. No person who has in good faith and without any intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to any person of full age, previous to any default in the payment of any debt or liability of the corporation, shall be subject to any personal liability on account of the nonpayment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to any default shall be liable for any such debt or liability of the corporation to the extent of such stock, in the same manner as if he had been the owner at the time the corporation contracted such debt or liability.

1903, c. 275, s. 11.

239. Stock sold if subscription unpaid. Whenever any stockholder or his assignee fails to pay any instalment on the stock, when the same is required by law to be paid, the directors of the bank may sell the stock of such delinquent stockholder at public sale, as they shall deem best, having first given the delinquent stockholder twenty days' notice, personally or by mail, at his latest known address. If no party can be found who will pay for

such stock the amount due thereon to the bank, with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank and such stock shall be sold as the directors may order within six months of the time of such forfeiture, and if not sold, it shall be cancelled and deducted from the capital of the bank.

1903, c. 275, s. 11.

IV. Corporation Commission.

240. May make rules. The corporation commission shall have power to make such rules for the government of the banks and banking institutions of this state, not inconsistent with law, as may in its judgment seem wise and expedient.

1903, c. 275, s. 20.

241. All banking institutions under supervision of. Every bank, corporation, partnership, firm or individual, now or hereafter transacting a banking business, or banking and trust, fiduciary and surety business or banking and real estate business under the laws of, and within, this state, shall be subject to the provisions of this chapter and regulated by and be under the supervision of the corporation commission.

1903, c. 275, s. 19; 1907, c. 829, s. 9.

242. Quarterly reports to; publication in county. Every bank and every corporation, partnership, firm or individual transacting a banking business, or banking and trust, fiduciary and surety business or banking and real estate business, shall make to the corporation commission not less than four reports during each year, according to the form which may be prescribed by said commission; which reports shall be verified in the case of incorporated banking companies by the oath or affirmation of the president, vice-president, or cashier, and, in addition, two of the board of directors, and in other cases by the oath or affirmation of the partners, members of the firm or individual owner. The bank, corporation or individual making such report shall publish same in some newspaper in the county in which such bank, corporation or individual is located.

1903, c. 275, s. 21; 1907, c. 829, s. 10. **False and misleading statements held, prior to this statute, to give person induced thereby to deposit money a right of action against directors:** Tate, Treasurer, v. Bates, 118-287. **Directors presumed to know condition of bank:** Ibid; Solomon v. Bates, 118-311. **If false and fraudulent statements are made by officers they are liable to one induced thereby to deal with such bank:** Solomon v. Bates, 118-311; Houston v. Thornton, 122-365.

242a. Quarterly reports to show amount of trust and surety business. Every person, firm or corporation or copartnership doing a banking and trust and fiduciary and surety or guarantee business shall make to the corporation commission not less than four reports during each year, showing the entire amount of trust and surety and fiduciary and guarantee business as a part of the liabilities of said banking institution, which report shall be published as are the reports of other banking institutions. If any person, firm, copartnership or corporation shall show by said reports, or by the examination of the bank examiner, that such liabilities are equal to the amount of the capital stock, the said corporation commission shall have the authority and it is hereby empowered to make such rules and regulations and reductions of said liabilities as it may deem necessary for the protection of the creditors and depositors of such banking institution.

1907, c. 829, s. 11.

243. Special reports. The corporation commission shall have power to call for special reports from any bank, corporation, firm or individual transacting a banking business, whenever necessary, in order to obtain a full and complete knowledge of such bank.

1903, c. 275, s. 22.

244. Annual report of stockholders. Every bank shall at all times keep a correct record of the names of all its stockholders, and once in each year, or whenever called upon, file in the office of the corporation commission a correct list of all of its stockholders, with the number of shares held by each.

1903, c. 275, s. 16.

245. Penalty for failure to report, etc. Every bank, corporation, partnership, firm or individual that shall refuse, fail or neglect to make any report, or any published statement required by the provisions of this chapter shall be subject to a penalty of two hundred dollars. The penalty herein provided for shall be recovered by the state in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney general to prosecute all such actions.

1903, c. 275, s. 26.

V. Bank Examiners.

246. Appointed by corporation commission. The corporation commission shall appoint a suitable person or persons to make an examination of and into the affairs of every bank, corporation or

individual doing a banking business, as often as shall be deemed necessary and proper, and at least once every year. And it shall also be the duty of the said bank examiner to verify the report made by the directors or members or individual conducting any banking institution as required by section two hundred and twenty-six. The corporation commission may at any time remove any person appointed by it.

1903, c. 275, s. 23; 1905, c. 539.

247. Powers. Such examiners shall have power to make a thorough examination into all the books, papers and affairs of the bank or corporation, firm or individual transacting a banking business, and, in so doing, to administer oaths and affirmations and to examine on oath or affirmation any individual banker and the officers, agents, partners and clerks of such bank, corporation, firm or individual touching the matters he or they shall be authorized and directed to inquire into, and examine, and to summon, and by attachment compel the attendance of any person or persons in this state to testify under oath before him or them in relation to the affairs of such corporation, partnership, firm or individual.

1903, c. 275, s. 24.

248. Reports by, to corporation commission. Bank examiners shall make a full and detailed report in writing to the corporation commission, of the condition of each corporation, partnership, firm or individual doing a banking business, within ten days after each and every examination made by them.

1903, c. 275, s. 24.

249. Annual examinations; expenses paid by bank. One examination each year shall be designated as the annual examination, and for such examination the bank, corporation, or individual so examined shall pay into the office of the corporation commission, to be paid to the examiners, an examination fee, as follows: Banks, banking institutions or individuals doing a banking business, having a capital of twenty-five thousand dollars or less, shall pay a fee of fifteen dollars; those having a capital stock of more than twenty-five thousand dollars and not over fifty thousand dollars, twenty-five dollars; those having a capital stock of over fifty thousand dollars, thirty dollars. The expenses incurred and services, other than examinations performed specially for any bank, shall be paid by such bank or banking institution. No bank shall be compelled to pay for more than one examination in each year, unless it shall appear that the condition of such bank, banking institution or banker is precarious, or in any way unsatisfactory, then

it shall be the duty of the commission to order a special examination, which shall be paid for by such bank at the same rates as the annual examinations.

1903, c. 275, s. 25.

250. Take possession of bank, when; receiver appointed, how. Any bank examiner who has filed such bond as may be required by the commission, when ordered by the commission, shall have authority to take possession of any bank doing business under the laws of this state and retain possession thereof for a time sufficient to make a thorough examination into its affairs and financial condition; and in case it is found by the examiner, upon such examination, that such bank is insolvent or is conducting its business in an unsafe and unauthorized manner, or is jeopardizing the interests of its depositors, then such examiner, when authorized by the corporation commission, shall have full power and authority to take, hold and retain possession of all the money, rights, credits, assets and property of every description belonging to such bank, corporation, partnership, firm or individual, until the corporation commission can receive and act on the report made by the examiner of such bank, and have a receiver appointed, for the purpose of winding up and settling the affairs of such bank, banking institution or banker, according to law; and the corporation commission is hereby empowered, in its own name, to institute and maintain civil actions for the appointment of receivers in such cases, and for such other relief as may be necessary or proper to protect the creditors of such bank. The commissioners in their judgment may grant such bank, corporation or individual sixty days in which to correct any errors or irregularities, and make good any deficiencies or losses shown in any reports or otherwise. When a receiver has been appointed for a failing bank or banking institution, or corporation doing a banking business, the said receiver shall be under the control of the corporation commission and shall obey its orders in so far as they do not conflict with the orders or decrees of the court made in the case.

1903, c. 275, s. 30; 1907, c. 829, s. 13. **Receiver is proper party to enforce the double liability of stockholders of an insolvent bank:** Smathers v. Bank, 135-410. **Receiver appointed at instance of creditors not the proper party to be sued for deposit:** Crutchfield v. Hunter, 138-54. **Ordinarily motion for receiver must be made before resident judge or judge holding courts of district:** Worth, Treasurer, v. Bank, 121-343. **Where two receivers appointed by two courts, question of priority settled on basis of fractions of a day:** Ibid. **Under former statute giving state treasurer power to apply for receiver, creditor still had right to do so.** Ibid. **For complaint by receiver against cashier for accounting,** see Dunn v. Johnson, 115-249. **Upon bank's closing doors,**

all claims against and in favor of it mature eo instanti: Davis v. Mfg. Co., 114-321. Where resident creditor of insolvent bank brings suit in another state, hindering the collection of bank's assets, receiver can enjoin him even if there was an adequate remedy at law: Davis v. Lumber Co., 132-233.

251. May make arrests, when. When it shall appear to any bank examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder or owner of a bank or banking institution has been guilty of a violation of the criminal laws of the state relating to banks and banking institutions, it shall be his duty to hold and detain such person until a warrant can be procured for his arrest; and for such purpose such examiner shall have and possess all the powers of a peace officer of such county, and may arrest without warrant for past offenses. Upon report of his action to the corporation commission, it may direct the release of the person so held, or, if in its judgment such person should be prosecuted, the commission shall cause the solicitor of the judicial district in which such detention is had to be promptly notified, and the action against such person shall be continued a reasonable time to enable such solicitor to be present at the trial.

CHAPTER 8.

BASTARDY.

252. Justices have jurisdiction; warrant issued only on complaint of woman or county commissioner. Justices of the peace of the several counties shall have exclusive original jurisdiction to issue, try and determine all proceedings in cases of bastardy in their respective counties. A warrant in bastardy shall be issued only upon the voluntary affidavit and complaint of the mother of the bastard; or, upon the affidavit of one of the county commissioners, setting forth the fact that the bastard is likely to become a county charge.

Code, s. 31. **Bastardy proceedings are civil, not criminal in their nature:** State v. Addington, 143-687; Burton v. Belvin, 142-151; State v. Liles, 134-735; State v. Edwards, 110-511; State v. Peeples, 108-768; State v. Bryan, 83-611; State v. Higgins, 72-226; State v. Pate, 44-244; State v. Carson, 19-370; State v. Wilkie, 85-513; State v. Crouse, 86-617; State v. Hickerson, 72-421; State v. McIntosh, 64-607; State v. Waldrop, 63-507; Ward v. Bell, 52-79; State v. Thompson, 48-367; Adams v. Pate, 47-15; State v. Brown, 46-130. **The following cases, now overruled, hold that**

bastardy is a criminal action or a proceeding in the nature of a criminal action: State v. Perry, 122-1043; State v. Ballard, 122-1024; State v. Nelson, 119-797; State v. Ostwalt, 118-1208; State v. Wynne, 116-981; State v. Cagle, 114-835; Myers v. Stafford, 114-234; State v. White, 125-674; State v. Bruce, 122-1040. **Jurisdiction of magistrate stated in the following cases, some of which do not hold since the decision that the proceeding is civil:** State v. Mize 117-780; State v. Wynne 116-981; State v. White, 125-674; State v. Ostwalt, 118-1208; State v. Parish, 83-613; State v. Roberts, 32-350; State v. Jenkins, 34-121; State v. Elam, 61-460; State v. McQuaig, 63-550; State v. Hales, 65-244. **Former proceeding dismissed for want of jurisdiction no bar to second proceeding:** State v. Giles, 103-391. **Justice's jurisdiction to issue warrant before birth of child depends upon domicil of mother at time and not on her legal place of settlement; and if the mother continues to reside in the same county until the birth of her child, making her whole residence therein more than twelve months, the full jurisdiction of the case will be in that county:** State v. Hales, 65-244. **Proceedings can not be instituted against personal representative of putative father to subject his estate to maintenance:** Clements v. Durham, 52-100. **The intention of proceedings in bastardy is to secure to the mother her probable expenses or to reimburse her actual outlay even though the child die at birth:** State v. Addington, 143-683—**and if the child live, to indemnify the county against loss:** State v. Brown, 46-130; Ward v. Bell, 52-79; State v. Edwards, 110-511; State v. Beatty, 66-648.

253. Procedure on complaint by county commissioner. When complaint is made on affidavit by one of the county commissioners, as set forth in the preceding section, to any justice of the peace of the county in which the woman resides, that any single woman within his county is big with child, or delivered of a child, he may cause her to be brought before him, or any other justice of the county, to be examined upon oath respecting the father; and if she shall refuse to declare the father, she shall pay a fine of five dollars and give a bond payable to the state with sufficient surety to keep such child from being chargeable to the county, otherwise she shall be committed to prison until she shall declare the same, or pay the fine aforesaid and give such bond.

Code, s. 32. **Where woman refuses to disclose father, pays the fine and gives the bond, she can not afterwards pursue the father on ground of collusion between justice and father, she being in pari delicto:** State v. Price, 81-516; State v. Brown, 46-129. **Question as to which county must maintain child settled:** in State v. Elam, 61-460; Merritt v. McQuaig, 63-550; State v. Jenkins, 34-121; State v. Roberts, 32-350. **Proceeding may be brought while child en ventre sa mere:** State v. Addington, 143-687; State v. Wynne, 116-982; State v. Crouse, 86-617.

254. Procedure when woman declares father. If any woman shall, upon oath, accuse any man of being the father of her bastard child, the justice before whom such oath is made shall cause him

to be brought before some justice of the peace of such county to answer the charge; and, if he shall, upon oath, deny that he is the father of such child, the justice shall proceed to try the issue of paternity, and if it shall be found that he is the father of the child, or if he shall not deny upon oath that he is the father of the child, then he shall stand charged with the maintenance thereof, as the court may order, and shall give bond, with sufficient surety, payable to the state, to perform said order, and to indemnify the county where such child shall be born from charges for his maintenance and may be committed to prison until he finds surety for the same, and shall be liable for the costs of the issue or proceeding, and from this judgment and finding the affiant, the woman or the defendant may appeal to the next term of the superior court of the county where the trial is to be had de novo.

Code, s. 32. **The procedure hereunder generally discussed:** State v. Edwards, 110-512. **The offense is committed when child is begotten:** State v. Wynne, 116-981; State v. Nelson, 119-797. **Defendant can not be placed twice in jeopardy:** State v. Ostwalt, 118-1208. **A judgment committing defendant "until he finds surety" is valid:** State v. Wynne, 116-981. **The provision that the affiant or the woman may appeal is unconstitutional:** State v. Ostwalt, 118-1208; State v. Bruce, 122-1040; State v. Ballard, 122-1024; **but this appears to be overruled by** State v. Liles, 134-742. **Effect of father's compromising with woman,** see State v. Beasley, 75-211; State v. Harshaw, 20-506. **Summons may be issued by one justice and returnable before another:** Williams v. Bowling, 111-295. **Mother should not be joined as party plaintiff with the state,** State v. Collins, 85-511. **The correct issues in bastardy proceeding set forth:** State v. Liles, 134-735; State v. Warren, 124-807; State v. Rose, 75-239; Warlick v. White, 76-175; State v. Herman, 35-502. **Proof that putative father was impotent at time child was begotten is sufficient bar:** State v. Broadway, 69-411. **Not necessary for proceeding to show affirmatively that mother is a single woman:** State v. Allison, 61-346; State v. Pettaway, 10-623; State v. Wilson, 32-131; State v. Peeples, 108-768; State v. McDowell, 101-736; State v. Higgins, 72-227; Wilkie v. West, 5-319. **Child born in wedlock is presumed to be legitimate, but this presumption may be rebutted:** State v. McDowell, 101-734; State v. Pettaway, 10-623; State v. Allison, 61-346; State v. Herman, 35-502; State v. Wilson, 32-131. **Where married woman was visibly pregnant at her marriage, presumption is the child was the child of her husband:** State v. Herman, 35-502. **When trial by justice without jury, the justice must nevertheless observe the common law and must give notice to defendant of the charge against him and give him opportunity of making defense, and the evidence must be according to law:** State v. Barrow, 7-121. **When mother of child is a married woman legitimacy of child is an issue of fact dependable on proof of impotence or non-access of husband:** State v. Liles, 134-735; State v. McDowell, 101-736. **Legitimacy of child being in issue, evidence of bad character of mother as to chastity during husband's life time is incompetent.** Warlick v. White, 76-175. **As to legiti-**

macy of child, mother a competent witness: Warlick v. White, 76-175. **Purpose of law both to indemnify county and maintain child:** State v. Beatty, 66-648; State v. Addington, 143-683; State v. Edwards, 110-511; Ward v. Bell, 52-79; State v. Brown, 46-130. **As to maintenance, no difference between past and future as far as court concerned:** State v. Beatty, 66-648. **Resemblance of child and accused, competent evidence:** State v. Horton, 100-443; State v. Britt, 78-439; Warlick v. White, 76-175; State v. Woodruff, 67-89; State v. Bowles, 52-579. **Evidence that mother was caught in the act with another man about the time child was begotten held does not of itself rebut presumption raised by woman's oath and examination:** State v. Bennett, 75-305; State v. Parish, 83-613; see State v. Britt, 78-439. **Child can be exhibited to jury:** Warlick v. White, 76-175; State v. Woodruff, 67-89; State v. Horton, 100-443. **Defendant may show woman unworthy of credit:** State v. Floyd, 35-382; State v. Pate, 44-244. **Wife competent to prove intercourse with one not her husband:** State v. Pettaway, 10-623. **Husband impotent or non-access proven, child declared a bastard:** State v. Pettaway, 10-623; State v. Rose, 75-239. **When the child dies upon being born, the mother is still entitled to her expenses incident thereto, including, among other things, her medicine and medical attention, and the burial expenses of the child:** State v. Addington, 143-683.

255. Procedure on appeal. Upon the trial of the issue, whether before the justice or at term, the examination of the woman, taken and returned, shall be presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant; and, if the jury at term shall find that the person accused is the father of the child, then the judge shall make the order for the maintenance and for costs of proceeding, and shall take bond from the defendant and his sureties for the maintenance of the child and to indemnify the county and pay the costs; and, in default thereof, may imprison the defendant.

Code, s. 32. **Case stands for trial, when:** State v. Edwards, 110-511; State v. Cagle, 114-835; but see if this last is not overruled by State v. Liles, 134-742. **Provision that oath and examination of mother is presumptive evidence against accused is valid:** State v. Rogers, 119-793, 79-609; State v. Mitchell, 119-784; State v. Cagle, 114-835. **Accused failing to demand privilege of cross-examining mother when her written examination taken, waives his right to object to her evidence:** State v. Rogers, 119-793; State v. Mitchell, 119-784. **When woman charges accused on her examination, burden is on him to disprove:** State v. Mitchell, 119-784. **Woman's examination not signed is competent:** State v. Thompson, 26-484. **Woman's examination not appearing to be on oath is invalid:** State v. Ledbetter, 26-245. **Jury must be satisfied, if matter put at issue, beyond a reasonable doubt:** State v. Rogers, 119-793; but this may be overruled by State v. Liles, 134-742; see State v. Williams, 109-846; State v. Rogers, 79-609. **Affidavit of woman can be amended:** State v. Giles, 103-391. **For effect of evidence of illicit intercourse with others,**

see State v. Warren, 124-807; State v. Giles, 103-391; State v. Britt, 78-439; State v. Bennett, 75-305; State v. Parish, 83-613; State v. Perkins, 117-698; State v. Patterson, 74-157. **Child dying before case tried, what order made:** State v. Beatty, 66-648; State v. Addington, 143-683.

256. Putative father out of county. If the putative father shall escape or be in any other county than that of the justice issuing the warrant, it shall be issued, endorsed, executed and returned as provided in warrants in criminal actions.

Code, s. 32.

257. Upon appeal parties and witnesses recognized. When an appeal shall be taken the justice shall recognize the person accused of being the father of the child with sufficient surety for his appearance at the next term of the superior court for the county, and to abide by and perform the order of the court; said justice shall also recognize the woman and other witnesses to appear at said superior court, and shall return to said court the original papers in the proceeding and a transcript of his proceedings as required in other cases of appeal. If the putative father fail to appear, unless for good cause shown, the judge shall direct the issue of paternity to be tried; and if the issue be found against the person accused, he shall order a capias or attachment to be issued for the father, and may also enter up judgment against the father and his surety on his recognizance.

Code, s. 33. **Justice failing to recognize defendant, capias issued:** State v. Green, 71-172; State v. Palin, 63-471.

258. Case may be continued till birth of child. When the judge or justice, as the case may be, trying the issue of paternity, shall deem it proper, he may continue the case until the woman shall be delivered of the child; but when a continuance is granted, the court shall recognize the person accused of being the father of the child with surety for his appearance either at the next term of the court or at a time to be fixed by the justice granting the continuance, which shall be after the delivery of the woman.

Code, s. 34. State v. Addington, 143-688.

259. Fine, allowance and bond. When the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding the sum of ten dollars and the court shall make an allowance to the woman not exceeding the sum of fifty dollars, to be paid in such instalments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed by law; and in default of such payment he shall be committed to prison.

Code s. 35. **The word "fine" herein is used in the sense of a punish-**

ment for a criminal offense and can not be imposed when issue of paternity found against defendant: State v. Addington, 143-683; State v. Liles, 134-737. **Provision of statute that allowance be made in addition to fine, is constitutional:** State v. Wynne, 116-981; State v. Morgan, 141-727; but see State v. Addington, 143-683. **Mother granted an allowance is such a creditor of father of child as would enable her to prevent his discharge:** State v. Parsons, 115-730. **Woman can release her interest in the bond, where she was the relator and suit was brought in name of state to whom bond was payable:** State v. Ellis, 34-264. **Suits on bond:** Shew v. Stewart, 18-412.

260. Action barred in three years after birth. All examinations upon oath to charge any man with being the father of a bastard child shall be taken within three years next after the birth of the child, and not after.

Code, s. 36. **Time in which proceeding must be brought controlled entirely by this section:** State v. Perry, 122-1043; State v. Hedgepeth, 122-1039. **See** State v. Ledbetter, 26-242; State v. Robeson, 24-46.

261. Execution may issue for maintenance. When the judge or justice shall charge the father of a bastard child with its maintenance and the father shall neglect to pay the same, then the judge or justice, upon application of the party aggrieved, notice being served on the defendant at least ten days before the return day stated in the notice, or such notice being returned by the sheriff or constable that the defendant is not to be found, may order an execution against the goods, chattels, lands and tenements of the father for such sum as the court shall adjudge sufficient for the maintenance of the bastard child.

Code, s. 37. **Father can not claim his exemption of $500 as against allowance to mother:** State v. Parsons, 115-730. **Summary remedy here provided is only cumulative:** Shew v. Stewart, 18-412. **In suit by mother to eject father from land purchased under execution by her, she must show this section complied with:** McPherson v. McCoy, 13-391.

262. Putative father when committed or apprenticed. In all cases arising under this chapter, when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall, by law, be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as the court may deem proper: Provided, that such person or putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself as an apprentice to any person whom he may select, for such time and at such price as the court may direct. The binding shall be by indenture in open court, and the price obtained shall be paid to the county treasurer.

On the indenture being signed by the presiding judge of the court and by the master receiving such apprentice, the person thus bound shall be treated and regarded as an apprentice in all matters except education.

Code, s. 38. **Defendant may not be put to work on roads:** State v. Addington, 143-683; State v. Morgan, 141-726, **overruling** Myers v. Stafford, 114-234. **Imprisonment for failure to obey order to maintain, or to give bond, valid:** State v. Addington, 143-688; State v. Morgan, 141-726; State v. Nelson, 119-797; State v. Edwards, 110-512; State v. Palin, 63-471. **Discharged from imprisonment upon complying with section 1915 of the Revisal,** see State v. Parsons, 115-730; State v. White, 125-674. **Who can object, and how, to defendant's discharge as an insolvent, discussed** in State v. Parsons, 115-730.

263. Procedure for legitimating bastards. The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which the father may reside, praying that such child may be declared legitimate; and if it shall appear that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree.

Code, s. 39. **Judgment of court upon subject of legitimation is conclusive:** Craige v. Neely, 51-170. **Marriage of father and mother in a state where children are legitimated thereby, effect on child's relation in other states:** Fowler v. Fowler, 131-169.

264. Effects of legitimation. The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock; and in case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock.

Code, s. 40. King v. Davis, 91-146. **Effect of legislative private act passed at instance of father legitimating children and defining their rights,** see Perry v. Newsome, 36-28; Drake v. Drake, 15-110.

CHAPTER 9.

BONDS.

I. Mortgage in Lieu of.

265. Fiduciary or official. Any administrator, executor, guardian, collector or receiver, or any officer required to give an official bond, or the agent or surety of such person or officer, may execute a mortgage on real estate, of the value of the bond required to be given by such administrator, executor, guardian, collector, receiver or officer, to the state of North Carolina, conditioned to the same effect as the bond should be, were the same given, with a power of sale, which power of sale may be executed by the clerk of the superior court, with whom said mortgage shall be deposited, upon a breach of any of the conditions of said mortgage, after advertisement for thirty days.

Code, s. 118; 1874-5, c. 103, s. 2. **Administrator can not give mortgage on lands of intestate of whom he is heir:** In re Sellars, 118-573.

266. Appearance; security for costs or fine. Any person required to give a bond or undertaking, or required to enter into a recognizance for his appearance at any court, in any criminal proceeding, or for the security of any costs or fine in any criminal action, may also execute a mortgage on real or personal property of the value of such bond or recognizance, payable to the state of North Carolina, conditioned as such bond or recognizance would be required, with power of sale, which power shall be executed by the clerk or justice of the peace in whose court said mortgage shall be executed, upon a breach of any of the conditions of said mortgage: Provided, that where such mortgage upon real property is executed before a justice of the peace the power of sale shall be enforced by the clerk of the court of the county in which the criminal proceeding is had: And provided further, that no such mortgage on real property executed for the security for costs or fine shall allow a longer time for payment of said costs or fine than six months from the execution thereof, and no mortgage on personal property a longer time than three months, except in cases of appeal, when the time allowed shall be counted from the date of the final decision in the cause: And provided further, that all legitimate expenses of sale, which shall only be made after due advertisement according to law, shall be paid out of the proceeds of the sale of the mortgaged property, as shall also the following fees, to-wit: For each sale of real property mortgaged under this section the clerk shall receive two dollars, and for each sale of personal property mortgaged under this section the clerk or justice of the peace who enforces the power of sale shall receive one dollar.

Code, s. 120; 1874-5, c. 103, s. 3; 1891, c. 425; ss. 1, 2, 3. **Mortgage given may be foreclosed by motion, upon notice, in original action:** Ryan v. Martin, 103-282. **This section has no application in justices' courts:** Comron v. Standland, 103-207. **Kind of mortgage necessary to comply with statute;** Eshon v. Commrs., 95-75. **Referred to** in State v. Jenkins, 121-642.

267. How cancelled; effect. Any mortgage given by any person in lieu of bond or undertaking or recognizance for his appearance at any court in any criminal proceeding, or for the security of any cost or fine in a criminal action, which has been registered, when the party made his appearance at the court to which he was bound and did not depart the court without leave, or paid the cost or fine required, may be cancelled or discharged by the clerk of the court of the county where such action was pending by entry of "satisfaction" upon the margin of the record where such mortgage is recorded, in the presence of the register of deeds or his deputy, who shall subscribe his name as a witness thereto, and such release shall have the effect to discharge and release all the right, title and interest of the state of North Carolina in and to the property described in such mortgage.

1905, c. 106.

268. Clerk superior court; depository of. In all cases where the clerk of the superior court may be required to give surety, he may deposit a mortgage with the register of deeds, payable to the state, and conditioned, as the bond would have been required, with power of sale. The power of sale shall be executed by the register of deeds, upon a breach of any of the conditions of said mortgage, and the register of deeds shall in all cases immediately register the same, at the expense of the said clerk.

Code, s. 122; 1874-5, c. 103, s. 6.

269. Prosecution. It shall be lawful for any person desiring to commence any civil action or special proceeding, or to defend the same, his agent or surety, to execute a mortgage on real estate of the value of the bond or undertaking, required to be given at the beginning of said action, or at any stage thereof, to the party to whom the bond or undertaking would be required to be made, conditioned to the same effect as such bond or undertaking, with power of sale, which power of sale may be executed upon a breach of any of the conditions of the said mortgage after advertisement for thirty days.

Code, s. 117; 1874-5, c. 103, s. 1. **This section does not require, but simply allows, defendant to execute mortgage:** Wilson v. Fowler, 104-471—**and has no application in justice's court,** Comron v. Standland, 103-207. **Whether can be given in lieu of appeal undertaking discussed in** Eshon v. Commrs. 95-75.

270. Affidavit of value of property required. In all cases where a mortgage is executed, as hereinbefore permitted, it shall be the duty of the clerk of the court in which it is executed, or of the justice, to require an affidavit of the value of the property mortgaged to be made by at least one witness not interested in the matter, action or proceeding in which the mortgage is given.

Code, s. 121; 1874-5, c. 103, s. 4.

271. Additional security required, when. If, from any cause, the property mortgaged in lieu of a bond shall become of less value than the amount of the bond in lieu of which the mortgage is given, and it shall so appear upon affidavit of any person having any interest in the matter as a security for which the mortgage was given, it shall be the duty of the mortgagor to give additional security by a deposit of money, or the execution of a mortgage on more property, or justify as required in cases where bond or undertaking is given.

Code, s. 119; 1874-5, c. 103, s. 5.

II. In Surety Companies.

272. By state officers. All persons who are required to give bond to the state of North Carolina to be received by the governor or by any department of the state government shall, in lieu of personal security, be permitted to give as security for said bond and for the performance of the duties named in the said bond any indemnity or guaranty company authorized to do business in the state of North Carolina, subject to such regulations as the governor or department may prescribe, and with power in them to demand additional security at any time. Any person presenting any indemnity or guaranty company as surety shall accompany his bond with a statement of the insurance commissioner as to the condition of such company as required in this Revisal.

1901, c. 754. **For certificate of solvency and insolvency,** see sections 4802, 4803. **For construction of surety bonds,** see Blades v. Dewey, 136-176; Bank of Tarboro v. Fid. Co., 128-366. **What is reasonable notice to a surety company of default:** Bank of Tarboro v. Fid. Dep. Co. 128-366. **In action on bond, where burden of proof rests:** Bank v. Fidelity Co., 126-320.

273. Municipal officers; fiduciaries; litigants, etc. Whenever, by the law of North Carolina, or by the regulation of any board, body or organization in this state, any bond, recognizance, obligation or undertaking is required of, permitted to be made, given, tendered or filed by any sheriff, clerk of a court, register of deeds, tax collector, treasurer, constable or coroner, mayor, clerk, police-

man, weigher or standard keeper of any county, city, town or township in this state, or by any trustee, receiver, guardian, administrator, executor, assignee, or any other fiduciary, or party to a civil action or proceeding, either for the prosecution thereof or for any other purpose whatsoever in the course of the action, or by any officer of any town or city, conditioned for the doing or not doing of anything, in such bond, recognizance, obligation or undertaking specified, any and all clerks of the superior courts, municipal officers, boards, courts and judges, now or hereafter permitted to accept, approve or pass upon the sufficiency of such bond, recognizance, obligation or undertaking shall accept such bond, recognizance, obligation or undertaking, and approve the same, whenever the same is executed or the conditions thereof are guaranteed by a corporation of this or any other state licensed in this state, which corporation under its charter is authorized to act as guardian or other trustee, or to guarantee the fidelity of any persons holding places of public and private trusts, and to guarantee the performance of contracts, other than insurance policies, and to execute and guarantee bonds and undertakings required or permitted in actions or proceedings, as by law allowed. Whenever such bond, recognizance, obligation or undertaking is so required or permitted to be made, given, tendered or filed with one surety, or with two or more sureties, the execution of the same, or the guaranteeing of the performance of the condition thereof, shall be sufficient when executed or guaranteed solely by such company so authorized, and shall be in all respects a full and complete compliance with every requirement of every law, rule and regulation that such bond, recognizance, obligation or undertaking shall be executed by one surety or two sureties, and that such surety or sureties shall be residents or freeholders, and such bond, recognizance, obligation or undertaking shall be accepted and approved when executed by such company: Provided, the clerk of the superior court may have discretion as to the acceptance of any bond on which said company or companies may become sureties on the bonds of guardians, executors, administrators, assignees, or other fiduciary or any other party to a civil action or proceeding.

1895, c. 270; 1899, c. 54, s. 45; 1901, c. 706. **For construction of surety bonds see under section 272.**

274. How released from liability. Any company executing such bond, obligation or undertaking, may be released from its liability or security on the same terms as are or may be by law prescribed for the release of individuals upon any such bonds, obligations or undertakings.

1899, c. 54, s. 48. **Surety company can only be released by getting off of bond:** Bank of Tarboro v. Fid. and Dep. Co., 128-366. **County commissioners can not release surety on sheriff's bond:** Fidelity Co. v. Fleming, 132-332. 153-248

275. Estoppel to plead ultra vires; penalty failure to pay judgment. Any company which shall execute any bond, obligation or undertaking under the provisions of this subchapter shall be estopped in any proceeding to enforce the liability which it shall assume to incur, to deny its corporate power to execute such instrument or assume such liability. If any surety company against which a judgment shall have been recovered shall fail to discharge the same within sixty days from time such final judgment is rendered, it shall forfeit its rights to do business in this state, and the insurance commissioner shall cancel its license.

1899, c. 54, s. 49; 1901, c. 706, s. 1, sub-s. 5.

276. When accepted and officer inducted. Upon presentation to the person authorized by law to take, accept and file official bonds, of any bond duly executed in the penal sum required by law by the officer chosen to any such office, as principal, and by any surety company, as security thereto, whose insurance or guaranty is accepted as security upon the bonds of United States bonded officials (such insurance company having complied with the insurance laws of the state of North Carolina), or by any other good and sufficient security thereto, such bond shall be received and accepted as sufficient, and the principal thereon shall be inducted into office.

1899, c. 54, s. 53; 1901, c. 706, s. 1, sub-s. 5.

277. Expense of fiduciary bond charged to fund. Any receiver, assignee, trustee, committee, guardian, executor or administrator, or other fiduciary required by law to give a bond as such, may include as part of his lawful expenses such sums paid to such companies for such suretyship not exceeding one-half of one per cent. per annum on the account of such bonds as the clerk, judge or court may allow.

1901, c. 706, s. 1, sub-s. 5.

III. Officer Acting Without.

278. Penalty for. Every person or officer of whom an official bond is required, who shall presume to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the state for each attempt so to exercise his office.

Code, s. 1882; R. C., c. 78, s. 8. **What amounts to discharging duty as officer, discussed** in Hoell v. Cobb, 49-259; Mabry v. Turrentine, 30-201; Burke v. Elliott, 26-355; Gilliam v. Reddick, 26-368; State v. McEntyre, 25-171.

IV. Irregularity.

279. Informal taking, not to invalidate. Whenever any instrument shall be taken by or received under the sanction of the board of county commissioners, or by any person or persons acting under or in virtue of any public authority, purporting to be a bond executed to the state for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring of the office or making of the appointment, or any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the state for the benefit of the person injured by a breach of the condition thereof, in the same manner as if the office had been duly conferred or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law: Provided, that no action shall be sustained thereon because of a breach of any condition thereof or any part of the condition thereof which is contrary to law.

Code, s. 1891; R. C., c. 78, s. 9; 1842, c. 61; 1869-70, c. 169, s. 16. **Purpose of section stated:** Commrs. v. Magnin, 86-286. **Official bond not in accordance with statute good as a voluntary bond:** Governor v. Witherspoon, 10-42. **Guardian bond, sureties claiming it was not complete,** see Rollins v. Ebbs, 138-140, **overruling** Rollins v. Ebbs, 137-355. **Where guardian was appointed by court of which he was acting justice:** Barnes v. Lewis, 73-138. **Treasurer's bond, awkward statement of condition as to school tax in,** see Commrs. v. Magnin, 86-286. **Constable's bond, where a delivery was denied:** Greensboro v. Scott, 84-188—**where condition did not state the term,** Shipman v. McMinn, 60-122—**where blank for constable's name not filled out:** Grier v. Hill, 51-572. **Sheriff's bond, where kind of taxes misstated,** see Commrs. v. Sutton, 120-298—**where taxes for building fences were made payable to one other than county treasurer,** Speight v. Staton, 104-44. **Failure to register constable's bond does not invalidate:** Warren v. Boyd, 120-57. **Section referred to** in Prairie v. Jenkins, 75-545; Barnes v. Lewis, 73-138; Hoell v. Cobb, 49-259; State v. Jones, 29-359; State v. McMinns, 29-344; State v. Pool, 27-105.

V. Actions on.

280. Taken in judicial proceedings brought in name of state. Bonds and other obligations taken in the course of any proceeding

in law, under the direction of the court, and payable to any clerk, commissioner, or officer of the court, for the benefit of the suitors in the cause, or others having an interest in such obligation, may be put in suit in the name of the state.

Code, s. 51; R. C., c. 13, s. 11. **Merely referred to** in Lackey v. Pearson, 101-655; Cotten, ex parte, 62-82.

281. Official bonds, relator; successive suits. Every person injured by the neglect, misconduct, misbehavior in office of any clerk of the superior court, register, entry-taker, surveyor, sheriff, coroner, constable, county treasurer, or other officer may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the state, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment shall be given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty shall be recovered, and every such officer, and the sureties on his official bond, shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

Code, s. 1883; R. C., c. 78, s. 1; 1793, c. 384, s. 1; 1833, c. 17; 1825, c. 9; 1869-70, c. 169, s. 10. **As to different official bonds, see further under sections prescribing the bonds for the respective officers.**

THIS SECTION GENERALLY CONSTRUED. It enlarges scope of official bonds: Kivett v. Young, 106-567. **Construction of words "by virtue or under color of his office:"** Daniel v. Grizzard, 117-105; Smith v. Patton, 131-397; Thomas v. Connelly, 104-342; Cassidey ex parte, 95-225; Greenlee v. Sudderth, 65-470; Broughton v. Haywood, 61-380.

BONDS CUMULATIVE. Bonds of officers given from time to time during term are cumulative: Fidelity Co. v. Fleming, 132-332; Dixon v. Commrs., 80-118; Pickens v. Miller, 83-543; Moore v. Boudinot, 64-190-Bell v. Jasper, 37-597; Poole v. Cox, 31-69.

LIABILITY ON OFFICIAL BONDS. Even though he may not be liable on bond he may be personally liable: Holt v. McLean, 75-346. **Liability of clerk, see section 296—of county treasurer, see section 297—of sheriff, see section 298—of register of deeds, see section 301—of constable, see section 302—and of other officers, see section prescribing their bonds. Where after giving bond, new duties are added to office by statute, effect on liability:** Daniel v. Grizzard, 117-110; County Bd. Education v. Bateman, 102-52; Prairie v. Worth, 78-169; State v. Bradshaw, 32-229. **The bond of a public officer is liable for money that comes into his hands as an insurer and not merely for exercise of good faith:** Smith v. Patton, 131-396; Presson v. Boone, 108-78; Bd. Education v. Bateman, 102-52; Morgan v. Smith, 95-396; Havens v. Lathene, 75-505; Bd. Commrs. v. Clarke, 73-257; and cases therein cited.

RELATOR IN ACTIONS ON BOND. On sheriff's bond, for school taxes: Commrs. v. Sutton, 120-298; Commrs. v. Magnin, 86-286—**for county taxes;** Commrs. v. Clarke, 73-255—**for illegal levy and sale;** Cook v. Smith,

119-350—**for costs collected by sheriff and not paid to clerk,** Jackson v. Maultsby, 78-174. **On treasurer's bond, for school money;** Commrs. v. Magnin, 86-286—**for money due the county,** Wescott v. Thees, 89-55. **On register's bond for wrongly issuing marriage license:** Furr v. Johnson, 150-157; Joyner v. Roberts, 112-111; and cases cited under section 2090. **Clerk's bond, for proceeeds of partition sale:** Smith v. Patton, 131-396—**for records money, etc., not turned over to successor,** Peebles v. Boone, 116-57. **Constable's bond, for negligence in not collecting debt:** Chipley v. Albea, 53-204; State v. Corpening, 32-58; Governor v. Deaver, 25-56; State v. Lightfoot, 24-306. **Surety can not bring action as relator against co-sureties for default of principal:** Sanders v. Bean, 44-318. **Relator is real party in interest and miscalling his name will not impair his right:** Warrenton v. Arrington, 101-109. **No abatement of action when relator dies:** Davenport v. McKee, 98-500.

ACTION ON OFFICIAL BONDS GENERALLY. Bonds made payable to state must be sued on in name of state: Carmichael v. Moore, 88-29; Williams v. McNair, 98-336; Norman v. Walker, 101-24. **Plaintiff can sue all or one obligor in bond:** Guess v. Barbee, 28-279. **Misjoinder of parties plaintiff not fatal:** Warrenton v. Arrington, 101-109. **How bonds put in evidence:** Short v. Currie, 53-42. **Justice's jurisdiction as to actions on bonds discussed** in Fell v. Porter, 69-140; Bryan v. Rousseau, 71-194. **Obligors in bond payable to beneficiary can not defend on ground that it was not made payable to state:** Warrenton v. Arrington, 101-109—**nor on ground that their names were not inserted in instrument:** Howell v. Parsons, 89-230. **In action against sureties on several bonds, how judgment entered:** Davenport v. McKee, 98-500. **Actions brought until penalty exhausted:** State v. McAlpin, 28-347. **What evidence against principal admissible against sureties, see section 285. Is demand necessary before action brought:** Furman v. Timberlake, 93-66; Little v. Richardson, 51-305; Kivett v. Massey, 63-240; Potter v. Sturges, 12-79; White v. Miller, 20-50; Wills v. Sugg, 25-96; State v. McIntosh, 31-307. **Statute of limitations bars action in six years:** Commrs. v. McRae, 89-95; see also section 393. **For actions on bond of sheriff, see section 298—of clerk, see section 296—of county treasurer, see section 297—of register of deeds, see section 301—of constable, see section 302.**

Cases referring to but not construing section: Daniel v. Grizzard, 117-108; Peebles v. Boone, 116-57; Fell v. Porter, 69-140.

282. Complaint must show party in interest; may sue officer individually. Any person who may bring suit in manner aforesaid shall state in his complaint on whose relation and in whose behalf the suit is brought, and he shall be entitled to receive to his own use the money recovered; but nothing herein contained shall prevent such person from bringing at his election an action against the officer to recover special damages for his injury.

Code, s. 1884; R. C., c. 78, s. 2; 1793, c. 384, ss. 2, 3; 1869-70, c. 169, s. 11. **Pleadings should set forth parties interested:** Kerlee v. Corpening, 97-330. **Following cases casually touch upon subject matter:** Peebles v. Boone, 116-57; Joyner v. Roberts, 112-111; Fagan v. Williamson, 53-433. **See under section 281.**

283. Summary remedy on official bond. Whenever a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, shall have collected or received any money by virtue or under color of his office, and on demand shall fail to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may move for judgment in the superior court against such officer and his sureties for any sum demanded; and the court shall try the same and render judgment at the term when the motion shall be made, but ten days' notice in writing of the motion must have been previously given.

Code, s. 1889; R. C., c. 78, s. 5; 1819, c. 1002; 1869-70, c. 169, s. 14; 1876-7, c. 41, s. 2. **This section only gives summary remedy to person who is himself entitled to funds:** O'Leary v. Harrison, 51-338. **Justice's jurisdiction under this section:** Fell v. Porter, 69-140; Bryan v. Rousseau, 71-194. **Referred to** in Lackey v. Pearson, 101-654; Smith v. Moore, 79-86; Guess v. Barbee, 28-279. **For annotations as to clerk's bond see section 296—county treasurer's see section 297—sheriff's, section 298—register of deed's, section 301—consable's, section 302—and as to other officer's, see under sections prescribing bond of such officers.**

284. Damages against officers for money unlawfully detained. Whenever money received as aforesaid shall be unlawfully detained by any of said officers, and the same shall be sued for in any mode whatever, the plaintiff shall be entitled to recover, besides the sum detained, damages at the rate of twelve per centum per annum from the time of detention until payment.

Code, s. 1890; R. C., c. 78, s. 9; 1819, c. 1002, s. 2; 1868-9, c. 169. **Cases referring casually to section:** Presson v. Boone, 108-87; Gregory v. Morisey, 79-559; State v. Allen, 27-36.

285. Evidence against principal admissible against sureties. In actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors or guardians, when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing which, by law would be admissible and competent for or toward proving the same as against him, shall in like manner be admissible and competent as presumptive evidence only against all or any of his sureties who may be defendants with or without him in said actions.

Code, s. 1345; R. C., c. 44, s. 10; 1844, c. 38; 1881, c. 8. **Judgment against guardian once conclusive against surety, now only presumptive evidence:** McNeill v. Currie, 117-346; Brown v. Pike, 74-531; Moore v. Alexander, 96-36. **Admissions by sheriff evidence as against sureties, when:** State v. Woodside, 30-104. **Record of sheriff's settlements as evidence against sureties on bond:** Davenport v. McKee, 98-500. **Judgment against**

clerk as evidence against sureties: Morgan v. Smith, 95-396. **This section held not to apply in action on indemnity bond of sheriff for tort:** Martin v. Buffaloe, 128-305. **Annual account of guardian presumptive evidence against sureties on bond:** Loftin v. Cobb, 126-58; Armistead v. Harramond, 11-339. **Cited** in Lewis v. Fort, 75-253; Speer v. James, 94-424.

286. Officer liable for the debt, when. When a claim shall be placed in the hands of any sheriff, coroner or constable for collection, and he shall not use due diligence in collecting the same, he shall be liable for the full amount of the claim notwithstanding the debtor may have been at all times and is then able to pay the amount thereof.

Code, s. 1888; R. C., c. 78, s. 3; 1844, c. 64; 1869-70, c. 169, s. 12. **See sections 298 and 302 and annotations thereunder. This section only applies to such claims as are within magistrate's jurisdiction:** Brunhild v. Potter, 107-416; McLaurin v. Buchanan, 60-91; Ellis v. Long, 30-515; State v. Long, 29-379. **Sixteen days delay in collecting held to be negligence, when:** Nixon v. Bagby, 52-4. **Cases against sheriff:** Brunhild v. Potter, 107-416; McLaurin v. Buchanan, 60-91; State v. Allen, 27-36—**against constable:** State v. Galbraith, 65-409; Lipscomb v. Cheek, 61-332; Nixon v. Bagby, 52-4; Dunton v. Doxey, 52-222; State v. Wall, 31-20; Chipley v. Albea, 53-204; Morgan v. Horne, 44-25; State v. Stephens, 25-92; Wills v. Sugg, 25-96. **Claim remaining in constable's hands during two successive terms of office, which bond sued on,** see State v. Wall, 31-20. **Officer is agent of creditor:** State v. Wall, 31-20; Williams v. Williamson, 28-281. **Constable taking claims for collection that are in magistrate's jurisdiction, presumption is that he takes them as constable:** Dunton v. Doxey, 52-222. **Degree of diligence required of constable under this section:** Morgan v. Horne, 44-25; Hearn v. Parker, 52-150.

VI. State Officers.

287. Secretary of state. The secretary of state shall give bond with sufficient surety, approved by the governor and auditor, for the sum of twenty thousand dollars, payable to the state, and conditioned for the faithful performance of his duties. And the bond of the secretary of state shall be deposited in the treasurer's office for safe keeping; and he shall take the oath prescribed for public officers.

Code, s. 3338; 1868-9, c. 270, ss. 42, 43. **See cases under section 281 for liability on bond.**

288. Treasurer. The treasurer shall, after he receives notice of his election, and before he enters upon the execution of the duties of his office, give a bond to the state in the sum of two hundred and fifty thousand dollars, with not less than four sufficient sure-

ties, to be approved by the president of the senate and speaker of the house of representatives, conditioned that he will faithfully execute the duties of his office, which bond shall be deposited in the office of the secretary of state, and shall be deemed to extend to the faithful execution of the office of treasurer by the person elected thereto, until a new election of treasurer be made, and a new bond given by the person elected.

Code, s. 3357; 1868-9, c. 270, s. 74. **Treasurer's bond not only safeguard against misappropriation but against payment of illegal warrants of auditor:** Bank v. Worth, 117-156. **Treasurer no right to pay out money except upon proper warrants:** Arendell v. Worth, 125-111. **As to actions on official bonds generally see section 281.**

289. Treasurer's clerks. The clerks in the treasurer's office shall enter into good and sufficient bonds, payable to the state of North Carolina, in the following sums: The chief clerk, ten thousand dollars, the other clerks, except the clerk charged with the stenographic duties, five thousand dollars each, conditioned upon the faithful performance of the duties of their respective offices, and the faithful accounting for all moneys and things of value, which may come into their hands by virtue or color of their respective offices. These several bonds shall be in addition and cumulative to the official bond of the state treasurer, and shall not be construed to affect in any way the liability of the state treasurer upon his official bond. The bonds shall be approved by the treasurer and, if given in a surety company, the costs thereof, not to exceed twenty cents on the one hundred dollars of penalty, may be paid by the state.

Rev. 1905. **A bond by a clerk to treasurer individually is not an official bond:** Jackson v. Martin, 136-196—**and does not extend beyond clerk's term of office,** Ibid; also Thomas v. Summey, 46-554. **Action on bond given to treasurer individually is barred in three years:** Jackson v. Martin, 136-196.

290. Clerk of supreme court, bond and oath of office. Before undertaking his duties, the clerk of the supreme court shall enter into bond with sufficient surety payable to the state of North Carolina, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with the secretary of state; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh.

Code, s. 958; R. C., c. 33, s. 9; 1812, c. 829, s. 2; 1818, c. 963, s. 5; 1846, c. 28, s. 3; 1799, c. 520, s. 2. **For annotations on official bonds generally see sections 281 and 283.**

291. Keeper of capitol; penalty; when renewed; where deposited. Before entering upon the duties of his office the keeper of the capitol shall execute a bond, with good security, in the sum of two hundred and fifty dollars, payable to the state of North Carolina, and conditioned for the faithful discharge of his duties. The bonds shall be deposited in the office of secretary of state, and be renewed every two years under the care of the board of public buildings; and shall be put in suit whenever in their judgment the conditions thereof, or any of them, may have been broken; and the same shall not be discharged until the whole penalty is exhausted in damages.

Code, s. 2306; R. C., c. 103, s. 6. **Office of keeper of capitol a legislative office:** Cherry v. Burns, 124-761. **For annotations on official bonds generally, see section 281.**

292. Public printer. Any person to whom may be awarded the public printing and binding shall give bond, with approved surety, payable to the state of North Carolina, in the sum of five thousand dollars, conditioned for the faithful performance of his duties and undertakings under his contract. The surety herein required shall justify before some person authorized to administer oaths.

Code, s. 3621; 1899, c. 250, s. 2. **Case involving public printer's bond:** Worth v. Stewart, 122-263.

293. Insurance commissioner. The insurance commissioner shall, before he enters upon the execution of the duties of his office, give a bond to the state in the sum of twenty-five thousand dollars, with sufficient surety, to be approved by the state treasurer, conditioned for the faithful performance of the duties of his office during his term of office; which bond shall be deemed to extend to the faithful execution of the office of insurance commissioner by the person appointed thereto until a new appointment of insurance commissioner be made and a new bond given by the person elected.

1899, c. 54, s. 55; 1905, c. 430, s. 2.

For annotations as to actions on official bonds generally, see sections 281 and 283.

294. Paymaster of state troops. The paymaster of the state troops shall, before he enters on the duties of his office, give bond and sufficient security, in the sum of five thousand dollars, payable to the state, for the faithful accounting for all sums of money which may come into his hands by virtue or color of his office.

Code, s. 3192; R. C., c. 70, s. 30; 1806, c. 708, s. 12. **See annotations under section 281 and 283.**

VII. County Officers.

295. Clerk of superior court. At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it shall be the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than fifteen thousand dollars, payable to the state of North Carolina, and with a condition to be void if he shall account for, and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property, which have come, or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are, or thereafter shall be prescribed by law: Provided, that the bonds of the clerks of the superior courts of Pamlico and Carteret counties may be fixed at an amount not less than five thousand dollars, in the discretion of the county commissioners. Each clerk of the superior court shall furnish the chairman of the board of county commissioners of his county with all notifications furnished him in compliance with section four thousand eight hundred and three of this Revisal concerning any company in which any officer of the county is bonded.

Code, s. 72; 1899, c. 54, s. 52; 1903, c. 747; 1889, c. 7; 1891, c. 385; 1901, c. 32; C. C. P., s. 137; 1895, cc. 270, 271; 1907, c. 103. **How bond proven:** Battle v. Baird, 118-854; Short v. Currie, 53-42. **"By virtue or color of his office" construed:** Thomas v. Connelly, 104-342; Presson v. Boone, 108-78; Sharpe v. Connelly, 105-87; Cassidy ex parte, 95-225; Syme v. Bunting, 91-48; Brown v. Coble, 76-391; Greenlee v. Sudderth, 65-470; McNeill v. Morrison, 63-508; Broughton v. Haywood, 61-380. **County commissioners may grant indulgences till next meeting for bond to be perfected:** Buckman v. Commrs., 80-121. **Clerk's bonds are cumulative:** Moore v. Boudinot, 64-193; Poole v. Cox, 31-69; Hunter v. Routledge, 51-216; Oates v. Bryan, 14-451. **Clerical error in reciting term of office does not necessarily invalidate bond:** Battle v. Baird, 118-855; Sprinkle v. Martin, 69-175; Kello v. Maget, 18-414. **For liability on bond, and actions on same, see sections 296, 281 and 283.**

296. Clerk's bond, how approved; where deposited. The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate

book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds.

Code, s. 73; C. C. P., s. 138. **For annotations on official bonds generally, see sections 281 and 283. How bond proven:** Battle v. Baird, 118-854; Short v. Currie, 53-42.

LIABILITY ON BOND. For funds paid him by commissioner in partition: Smith v. Patton, 131-396. **For failing to issue execution:** McIntyre v. Merritt, 65-558; Bank v. Bobbitt, 111-194; Williamson v. Kerr, 88-10. **For failure to perform new duty added by statute:** Wilmington v. Nutt, 80-265. **For failure to docket and index judgment:** Darden v. Blount, 126-249; Holman v. Miller, 103-118; Dewey v. Sugg, 109-328; Remond v. Station, 116-140. **For failing to take proper guardian bonds:** Topping v. Windley, 99-4. **For preferring one judgment creditor over another in issuing execution:** Bank of Newbern v. Jones, 17-284. **For money coming into his hands as insurer:** Smith v. Patton, 131-396; Presson v. Boone, 108-78; Bd. Education v. Bateman, 102-52; Morgan v. Smith, 95-396; Havens v. Lathene, 75-505; Bd. Commrs. v. Clarke, 73-257; Oats v. Bryan, 14-451; Cox v. Blair, 76-78; Richardson v. Smith, 47-8; State v. Gaines, 30-168. **For breach of duty as receiver of infants' estates:** Waters v. Melson, 112-89; Presson v. Boone, 108-78; Syme v. Bunting, 91-48; Rogers v. Odom, 86-432. **See also sections 281 and 283.**

ACTIONS ON BOND. None can be maintained unless the damages sustained would give an action on the case for neglect of official duty: Jones v. Biggs, 46-364. **Proper parties when suing for proceeds of partition sale:** Smith v. Patton, 131-396. **Demand is necessary before bringing action:** Furman v. Timberlake, 93-66; but see Little v. Richardson, 50-305. **On trial a clerk's bond found in proper custody presumed properly given and accepted:** Battle v. Baird, 118-854. **How bond put in evidence:** Short v. Currie, 53-42. **Right of action which plaintiff has in a judgment which clerk fails to index is assignable:** Redmond v. Staton, 116-140—but simple assignment of the judgment does not assign right of action against clerk: Ibid. **Action for failing to take sufficient administration bond can not be joined with cause of action against administrator:** Mitchell v. Mitchell, 96-14. **Duly certified copy of bond by proper custodian competent evidence:** Battle v. Baird, 118-854. **Where question arises between different sets of sureties:** Sharpe v. Connelly, 105-87; Morgan v. Smith, 95-396. **Judgment against clerk and a surety competent evidence against all sureties:** Morgan v. Smith, 95-396. **Judgment where defendant fails to answer must be by default and inquiry:** Battle v. Baird, 118-855.

297. County treasurer; penalty; when renewed. The county treasurer, before entering upon the duties of his office, shall give bond with three or more sufficient sureties, to be approved by the board of commissioners, payable to the state, conditioned that he will faithfully execute the duties of his office, and pay according to law, and on the warrant of the chairman of the board of commissioners, all moneys which shall come into his hands as treas-

urer, and render a just and true account thereof to the board when required by law, or by the board of commissioners. The penalty of his bond shall be a sum not exceeding the amount of the county and local taxes assessed during the previous year, and the board of commissioners at any time, by an order, may require him to renew, increase or strengthen his bond. A failure to do so within ten days after the service of such an order shall vacate his office and the board shall appoint a successor: Provided, the board of commissioners may fix the bond of the treasurer of Forsyth county at such sum as they may deem best, not less than twenty thousand dollars, and may increase it at any time; and in Craven county the bond of the treasurer shall be equal to the county funds during the preceding year, but not to exceed forty thousand dollars.

Code, s. 766; 1868-9, c. 157, s. 4; 1895, c. 270, s. 2; 1899, c. 132; 1899, c. 207, s. 4; 1903, c. 12, s. 2; 1901, c. 536; 1899, c. 54, s. 52. **Failure to file bond, office vacated:** Kilburn v. Latham, 81-312. **County commissioners are proper parties relator in action on treasurer's bond:** Comrs. v. Magnin, 86-286. **Example of bond held sufficient to protect school moneys:** Ibid. **New duty, added by statute, of being treasurer of board of education, with requirement of special bond, old official bond not liable for school moneys:** Bd. Education v. Bateman, 102-52. **A settlement of outgoing treasurer does not discharge liability on bond:** Comrs. v. McRae, 89-95. **Cited merely** in Koonce v. Comrs., 106-199. **For annotations on official bonds generally, see sections 281, 283.**

298. Sheriff; number; penalty; form. The sheriff shall execute three several bonds, payable to the state of North Carolina, as follows: One conditioned for the collection and settlement of state taxes according to law, a sum not exceeding the amount of the taxes assessed upon the county for state purposes in the previous year; one conditioned for the collection and settlement of county and other local taxes according to law, a sum not exceeding the amount of such county and other local taxes for the previous year. Every sheriff shall deposit the county and other local taxes, by him collected, with the county treasurer, if there be a county treasurer, as often as he shall collect or have in his possession at any one time of such county or local taxes, a sum equal to five hundred dollars. The amount of the third bond, for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

"The condition of the above obligation is such, that whereas the above bounden..... is elected and appointed sheriff of .....county; if, therefore, he shall well and truly execute and due return make of all process and precepts, to him directed,

and pay and satisfy all fees and sums of money, by him received or levied by virtue of any process, into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, his, her or their executors, administrators, attorneys, or agents; and in all other things well, truly and faithfully execute the said office of sheriff, during his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect."

Provided, the bonds of the sheriff in Craven county shall be as follows: One conditioned for the collection, payment and settlement of the county, poor, school and special taxes in a sum double the amount of said taxes, for the previous year; one for the collection, payment and settlement of the public taxes as required by law in a sum double the amount of said taxes for the previous year: Provided, that the aggregate amount of said two bonds shall not be required to exceed the sum of forty thousand dollars. And the amount of the third bond for the due execution and return of process, payment of fees and moneys collected and the faithful execution of his office as sheriff shall not be less than five thousand dollars and no more than fifteen thousand dollars in the discretion of the board of county commissioners; and whenever and as often as the sheriff shall have collected of the county, school or other local and special taxes a sum equal in amount to three hundred dollars he shall immediately pay the same to the treasurer of the county.

Code, s. 2073; R. C., c. 105, s. 13; 1777, c. 118, s. 1; 1823, c. 1223; 1879, c. 109; 1895, c. 270, ss. 1, 2; 1899, c. 207, s. 2; 1903, c. 12; 1899, c. 54, s. 52. **See sections 2812 to 2815.**

THE BOND ITSELF. Must be given before inducted into office: Colvard v. Commrs., 95-515; but see Worley v. Smith, 81-304. **The legislature's power to extend time for settlement of taxes enters into the terms of every bond, and sureties must take notice:** Worth v. Cox, 89-44. **County bond covers school taxes:** Commrs. v. Sutton, 120-298; Tillery v. Candler, 118-888; Lindsay v. Dozier, 44-275. **County commissioners no power to release sureties:** Fidelity Co. v. Fleming, 132-332. **Bond for collection of taxes of one year can not be construed to mean another year:** Prince v. McNeill, 77-398. **Ceremony of acknowledgment in open court and registration not essential:** McLean v. Buchanan, 53-444. **All bonds taken during term are cumulative:** Fidelity Co. v. Fleming, 132-332; Dixon v. Commrs., 80-118; Pickens v. Miller, 83-543; Moore v. Boudinot, 64-190; Bell v. Jasper, 37-597; Poole v. Cox, 31-69; Oats v. Bryan, 14-451. **Sureties on bond have no right to tax-books, when:** Somers v. Commrs., 123-584.

LIABILITY ON BOND. See generally under secions 281, 283 and 286. **Liable for seizing property not subjecct to process:** Martin v. Buffaloe, 128-305; Leavering v. Smith, 115-385; Draper v. Buxton, 90-182—**for taxes,** Williamson v. Jones, 127-178; Commrs. v. White, 123-534; McGuire v.

Williams, 123-349; Commrs. v. Wall, 117-377; Liles v. Rogers, 113-197; Worth v. Cox, 89-44; Vann v. Pipkin, 77-408; Commrs. v. Clarke, 73-255—**for failing to lay off personal property exemptions,** Scott v. Kenan, 94-296—**only for some breach of duty specifically described in bond,** Eaton v. Kelly, 72-110, but see State v. Bradshaw, 32-229; also under sec. 281—**for costs collected and not paid to clerk,** Jackson v. Maultsby, 78-174—**for failure to pay over money collected on execution,** Walters v. Moore, 90-41; Fagan v. Williamson, 53-433; Brooks v. Gibbs, 47-326; Ellis v. Long, 30-513—**for sale of exempt property,** Hobbs v. Barefoot, 104-224—**for failure to collect money on execution,** Erwin v. Lowrance, 64-483—**for failure to arrest defendant in arrest and bail,** Jenkins v. Troutman, 52-169; Houser and Wilson v. Hampton, 29-333—**for amercements,** Hobbs v. Barefoot, 104-224; see also sections 2815 and 2817—**for allowing debtor to escape,** Mabry v. Turrentine, 30-201; Willey v. Eure, 53-320—**for failure to apply money to proper execution,** Titman v. Rhyne, 89-64—**for failure to take proper bail bond,** Evans v. Blalock, 47-377. **Bond not liable for money paid sheriff on judgment when he had no execution,** Mills v. Allen, 52-564—**nor unless duty alleged to be unperformed is set out as a condition therein,** Eaton v. Kelly, 72-110.

PROCEDURE IN ACTION ON. **For summary remedy on bond,** see section 283. **For action on official bonds generally,** see section 281. **Sheriff's audited account is prima facie correct and burden is on plaintiff to show otherwise:** Williamson v. Jones, 127-178; Commrs. v. White, 123-534; Davenport v. McKee, 98-500. **County commissioners proper relator in action for school taxes:** Commrs. v. Sutton, 120-298; see also sec. 281. **Demand on sheriff before suit for taxes not necessary,** McGuire v. Williams, 123-349; State v. McIntosh, 31-307. **Copy of bond certified by clerk competent evidence:** Erwin v. Lowrance, 64-483. **Where sheriff pleads in action to recover taxes that he has not received proper credits:** Williamson v. Jones, 127-178—**that tax was invalid,** McGuire v. Williams, 123-349—**that he is entitled to credit for insolvents,** Commrs. v. Wall, 117-377—**that his creditors have attached books,** Ibid. **Who relator in action on bond,** see section 281. **Where plaintiff in execution can sue on official or indemnity bond,** Martin v. Buffaloe, 128-305. **What amounts to plea in bar necessary to be decided before reference:** Commrs. v. White, 123-534. **Where sureties plead that amercement was fraudulently obtained:** State v. Woodside, 29-296—**that taxes covered by their bond were used to pay tax covered by other bond,** Liles v. Rogers, 113-197—**that time for sheriff to settle was extended without their consent,** Worth v. Cox, 89-44—**that office was really vacant, sheriff having failed to make settlement and renew bond,** Vann v. Pipkin, 77-408—**that bond was never accepted and registered,** Jenkins v. Howell, 65-61—**that they are not liable for trespass of sheriff under color of office,** State v. Brown, 33-141; State v. Long, 30-415.

299. Coroner; penalty; oath of office. Every coroner shall execute an undertaking for the faithful discharge of the duties of his office with good surety, in the sum of two thousand dollars, payable to the state of North Carolina and approved by the board of county commissioners.

Code, s. 661; R. C., c. 25, s. 2; 1791, c. 342, ss. 1, 2; 1820, c. 1047, ss. 1, 2; 1899, c. 54, s. 52. Mabry v. Turrentine, 30-201. **For actions on official bonds see sections 281 and 283, and for actions on coroner's bond acting as sheriff, see section 298.**

300. Coroners' bonds registered. All official bonds of coroners shall be duly proved, certified, registered and filed as sheriffs' bonds are required to be; and certified copies of the same, from the register's office, shall be received and read in evidence in the like cases, and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence.

Code, s. 662; 1860-1, c. 18.

301. Register of deeds. Every register of deeds shall give bond with sufficient surety, to be approved by the board of county commissioners, in a sum not exceeding ten thousand dollars, payable to the state, and conditioned for the safe keeping of the books and records, and for the faithful discharge of the duties of his office, and shall renew his bond annually on the first Monday in December.

Code, s. 3648; 1868, c. 35, s. 3; 1876-7, c. 276, s. 5; 1899, c. 54, s. 52.

THE BOND. Proper construction of condition in bond; see Kivett v. Young, 106-567 and cases there cited; also Cole v. Patterson, 97-365; Joyner v. Roberts, 112-111. **Failing to give bond, office vacated:** Cole v. Patterson, 97-360.

ACTIONS ON THE BOND. For wrongly issuing marriage license: Furr v. Johnson, 140-157; Joyner v. Roberts, 112-111; also see under sec. 2090. **For failing to properly index recorded mortgage:** Daniel v. Grizzard, 117-105. **For wrongly recording amount in a mortgage:** Kivett v. Young, 106-567. **For actions on official bonds generally, see sections 281 and 283.**

302. Constable, where registered; fees, how paid. The board of commissioners of each county shall require of each constable, elected or appointed for a township, on entering upon the duties of his office, to give a bond with good surety, payable to the state of North Carolina, in a sum not exceeding one thousand dollars, conditioned as well for the faithful discharge of his duty as constable, as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same may be due. Said bond shall be duly proved and registered, and after registration, filed in the office of the register of deeds; and certified copies of the same from the register's office shall be received and read in evidence in all actions and proceedings where the original might be. The fees for proving and registering the bond of constable shall be paid by the constable. In Stanly county the fees shall be paid by the county.

Code, s. 647; R. C., c. 24, s. 7; 1818, c. 980; 1820, c. 1045, s. 2; 1833, c. 17; 1869-70, c. 185; 1899, c. 54, s. 52; 1891, c. 229.

THE BOND ITSELF. Void if taken by improper person: State v. Shirley, 23-596. Its registration: Warren v. Boyd, 120-56. Where four persons signed bond as obligors, but constable's name did not appear in condition nor did it appear who was constable, condition held void: Grier v. Hill, 51-572. Where bond made payable to the governor, and county court records were silent as to appointment and qualifications of constable, held a common law bond only: Reid v. Humphreys, 52-258. Condition for the collection of claims only refers to those within magistrate's jurisdiction: Brunhild v. Potter, 107-416; McLaurin v. Buchanan, 60-91; Ellis v. Long, 30-515; State v. Long, 29-379; Dunton v. Doxey, 52-222; State v. Outland, 33-134; State v. Stephens, 25-92.

LIABILITY ON BONDS. See under sections 281, 283 and 286. For false imprisonment by constable as such: Warren v. Boyd, 120-56. For failing to turn over money collected: Governor v. Bailey, 10-463. For failing to collect claims placed in his hands: State v. Galbraith, 65-409; Lipscomb v. Cheek, 61-332; Nixon v. Bagby, 52-4; State v. Wall, 31-20; Chipley v. Albea, 53-204; Dunton v. Doxey, 52-222; Governor v. Carraway, 14-436; Morgan v. Horne, 44-25; State v. Stephens, 25-92; Wills v, Sugg, 25-96. For taxes collected: Greensboro v. Scott, 84-184. For money collected on claim and misappropriated: Kivett v. Massey, 63-240. For failing to execute process: Hearn v. Parker, 52-150. Are constables' bonds cumulative since term extended to two years, see Moore v. Boudinot, 64-190; Goforth v. Mackey, 25-25. Where took claim as constable but collected it as deputy sheriff: Ringold v. McGowan, 34-44. General scope of his liability as collector of claims: State v. Holcombe, 24-211; Hearn v. Parker, 52-150; Morgan v. Horne, 44-25, see also in paragraph above. Constable accepting claims within magistrates' jurisdiction presumed to accept them as constable: Dunton v. Doxey, 52-222. Not liable for releasing prisoner arrested under void process: Appomattox Co. v. Buffaloe, 121-37.

ACTIONS ON BOND. See under sections 281, 283 and 286. For false imprisonment, held complaint sufficient: Warren v. Boyd, 120-56. Surety can not sue co-sureties as relator for default of principal: Sanders v. Bean, 44-318; see under section 281. In action for return of note, constable pleads he took judgment on it: Gregory v. Hooks, 33-371. Demand necessary before suing for money collected on claim: Kivett v. Massey, 63-240; Potter v. Sturges, 12-79; White v. Miller, 20-50; Wills v. Sugg, 25-96. Where negligence extended over period of two bonds, both liable: State v. Wall, 31-20.

CASES HAVING SLIGHT BEARING UPON SECTION: State v. James, 78-455; State v. Ferguson, 76-197; State v. Outland, 33-134; Williams v. Williamson, 28-281.

303. County surveyor. The county surveyor of each county shall enter into bond in the sum of one thousand dollars payable to the state of North Carolina, with sufficient surety for the faithful discharge of the duties of his office.

Code, s. 2762; R. C., c. 42, s. 5; 1777, c. 114, s. 13. **See section 281 for actions on official bonds.**

304. Entry-taker. Every entry-taker shall enter into bond in the sum of five hundred dollars, payable to the state, with sufficient security to be approved by the county commissioners, for the faithful discharge of the duties of his office.

Code, s. 2758; 1868-9, c. 173, s. 3. **For actions on official bonds see section 281.**

305. Wreck commissioner. Every person appointed a wreck commissioner shall enter into a bond, with good and sufficient surety, in the sum of two thousand dollars, payable to the state of North Carolina and conditioned for the faithful performance of his duties, which shall be approved by the board of county commissioners and deposited in the office of the clerk of the superior court.

1899, c. 79, s. 10. **For actions on official bonds, see section 281.**

306. Standard-keeper. The person elected as standard-keeper of any county shall give bond, with good and sufficient surety, payable to the state of North Carolina, in the sum of two hundred dollars, conditioned for the safe keeping of weights and measures, stamps and brands of said county, and for the faithful performance of the duties of his office.

Code, s. 3840; R. C., c. 117, s. 4; 1741, c. 32, s. 3; 1816, c. 901, s. 2; 1827, c. 22, s. 3; 1883, c. 393.

VIII. Pilots.

307. Pilot; may be enlarged; where filed. Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the state of North Carolina, in the sum of five hundred dollars, with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained.

Code, s. 3487; R. C., c. 85, s. 6; 1784, c. 207, s. 3. **For actions on official bonds, see section 281.**

IX. Duty of County Commissioners.

308. County officials' bonds; term of; examined annually; increased when. Every clerk, treasurer, sheriff, coroner, register of deeds, surveyor, and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of the office to which such officers are chosen, respectively. The bonds shall be carefully examined on the first Monday in December of every year, and if it shall appear that the security has been impaired, or for any cause become insufficient to cover the amount of money or property or to secure the faithful performance of the duties of the office, then the bond shall be renewed or strengthened, the insufficient security increased within the limits herein prescribed, and the impaired shall be made good; but no renewal, or strengthening, or additional security shall increase the penalty of said bond beyond the limits herein prescribed for the term of office.

Code, s. 1874; 1869-70, c. 169; 1876-7, c. 275, s. 5; 1899, c. 54, s. 54; 1895, c. 207, s. 4. **Commissioners can not release sureties on sheriff's bond:** Fid. Co. v. Fleming, 132-332. **Sheriff must give all three bonds before being inducted into office:** Dixon v. Commrs., 80-118; Worley v. Smith, 81-304; Bray v. Barnard, 109-44. **Sheriff failing to take notice of summons of commissioners to renew or justify bond, office declared vacant:** People v. Green, 75-329.

309. Vacancy declared on failure to renew bond. Upon the failure of any such officer to make such renewal of his bond, it is the duty of the board of commissioners, by an order to be entered of record, to declare his office vacant, and to proceed forthwith to appoint a successor, if the power of filling the vacancy in the particular case be vested in the board of commissioners; but if otherwise, the said board shall immediately inform the proper person having the power of appointment of the fact of such vacancy.

Code, s. 1875; 1869-70, c. 169, s. 2. **Cases of failure to give first bond:** Cole v. Patterson, 97-360; Kilburn v. Latham, 81-312; Worley v. Smith, 81-304; Dixon v. Commrs., 80-118. **Upon failure to give or renew bond, office declared vacant:** Bray v. Barnard, 109-44; Kilburn v. Latham, 81-312; Worley v. Smith, 81-304; People v. Green, 75-329—**but sheriff can not be deprived of his office without a day in court:** Vann v. Pipkin, 77-408.

310. Justification of surety on official. Every surety on an official bond required by law to be taken or renewed and approved by the board of commissioners, shall take and subscribe an oath before the chairman of the board or some person authorized by law

to administer an oath, that he is worth a certain sum (which shall be not less than one thousand dollars) over and above all his debts and liabilities and his homestead and personal property exemptions, and the sum thus sworn to shall in no case be less in the aggregate than the penalty of the bond. But nothing herein shall be construed to abridge the power of the said board of commissioners to require the personal presence of any such surety before the board when the bond is offered, or at such subsequent time as the board may fix for examination as to his financial condition or other qualifications as surety.

Code, s. 1876; 1869-70, c. 169, s. 3; 1879, c. 207; 1889, c. 7; 1891, c. 385; 1901, c. 32. **Cited** in Cole v. Patterson, 97-365. **Failure of sheriff to respond to summons to justify, effect:** People v. Green, 75-329.

311. County commissioners to approve bonds; custody; how acknowledged. The approval of all official bonds taken or renewed by the board of commissioners shall be recorded by their clerk. Every such bond shall be acknowledged by the parties thereto or proved by a subscribing witness, before the chairman of the board of commissioners, or before the clerk of the superior court, registered in the register's office in a separate book to be kept for the registration of official bonds, and the original bond, with the approval of the commissioners endorsed thereon and certified by their chairman, shall be deposited with the clerk of the superior court, except the bond of said clerk, which shall be deposited with the register of deeds for safe keeping.

Code, s. 1877; 1869-70, c. 169, s. 4; 1879, c. 207, s. 2.

312. Clerk of board to record yeas and nays on approval; penalty for failure. It is the duty of the clerk of the board of commissioners to record in the proceedings of the board the names of those commissioners who are present at the time of the approval of any official bond, and who shall vote for such approval, and every clerk neglecting to make such record beside other punishment shall forfeit his office. Any commissioner may cause his written dissent to be entered on the records of the board.

Code, ss. 1878, 1881; 1869-70, c. 169, ss. 5, 8; R. C., c. 78, s. 7; 1790, c. 327; 1809, c. 777.

313. Commissioner liable as surety, when. Every commissioner who approves an official bond, which he knows to be, or which by reasonable diligence he could have discovered to have been, insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond.

152-445

Code, s. 1879; 1869-70, c. 169, s. 6. **Cited** in Cole v. Patterson, 97-365.

314. Record of board conclusive evidence of facts stated therein on prosecution. In all actions under the preceding section, a copy of the proceedings of the board of commissioners in the particular case, certified by their clerk under his hand and seal of the county, shall be conclusive evidence of the facts in such record alleged and set forth.

Code, s. 1881; 1869-70, c. 169, s. 8.

315. Commissioners can not be sureties where they may approve. No member of the board of commissioners, or any other person authorized to take official bonds, shall sign as surety on any official bond, upon the sufficiency of which the board of which he is a member may have to pass.

Code, s. 1887; 1874-5, c. 120, s. 3.

X. Duty Superior Court Judge.

316. Official bond insufficient, new one required; office vacated for failure; successor appointed. Whenever oath shall be made before any judge of the superior court by five respectable citizens of any county within his district that after diligent inquiry made they verily believe that the bond of any officer of such county, which has been accepted by the board of commissioners, is insufficient either in the amount of the penalty or in the ability of the sureties, it shall be the duty of such judge to cause a notice to be served upon such officer requiring him to appear at some stated time and place and justify his bond by evidence other than that of himself or his sureties. And if this evidence so produced shall fail to satisfy the judge that the bond is sufficient, both in amount and the ability of the sureties, he shall give time to the officer, not exceeding twenty days, to give another bond, the judge fixing the amount of the new bond, when there is a deficiency in that particular. And upon failure to give a good bond to the satisfaction of the judge within the twenty days, he shall declare the office vacant, and if the appointment be with himself, he shall immediately proceed to fill the vacancy; and if not, he shall notify the persons having the appointing power that they may proceed as aforesaid.

Code, s. 1885; 1874-5, c. 120. **Proceeding as to clerk:** Mitchell v. West, 74-485—**as to sheriff,** Mitchell v. Hubbs, 74-484—**as to treasurer,** Mitchell v. Kilburn, 74-483.

317. Appointee to give bond; official bonds, liabilities. The person so appointed shall give bond before the judge, and the bond so given shall in all respects be subject to the requirements of the law in relation to official bonds; and all official bonds shall be considered debts and liabilities.

Code, s. 1886; 1874-5, c. 120, s. 2. **See section 281 for actions on official bonds.**

318. Judge to file statement of proceedings with commissioners. Whenever a vacancy shall be declared by the judge, he shall file a written statement of all his proceedings with the clerk of the board of commissioners, to be recorded by him.

Code, s. 1887; 1874-5, c. 120, s. 3.

XI. Fiduciaries.

319. Executors, administrators or collectors; penalty; condition. Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. The penalty of such bond must be at least double the value of all the personal property of the deceased; such value to be ascertained by the clerk by examination on oath of the applicant or of some other competent person: Provided, that if the personal property of any decedent shall be insufficient to pay his debts and the charges of administration, and it shall become necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application shall be made.

Code, s. 1388; 1870-1, c. 93; C. C. P., s. 468. **See Administration, sections 29, 30. For action on bond of administrator see section 30.**

Bonds Cumulative. Pickens v. Miller, 85-543; Jones v. Hays, 38-502; see also Fidelity Co. v. Fleming, 132-332 and cases there cited. **Clerk to determine value of estate:** Williams v. Neville, 108-565. **Bond only guarantees good faith, ordinary care and reasonable diligence:** Smith v. Patton, 131-399; Moore v. Eure, 101-11; Atkinson v. Whitehead, 66-296. **All moneys received by administrator under color of the administration are protected by bond:** Lafferty v. Young, 125-296; Shuffler v. Turner, 111-297; Jennings v. Copeland, 90-579. **The giving of the bond is not an essential condition of the order appointing administrator:** Howerton v. Sexton, 104-86; Harrison v. Cox, 95-357; Hughes v. Hodges, 94-56; Spencer v. Cahoon, 18-27; 15-225; Hoskins v. Miller, 13-360.

320. Public administrator. The public administrator shall enter into bond, with three or more sureties, approved by the clerk, in the penal sum of eight thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office, and obey all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands, and such bond shall be renewed every two years. Whenever the aggregate value of the real and personal property belonging to the several estates in the hands of the public administrator shall exceed the one-half of his bond, the clerk shall require him to enlarge his bond in amount so as to cover, at all times, at least the double of such aggregate.

Code, ss. 1390, 1391, 1392; 1868-9, c. 113, ss. 2, 3, 4. **For actions on bond of administrator, see section 30. General law stated as to requirement as to bond;** In re Brinson, 73-279. **Where bond was not renewed, but upon notice good bond was offered, error to refuse to accept such bond:** Trotter v. Mitchell, 115-193.

321. Public guardian. The public guardian shall enter into bond with three or more sureties, approved by the clerk of the superior court, in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands.

Code, s. 1557; 1874-5, c. 221, s. 2.

322. Public guardian's bond enlarged. Whenever the aggregate value of the real and personal estate belonging to his several wards shall exceed one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian.

Code, s. 1558; 1874-5, c. 221, s. 3.

323. Guardians to give bond; condition. Every guardian of an estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property, and the rents and profits issuing from the real estate of the infant; which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such,

and obey all lawful orders of the clerk or judge, touching the guardianship of the estate committed to him: Provided, if on application by the guardian by petition the court or judge shall decree a sale for any of the causes set forth in section one thousand seven hundred and ninety-eight of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold.

Code, s. 1574; R. C., c. 54, s. 5; 1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214. **See sections 1777 to 1785 both inclusive. Clerk's failure to require sufficient, renders him liable:** Howerton v. Sexton, 104-75; Topping v. Windley, 99-4.

THE BOND ITSELF. Where penalty was left blank but afterwards filled out by person intrusted with bond to deliver, and clerk without notice of defect, paid over fund, held sureties liable: Rollins v. Ebbs, 138-140; but see same case in 137-355. **Bond only guarantees good faith,** ordinary care and reasonable diligence: Smith v. Patton, 131-397; Moore v. Eure, 101-11; Atkinson v. Whitehead, 66-296. **The giving of bond is not essential to validity of appointment:** Howerton v. Sexton, 104-75 and cases therein cited. **Guardians' bonds are cumulative:** Jones v. Blanton, 41-115; Bell v. Jasper, 37-597; Jones v. Hays, 38-502.

LIABILITY ON BOND. Breaches of bond specified in dissenting opinion in Self v. Shugart, 135-191. **For general disregard of duty in not sending** ward to school but allowing him to waste large estate, even though on coming of age ward signs release to him of all claims: Boyett v. Hurst, 54-166. **For failing to account for money received:** Topping v. Windley, 99-4; Humble v. Mebane, 89-410; Rollins v. Ebbs, 138-140—**for moneys he should have collected:** Loftin v. Cobb, 126-58; Harris v. Harrison, 78-202. **Not liable for leaving money in executor's hands to defend suit against ward's property;** Matthews v. Downs, 54-333—**nor for allowing** ward to marry under age "in disparagement:" Shutt v. Carloss, 36-232. **Not liable for money stolen from him where diligence used to recover:** Atkinson v. Whitehead, 66-295. **Not liable for failure to sue to recover land:** Cross v. Craven, 120-331—**but is, for land sold for taxes:** Ibid. **Not liable on bond for note signed by him for board and tuition of ward:** McKinnon v. McKinnon, 81-201. **Where sureties deny liability because penalty blank not filled when they sign:** Rollins v. Ebbs, 138-140—**because they were told others would also sign:** Barnes v. Lewis, 73-138.

ACTIONS ON BOND. Should be brought in name of state for benefit of plaintiff: Norman v. Walker, 101-24; Carmichael v. Moore, 88-29; Williams v. McNair, 98-332; Dorsey v. R. R., 91-201; Jones v. McKinnon, 87-294; McKinnon v. McKinnon, 81-201; but see Norman v. Dunbar, 53-317. **Reference can not be had until plea in bar is decided:** Humble v. Mebane, 89-410. **Account of guardian as evidence:** Loftin v. Cobb, 126-58. **Ward's right of action against guardian accrues upon his arriving at 21:** Self v. Shugart, 135-188. **How judgment rendered on bond:** Anthony v. Estes, 101-541. **Where ward can sue several, he may elect:** Loftin v. Cobb, 126-58. **Surety on bond competent witness as to insolvency of bond if prin-**

cipal is dead: Topping v. Windley, 99-4. Where one guardian sues another in another state: Horton v. Horton, 39-54. Surety claiming he was deceived in signing by statement that another would sign whose name was in bond, evidence not admissible: Barnes v. Lewis, 73-138. Ex parte settlement as evidence: Luton v. Wilcox, 83-20; Turner v. Turner, 104-566. Surety can not deny that guardian properly received funds when he received them as guardian: Topping v. Windley, 99-4. Creditor can not sue: McKinnon v. McKinnon, 81-201. For statute of limitations barring action see section 393.

324. Guardian to renew bond every three years. Every guardian shall renew his bond before the clerk of the superior court every three years during the continuance of the guardianship.

Code, s. 1581. Clerk liable if he fails to require renewals: Topping v. Windley, 99-4; Howerton v. Sexton, 104-75.

CHAPTER 10.

BOUNDARIES.

325. May be established by special proceeding. The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated. 152-349

1893, c. 22. For annotations see next section.

326. Procedure for establishing. The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof: Provided, that either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the ques-

tion shall be heard de novo. When final judgment is given in this proceeding the court shall issue an order to the said surveyor to run and mark said line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket. The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. The occupation of land shall constitute sufficient ownership for the purposes of this chapter.

1893, c. 22; 1903, c. 21. **For additional remedy when records are burned, see section 328. This processioning act is similar to the "writ of perambulation" at common law in some respects:** Green v. Williams, 144-63. **Purpose of passage of statute:** Stanaland v. Rabon, 140-202. **Supersedes mode of processioning under Chap. 48 of the Code:** Williams v. Hughes, 124-3; Basnight v. Meekins, 121-23—**and must be strictly followed in all material respects:** Forney v. Williamson, 98-329. **Where there is a real dispute as to boundary, processioning is a matter of right:** Green v. Williams, 144-60. **Where title to a tract of land has been settled in one action the losing party can not reopen the question by a proceeding to have the land processioned:** Holley v. Holley, 96-229.

EVIDENCE. Possession is sufficient evidence of ownership under this proceeding: Williams v. Hughes, 124-3. **Possession defined under this chapter:** Basnight v. Meekins, 121-25. **Plaintiff stopping his line at end of distance, when call is for natural object or line beyond, must show what:** Hill v. Dalton, 140-9. **Where natural object can not be found or place where it was located, course and distance prevails:** Echerd v. Johnson, 126-409; Redmon v. Stepp, 100-212. **Lines of senior grant, when controlling object, can not be established by lines of junior grant:** Hill v. Dalton, 140-9, also 136-339; Sasser v. Herring, 14-340; Euliss v. McAdams, 108-507. **Parol evidence to remove latent ambiguities as to boundaries:** Lewis v. Roper Lumber Co., 113-57; Wynne v. Alexander, 29-237; Bullard v Barksdale, 33-461; Hurley v. Morgan, 18-425; Reed v. Schenck, 13-415; Loften v. Heath, 3-347; Bustin v. Christie, 3-99; Archibald v. Davis, 50-322; Waters v. Simmons, 52-54; Slade v. Green, 9-218. **Declarations of deceased persons to locate boundaries,** see Hill v. Dalton, 140-9; Yow v. Hamilton, 136-357; Shaffer v. Gaynor, 117-15; Bethea v. Byrd, 95-311; Smith v. Headrick, 93-210; Mason v. McCormick, 85-226; Huffman v. Walker, 83-411; Caldwell v. Neely, 81-114; Hedrick v. Gabble, 63-48; Toole v. Peterson, 31-180; Dancy v. Sugg, 19-515; Hartzog v. Hubbard, 19-241; Sasser v. Herring, 14-340; Gervin v. Meredith, 4-439; Harris v. Powell, 3-349. **Cases where it is given in testimony that lines were marked at time of survey when land was purchased in such a manner as to estop parties from setting up other boundaries:** Fincannon v. Sudderth, 144-587; Elliott v. Jefferson, 133-207. **To establish lost corners:** Caraway v. Chancy, 51-361; Addington v. Jones, 52-582; Topping v. Sadler, 50-357; Safret v. Hartman, 50-185; McNeill v. Massey, 10-91; Cherry v. Slade, 7-82; Den v. Green, 9-218. **General reputation as**

evidence see Echerd v. Johnson, 126-409; Mendenhall v. Cassells, 20-43.

PROCEDURE. **Court decides what are the boundaries and the jury finds where they are:** Echerd v. Johnson, 126-409. **Burden of proof is upon plaintiff to locate line:** Green v. Williams, 144-60; Woody v. Fountain, 143-66; Hill v. Dalton, 140-9; 136-339; Echerd v. Johnson, 126-409. **An affidavit filed by defendant denying plaintiff's allegations treated as an answer:** Scott v. Kellum, 117-664. **Injunction not granted in this proceeding, no substantive relief being afforded by it:** Wilson v. Alleghany Co., 124-7—**but this may not be so since the passage of section 717. Title to property is not in issue where answer does not deny the boundary set out or denies only the boundary:** Woody v. Fountain, 143-68—**but where, since the passage of the act, now section 717, the defendant denies plaintiff's title, an issue as to the title should be framed by the clerk and the cause transferred to the civil issue docket for trial in the superior court,** Woody v. Fountain, 143-66; Davis v. Wall, 142-452; Stanaland v. Rabon, 140-202; Smith v. Johnson, 137-43; Parker v. Taylor, 133-104—**the proceeding being converted into an action to quiet title with all the rules governing same,** Woody v. Fountain, 143-71—**or into an action of ejectment,** Davis v. Wall, 142-452; Parker v. Taylor, 133-104. **Where parties are both in possession, claiming to own their respective tracts, and the pleadings raise the issue as to dividing line, it is error to dismiss the proceeding and to try it as an action of ejectment simply because question of title incidentally arises:** Green v. Williams, 144-60. **Judgment of clerk, where defendant raises no issue of title; effect:** Parker v. Taylor, 133-103; Williams v. Hughes, 124-3; Midgett v. Midgett, 129-21. **This proceeding no bar to action of ejectment:** Vandyke v. Farris, 126-744. **Report of processioners:** Roberts v. Dickey, 110-67; Euliss v. McAdams, 101-391—**under prior law,** Hoyle v. Wilson, 29-466; Matthews v. Matthews, 26-155; Carpenter v. Whitworth, 25-204; Cansler v. Hoke, 14-268; Wilson v. Shufford, 7-504. **Setting aside report of processioners:** Martin v. Flippin, 101-452. **The survey, how made:** Norwood v. Crawford, 114-513; Porter v. Durham, 90-55. **Cases construing prior laws:** Forney v. Williamson, 98-329; Holley v. Holley, 96-229; Oakley v. Anderson, 93-109; Porter v. Durham, 90-57; Hoyle v. Wilson, 29-466; Matthews v. Matthews, 26-155; Carpenter v. Whitworth, 25-204; Cansler v. Hoke, 14-268; Willson v. Shufford, 7-504.

CHAPTER 11.

BURNT AND LOST RECORDS.

327. Certified copies of destroyed records received in evidence. Whenever the office of any registry shall have been, or may be destroyed by fire or other accident, and the records and other papers thereof be burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certi-

fied exemplifications would be. Such copies, when the court shall be satisfied of their genuineness, may be ordered to be recorded or registered.

153-23

Code, s. 55. **This section does not have effect to exclude parol testimony to prove contents:** Varner v. Johnston, 112-570; Hopper v. Justice, 111-418; Mobley v. Watts, 98-284. **Certified copy of deed can not be changed by parol testimony as to what original contained:** Hopper v. Justice, 111-418. **A copy should always be produced, but if no copy, then proof may be by parol:** Cowles v. Hardin, 91-233; Dumas v. Powell, 14-103; Baker v. Webb, 2-43.

328. Original papers may be again recorded; survey may be made by petition before clerk. All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. Whenever any conveyance of real estate, or any right or interest therein, shall have been lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided for in chapter ten, or he may proceed in the following manner to establish both the boundaries and nature of his estate: He shall file his petition before the clerk of the superior court, setting forth the location and boundaries of his land, whose land it adjoins, and the estate claimed therein, and praying to have his own boundaries established, and the nature of his estate declared. All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings, and thereupon, unless they or some of them shall, by answer on oath, deny the truth of the matters alleged, or some of them, the clerk of the superior court shall order a surveyor to run and designate the boundaries of the petitioner's land, return his survey, with the plot thereof, to court, which, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same, next before the petitioner: Provided, that in all cases wherein the process of surveying shall be disputed, and the surveyor shall be forbidden to proceed by any person interested, the same proceedings shall be had as under chapter ten. The petitioner shall set forth the whole substance of the conveyance as truly and specifically as he can, and if any of the persons notified shall, by answer, deny the truth thereof, the clerk of the superior court shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried, and on their verdict and the pleadings, the judge shall adjudge the

rights of the parties, and declare the contents of the deed, if any deed be found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed.

Code, s. 56. **This is an enabling statute, giving an additional, but not exclusive, remedy:** Jones v. Ballou, 139-526; Cowles v. Hardin, 91-231. **Plaintiff can depend upon rules of common law to set it up:** Hopper v. Justice, 111-420; Mobley v. Watts, 98-284; Cowles v. Hardin, 91-231. **When proceeding brought hereunder, requirements must be complied with:** Cowles v. Hardin, 79-577. **Before a deed can be made plaintiff must clearly prove that such a deed once existed, its legal operation and its loss:** Plummer v. Baskerville, 36-252; Loftin v. Loftin, 96-94.

329. Copies of lost wills may be admitted to probate. In all counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, have been or may be lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, and stating that said copy is a correct one, such copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills; and the proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it shall appear that said clerk has died or left the state, then his signature shall be proven by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper writing purporting to be his last will and testament.

Code, s. 57. **Probate of lost will must be made before clerk:** McCormick v. Jernigan, 110-406. **No statute of limitation applies to this proceeding:** Ibid.

330. Certified copy of will evidence; letters testamentary granted. In any action or proceeding at law, wherein it may become necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will shall have been admitted to probate, the clerk of the superior court shall thereupon issue letters testamentary.

Code, s. 58.

331. Contents of destroyed will proved on petition before clerk. Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief, and all persons having an interest under the same shall be made parties, and if the truth of such petition be denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge, shall be recorded as the will of the testator. Any devisee or legatee shall be a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same.

Code, s. 59. **Evidence to prove contents:** Cox v. Lumber Co., 124-78; Varner v. Johnston, 112-570; Mobley v. Watts, 98-284—**to prove existence of will,** Cox v. Lumber Co., 124-78. **Statute of limitations:** Varner v. Johnston, 112-570.

332. Destroyed judgments and proceedings perpetuated by petition in court having original jurisdiction. Every person desirous of perpetuating the contents of any destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate, and if, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed.

Code, s. 60. **Restored record can not be collaterally attacked:** Branch v. Griffin, 99-173.

333. Color of title, how determined. Every person who shall have been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state,

shall be deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession shall have commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, will make affidavit and produce such proof as shall be satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original, nor any copy thereof, is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction.

Code, s. 61. **Case in which this section relied upon:** Hill v. Overton, 81-393.

334. Action on destroyed official bonds. Actions on official or other bonds lodged in any office which are destroyed with the registry thereof, may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity.

Code, s. 62. **Lost bonds must be set up in a court of equity:** McCormick v. Jernigan, 110-406.

335. Witness tickets destroyed, others filed. The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof.

Code, s. 63.

336. Lost conveyances, how replaced. Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance.

Code, s. 64.

337. Records of courts admissible to prove contents of deeds, wills, etc. The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any

case, shall be admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits may have been informally certified; and when offered in evidence shall have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited, were original.

Code, s. 65. Fain v. Gaddis, 144-765.

338. Copies of deeds, etc., mentioned in preceding section may be registered. The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in the preceding section, may be recorded or registered on application to the clerk of the superior court, and due proof that the original thereof was genuine.

Code, s. 66.

339. Rules for petitions under this chapter. The following rules shall be observed in petitions and motions under this chapter: The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information and belief; the instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered. All persons interested in the prayers of the petition or decree, shall be made parties. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk of the superior court. The costs of every action under this chapter shall be paid as the court may decree. Appeals shall be allowed as in all other cases, and where the error alleged shall be an erroneous finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below. And it shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices.

Code, s. 67; 1893, c. 295. **Parties to proceeding:** Cowles v. Hardin, 79-577. **Verification of petition:** Cowles v. Hardin, 79-577. **Cases having some bearing:** Flemming v. Roberts, 77-415; Dail v. Sugg, 85-104.

340. Records allowed under this chapter have same effect as original. The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries.

Code, s. 68. **Cited** in Waters v. Crabtree, 105-402.

341. Recitals of decrees, records, etc., in deeds executed prior to destruction thereof prima facie evidence of existence. The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper writing, shall be deemed, taken and recognized as true in fact, and shall be prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed, or paper writing, and shall be to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them.

153-195

Code, s. 69. **Judgment roll lost, contents proven by minute docket:** Everett v. Newton, 118-919. **Recitals in deeds evidence of regularity of court proceedings:** Hare v. Holloman, 94-14; Everett v. Newton, 118-919—**evidence of facts and authority set out:** Irvin v. Clark, 98-437. **Recitals of record in a deed executed by virtue of court proceedings prior to 1865, prima facie evidence of existence and validity of record:** Isler v. Isler, 88-576. **Existence and validity of execution proven by recitals in sheriff's deed:** Dail v. Sugg, 85-104. **Cases merely citing section:** Lumber Co. v. Sanford, 112-655; In re Thomas, 111-416.

342. Deed prima facie evidence of records recited therein. Such deed of conveyance, or other paper writing, executed as aforesaid, and registered according to law, shall be allowed to be read in any suit now pending or which may hereafter be instituted in any court of this state, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or

further restoration or reinstatement of said decree, order, judgment, or record, than is contained in this chapter.

Code, s. 70. **Cited** in Hare v. Holloman, 94-20. See also, sec. 341.

343. Provisions of this chapter extend to what records, etc. This chapter shall extend to records of any court which has been, or may be destroyed by fire or otherwise, and to any deed of conveyance, paper writing, or other bona fide evidence of title executed before the destruction of said records.

Code, s. 71.

344. Certain records in Moore county presumed to have been burned. In all cases in Moore county of bonds, indentures, accounts, minutes, judgment rolls and all other records that can not be found on record or on file in the said clerk's office after diligent search therefor by the clerk of the court, and can not be otherwise accounted for, the same having been on record or file therein on or before September fifth, one thousand eight hundred and eighty-nine, shall be presumed to have been destroyed by fire. In all cases in which said bonds, indentures, accounts, minutes, judgment rolls and other records or any part thereof have been lost or destroyed and in which it may become necessary to use the same in evidence, it shall be presumed that the same were executed, filed, audited or adjudicated, as the case may be, in due and legal form and were in all respects lawful records and documents.

1891, c. 55.

345. In Buncombe, Madison, Yancey and Haywood counties. Whenever any of the records of any of the courts in this state have been burnt, lost or destroyed, and there is in existence any copy thereof, or of any part of the same, duly certified, whether under the seal of the court or otherwise, by any former clerk of said court, it shall be the duty of the present clerk of said court, or any clerk of said court hereafter in office, upon presentation to him of such copy and the payment of his lawful fees therefor, to record said copy upon the minutes or records of said court; and after the same shall have been so recorded the record then shall be used as and be taken and deemed and shall have all the force and effect of the original record so burnt, lost or destroyed; and such record thereof, or a copy of the same duly certified by the clerk of said court, shall be in all respects competent in the same way and manner as the original record in all the courts of this state. This section shall apply only to the counties of Buncombe, Madison, Yancey and Haywood.

1905, c. 308.

CHAPTER 12.

CIVIL PROCEDURE.

I. Definitions.

346. Remedies. Remedies in the courts of justice are divided into—

1. Actions.
2. Special Proceedings.

Code, s. 125; C. C. P., s. 1. **Section cited but not construed** in Lyon v. Comrs., 120-242.

347. Actions. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.

Code, s. 126; C. C. P., s. 2; 1868-9, c. 277, s. 2. **Cases differentiating special proceedings from civil actions:** Tate v. Powe, 64-644; Pollard v. Slaughter, 92-72; Parton v. Allison, 109-674.

PROCEEDINGS THAT ARE NOT ACTIONS. Special proceedings as stated in section 125. **Probating wills:** Young's Will, 123-358; Syme v. Broughton, 85-367; Love v. Johnston, 34-355; Whitfield v. Hurst, 31-170; Sawyer v. Dozier, 27-97; St. John's Lodge v. Callender, 26-335. **Condemnation proceedings:** Click v. R. R., 98-391.

Case merely citing section: State v. Burton, 113-659.

348. Special Proceedings. Every other remedy is a special proceeding.

Code, s. 127; C. C. P., s. 3.

REMEDIES THAT ARE SPECIAL PROCEEDINGS. Generally stated in Tate v. Powe, 64-644. **Proceedings for partition:** Ibid; also Bragg v. Lyon, 93-151; Capps, 85-408; also see chapter on Partition—**for drainage** Durden v. Simmons, 84-555; also see section 3983—**for widow's year's allowance,** Tate v. Powe, 64-644—**for creditors against administrator,** Jerkins v. Carter, 70-500; but see Haywood v. Haywood, 79-42; Patterson v. Miller, 72-516—**for sale of decedent's land for assets,** Badger v. Jones, 66-305; see also section 68—**for recovery of distributive shares and legacies,** Bell v. King, 70-330; see also section 144—**to force administrator to sell land for assets,** Pelletier v. Saunders, 67-261; see also chapter on administration—**to lay off dower,** Gatewood v. Tomlinson, 113-312; Felton v. Elliott, 66-195; Tate v. Powe, 64-644; but see Efland v. Efland, 96-488—**for alimony without divorce,** Reeves v. Reeves, 82-348; see also section 1567—**for damages for erection of mill,** Sumner v. Miller, 64-688—**for settlement of decedent's estates,** Herring v. Outlaw, 70-334; Hunt v. Sneed, 64-176; also see sections 104 and 150—**to remove administrator or executor,** Edwards v. Cobb, 95-4; Murrill v. Sandlin, 86-54; Simpson v.

Jones, 82-323; McFayden v. Council, 81-195; Barnes v. Brown, 79-401; also see sections 31, 34, 35, 37, 38—**to correct error in partition of land,** Wahab v. Smith, 82-229.

Case citing section: State v. Burton, 113-659.

349. Kinds of actions. Actions are of two kinds—

1. Civil.
2. Criminal.

Code, s. 128; C. C. P., s. 4.

350. Criminal action. A criminal action is—

1. An action prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof.

Words "criminal action" and "indictment" synonymous: State v. Simons, 68-378. **Prosecutions for public offenses are criminal actions:** State v. Lupton, 63-483.

2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property.

Proceeding on peace warrant is a criminal action: State v. Lyon, 93-576; State v. Oates, 88-668.

Code, s. 129; C. C. P., s. 5; Const., Art. IV, s. 1.

351. Civil action. Every other is a civil action.

Code, s. 130; C. C. P., s. 6. **Any proceeding that under the old mode was commenced by capias ad respondendum (including ejectment), or by a bill in equity for relief, is a civil action:** Tate v. Powe, 64-644. **In cases where question arose, the following proceedings have been held to be civil actions: Bastardy,** State v. Liles, 134-735; see also section 252—**mandamus,** Haymore v. Commrs., 85-268; Belmont v. Reilly, 71-260; Brown v. Turner, 70-93—**falsifying accounts of decedent's estate,** Murphy v. Harrison, 65-246—**enforcing a judgment nisi against sheriff,** Jones v. Gupton, 65-48—**ward's suit on guardian bond for account:** Rowland v. Thompson, 65-110—**ejectment,** Woodley v. Gilliam, 64-649.

352. Court means clerk, when. In those of the following enactments which confer jurisdiction or power, or impose duties, when the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant.

147-594

Code, s. 132; C. C. P., s. 9. **See section 358. Where provision is made that in order to sell land for assets the administrator must apply to the "superior court," the "clerk" is meant:** Pelletier v. Saunders, 67-261; see also Tillett v. Aydlett, 90-551. **Cases in which section is referred to but not construed:** Mills v. Lumber Co., 139-524; Adams v. Howard, 110-19; Click v. R. R., 98-392; Brittain v. Mull, 91-502.

II. General Provisions.

353. Remedies not merged. Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other.

Code, s. 131; C. C. P., s. 7. White v. Underwood, 125-25.

354. One form of action. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

Code, s. 133; C. C. P., s. 12; Const., Art. IV, s. 1.

"DISTINCTIONS BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY" ABOLISHED. But does not mean that distinctions between principles of law and equity abolished: Morrisey v. Swinson, 104-555; Ely v. Early 94-1; Allen v. Taylor, 96-37; Lumber Co. v. Wallace, 93-22; Katzenstein v. R. R., 84-694; Matthews v. McPherson, 65-189—**nor that it takes away jurisdiction from superior court over matters heretofore within equity jurisdiction,** Barcello v. Hapgood, 118-712. **The equity practice, with slight modification, is the outcome:** Staton v. Webb, 137-39.

"ONE FORM OF ACTION." Both legal and equitable remedies administered in one action: Floars v. Ins. Co., 144-232; Winders v. Hill, 142-694; Bean v. R. R., 107-731; Pendleton v. Dalton, 92-185; Stein v. Cozart, 122-280; Edwards v. Love, 94-365; Vegelahn v. Smith, 95-254; Allen v. Taylor, 96-37; Efland v. Efland, 96-488; Condry v. Cheshire, 88-375; Farmer v. Daniel, 82-152; Murray v. Blackledge, 71-492; McRae v. Battle, 69-98. **Only one form:** Williams v. R. R., 144-498; Finnannon v. Sudderth, 144-594; Lumber Co. v. Wallace, 93-22; Ely v. Early, 94-1; Bean v. R. R., 107-731; Wilson v. Hughes, 94-182; Haymore v. Commrs., 85-268; Belmont v. Reilly, 71-262; Bitting v. Thaxton, 72-541; Garrett v. Trotter, 65-431; Froelich v. Southern Express Co., 67-4—**and that form similar to the equity bill,** Staton v. Webb, 137-39.

"FORMS OF ALL SUCH ACTIONS AND SUITS" ABOLISHED. But this does not dispense with such degree of certainty and regularity as is essential in every system adopted for the administration of justice: Norton v. McDevit, 122-755; Moore v. Hobbs, 79-535; Oates v. Gray, 66-442. **Sustaining the words of the statute,** Staton v. Webb, 137-39.

EFFECT ON PROCEDURE AND PLEADING. See generally the latest cases: Blackmore v. Winders, 144-215; Wilson v. Brown, 134-407. **Essential principles and the rules of common-law pleading still remain except as modified by this section:** Webb v. Hicks, 116-598; Lassiter v. Roper, 114-17; Hinsdale v. Sinclair, 83-338; Oates v. Gray, 66-442; Parsley v. Nicholson, 65-207; Vass v. Bldg. Asso., 91-62; Rowland v. Windley, 82-133; Crump v. Mims, 64-767—**but see the following cases that seem to overrule the preceding,** Staton v. Webb, 137-39; Wilson v. Brown, 134-407; Pierce v. R. R., 124-83; Sams v. Price, 119-572; Holden v. Warren, 118-326; Fulps

v. Mock, 108-601; Stokes v. Taylor, 104-394; Moore v. Edmiston, 70-517. **Equities must be set up in the pleadings:** Moore v. Cameron, 93-51; Lumber Co. v. Wallace, 93-22; Stamps v. Cooley, 91-316; Ledbetter v. Quick, 90-276; Rawlings v. Hunt, 90-270; Adams v. Hayes, 120-383. **New system of pleading looks to the merits:** Halstead v. Mullen, 93-252. **Practice under Revised Code still remains except where in conflict herewith:** Boyleston Ins. Co. v. Davis, 74-78; London v. Bear, 84-266; Morisey v. Swinson, 104-555; Simms v. Goettle, 82-271; **but see if this doctrine is not destroyed by section 5453.**

Cases citing but not construing section: Kiff v. Weaver, 94-278; Sneeden v. Harris, 109-358.

355. Parties known as plaintiff and defendant. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Code, s. 134; C. C. P., s. 13. **It is irregular to be plaintiff and defendant in the same action:** Medlin v. Simpson, 144-397.

356. How party may appear. A party may appear in actions or proceedings in which he is concerned either in person or by attorney.

Code, s. 109; C. C. P., s. 423. **The test for determining the character of an appearance is the relief asked:** Woodard v. Milling Co., 142-100; Scott v. Life Asso. 137-518. **What amounts to a general appearance,** see Woodard v. Milling Co., 142-100; Scott v. Life Asso. 137-515; Allen-Fleming Co. v. Rwy., 145-; **General appearance cures all defects in service of process:** Roberts v. Allman, 106-391; Lemly v. Ellis, 143-200; Wheeler v. Cobb, 75-21; Penniman v. Daniel, 95-341; Hatcher v. Faison, 142-364; see also sections 429, 447. **What amounts to special appearance,** see Woodard v. Milling Co., 142-100; Scott v. Life Asso. 137-515. **Special appearance can only be made to dismiss an action or move to set aside judgment for lack of jurisdiction:** Scott v. Life Asso. 137-515; Clark v. Mnfg. Co., 110-111—**and can not be entered to take an appeal,** Ibid; also Allen-Fleming Co. v. Rwy., 145-; Houston v. Lumber Co., 136-328. **When special appearance made to move to dismiss action, and motion overruled, defendant should except and go ahead on the merits:** Graham v. O'Bryan, 120-463; Farris v. R. R., 115-600; Guilford County v. Georgia Co., 109-310. **Where counsel appears specially the entry should state the special purpose, but a failure to state it from inadvertence is not a waiver of client's right:** Suiter v. Brittle, 90-19. **As to the doctrine of appearance by representation,** see Card v. Finch, 142-140; Springs v. Scott, 132-548.

357. Feigned issues abolished. Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of

fact to be tried; and such order shall be the only authority necessary for a trial.

Code, s. 135; C. C. P., s. 15. **Feigned issues in ejectment abolished:** Harkey v. Houston, 65-137—**and in actions for seduction,** Hood v. Sudderth, 111-215. **Court should dismiss action upon a feigned issue ex mero motu:** Blake v. Askew, 76-325.

358. Jurisdiction of clerk on procedure. The clerk of the superior court shall have jurisdiction to hear and decide all questions of practice and procedure in this court, and all other matters whereof jurisdiction is given to the superior court, unless the judge of said court, or the court at regular term thereof, be expressly referrred to.

Code, s. 251; C. C. P., s. 108. **See section 352. Clerk has no equitable jurisdiction, except when specially conferred by statute:** Vance v. Vance, 118-864; Bragg v. Lyon, 93-151. **Exercise of judicial powers by clerk is exercise of them by court, acting through clerk:** Brittain v. Mull, 91-498. **Cases merely citing section:** Turner v. Holden, 109-186; Cushing v. Styron, 104-339; Click v. R. R., 98-392; Maxwell v. Blair, 95-317; Loftin v. Rouse, 94-508; Jones v. Desern, 94-35; Johnson v. Judd, 63-498; McAden v. Banister, 63-481; McAdoo v. Benbow, 63-462.

III. Limitations, General Provisions.

359. When action commenced. An action is commenced as to each defendant when the summons is issued against him.

Code, s. 161; C. C. P., s. 40. **Requisites of a valid summons:** Redmond v. Mullenax, 113-505. **Rebuttable presumption that summons was issued on the date it bears:** Houston v. Thornton, 122-365; Currie v. Hawkins, 118-593. **Fatal effect of a break in the chain of alias summonses:** Rufty v. Claywell, 93-306; Etheridge v. Woodley, 83-11; Koonce v. Pelletier, 115-233. **A summons is issued within the meaning of this section when it is delivered to the Sheriff:** Smith v. Lumber Co., 142-26; Webster v. Sharpe, 116-466—**when put out from clerk's office under his direction to be sent to officer for service,** Houston v. Thornton, 122-365.

Summons is not issued within the meaning of this section when it remains in the office of the clerk filled up and signed but held for a prosecution bond: Webster v. Sharpe, 116-466—**when signed and issued but not docketed on summons docket, nor returned served; nor followed by alias,** Neal v. Nelson, 117-393. **When defendant out of state, action commenced by affidavit for publication:** Grocery Co. v. Bag Co., 142-174; Best v. Mortgage Co., 128-351. **Cases merely citing section:** Morris v. House, 125-569; Farthing v. Carrington, 116-331.

360. Run from cause of action accrued; objection taken by answer. Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is pre-

scribed by statute. But the objection that the action was not commenced within the time limited can only be taken by answer.

Code, s. 138; C. C. P., s. 17.

CAUSE OF ACTION ACCRUES. In cases of fraud or mistake, from its discovery or when it should have been discovered: Tuttle v. Tuttle, 146-; Modlin v. Railroad and Lumber Co., 145-218; Peacock v. Barnes, 142-215; Alpha Mills v. Engine Co., 116-797—**in cases of failure of clerk to index judgment,** Shackleford v. Staton, 117-73—**of subjecting stockholders of bank to liability,** Long v. Bank, 90-405—**of negligence,** Mast v. Sapp, 140-533—**of sureties liable on administrator's bond,** Gill v. Cooper, 111-311—**of sureties generally,** Leak v. Covington 99-559—**of breach of covenant of seizin,** Shankle v. Ingram, 133-254—**of breach of covenant of warranty,** Shankle v. Ingram 133-254; Wiggins v. Pender, 132-628; Griffin v. Thomas, 128-310; Mizzell v. Ruffin, 118-69—**of damages for construction of railroad,** Lassiter v. R. R., 126-509; Ridley v. R. R. 118-996; Hocutt v. R. R., 124-219—**of sale by sheriff of exempt property,** Hobbs v. Barefoot, 104-224—**of failure of consideration, to recover purchase money** Barden v. Stickney, 132-416—**of trespass on land,** Spruill v. Mfg. Co., 130-42—**of ejectment,** Ladd v. Byrd, 113-466—**of ouster of cestui que trust,** Webb v. Borden, 145-188;—**of action against nonresident,** Green v. Ins. Co., 139-309.

In favor of debtor on mutual account: Stokes v. Taylor, 104-394—**of executor against creditor of testator,** Hinton v. Pritchard, 126-8; Lynn v. Lowe, 88-478; Miller v. Shoaf, 110-319; Love v. Ingram, 104-600—**of mortgagor or trustor,** Scott v. Lumber Co., 144-44; Bernhardt v. Hagamon, 144-526; Triplett v. Foster, 115-335; Woody v. Jones, 113-253; Moore v. Ray, 108-252—**of guardian against ward,** Dunn v. Beaman, 126-766; Kennedy v. Cromwell, 108-2—**of judgment debtor where judgment taken on rehearing before magistrate,** Salmon v. McLean, 116-209—**of tenant in common,** Tharpe v. Holcombe, 126-365—**of debtor to one under disability,** Eller v. Church, 121-269; Dunn v. Dunn, 137-533—**of trustee of implied trust,** Dunn v. Dunn, 137-533; **of trustee of express trust,** Dixon v. Dixon, 145-; Davis v. Boyden, 123-283; Wright v. Cain, 93-296; Patterson v. Lilly, 90-87; Bd. of Ed. v. Bd. of Ed., 107-366—**of county as against holders of bond coupons,** Threadgill v. Comrs., 116-616—**of vendee in bond for title,** Worth v. Wrenn, 144-656;—**of sureties on bond of first administrator against administrator d. b. n.,** Burgwyn v. Daniel, 115-115—**of grantee of junior grant,** Johnson v. Lumber Co., 144-717; McAden v. Palmer, 140-258—**of an employer of labor,** Robertson v. Pickerell, 77-302—**of a partner,** Loan Asso. v. Ferrell, 114-301; Murray v. Penny, 108-324; Reucher v. Anderson, 95-208—**of one who is guilty of conversion,** Ritch v. Oates, 122-634; University v. Bank, 96-280; Bryant v. Peebles, 92-176—**of obligor in bond,** Ervin v. Brooks, 111-358—**of one claiming under life tenant as against remainderman,** Norcum v. Savage, 140-472; Joyner v. Futrell, 136-301; Griffin v. Thomas, 128-310; Wooten v. R. R., 128-119; Hunnicutt v. Brooks, 116-788—**of grantee of the legal title from trustee as against cestui que trust;** Cherry v. Power Co., 142-404—**of person ousting cestui que trust,** Webb v. Borden, 145-188;—**of person who received money on executory contract where contract not executed,** Tomlinson v. Bennett, 145-279.

WHEN STATUTE BEGINS TO RUN NOTHING STOPS IT. Frederick

v. Williams, 103-189; Chancy v. Powell, 103-160; Mebane v. Patrick, 46-27; Barden v. Stickney, 132-416; Copeland v. Collins, 122-619; Neal v. Nelson, 117-393; Grady v. Wilson, 115-344; Koonce v. Pelletier, 115-234; Hughes v. Boone, 114-54; Helm Co. v. Griffin, 112-356; Asbury v. Fair, 111-251.

NECESSITY OF PLEADING THE STATUTE. **Statute of presumptions does not have to be pleaded:** Ins. Co. v. Edwards, 124-116; Crawford v. McLellan, 87-169—**but statutes of limitations are not available unless pleaded:** Boone v. Peebles, 126-824; Ins. Co. v. Edwards, 124-116; Bank v. Loughran, 122-668; Albertson v. Terry, 109-8; Guthrie v. Bacon, 107-337; Green v. R. R., 73-524—**except in possessory actions where title is to be shown:** Whitaker v. Jenkins, 138-476; Ins. Co. v. Edwards, 124-117; Freeman v. Sprague, 82-366; Asbury v. Fair, 111-251; Shelton v. Wilson, 131-501. **Defendant will not be allowed to plead the statute where the delay in suing was caused by his telling plaintiff if he would not sue he would not plead it:** Barcroft v. Roberts, 91-363; Daniel v. Commrs., 74-494.

LIMITATION BARRING ACTION, HOW PLEADED. **Can only be done by answer:** Wilmington v. McDonald, 133-548; King v. Powell, 127-10; Ins. Co. v. Edwards, 124-116; Bacon v. Berry, 85-124; Long v. Bank, 81-41—**not by demurrer:** Oldham v. Rieger, 145-; King v. Powell, 127-10; Bacon v. Berry, 85-124; Daniel v. Commrs. 74-494—**nor by motion to dismiss:** Oldham v. Rieger, 145-254; Lynn v. Lowe, 88-483; **nor by motion to vacate judgment:** Williams v. Mullis, 87-159—**and must set up the facts, not just plead a conclusion of law:** Duckworth v. Duckworth, 144-621; Pipes v. Lumber Co., 132-612; Murray v. Barden, 132-136; Heyer v. Rivenbark, 128-270; Turner v. Shuffler, 108-642; Pope v. Andrews, 90-401. **Other cases where held insufficiently pleaded:** Murray v. Barden, 132-136; Humble v. Mebane, 89-410.

STATUTE DOES NOT RUN. **Against an express trust until when:** Owens v. Williams, 130-165; Patterson v. Lilly, 90-82; Davis v. Boyden, 123-283; Bd. of Education v. Bd. of Education, 107-366—**against subscriptions of stock payable as called for,** Cooper v. Security Co., 127-219—**against municipality holding land in trust, when:** Turner v. Commrs., 127-153—**against a charge upon land for owelty of partition:** In re Ausborn, 122-42; Walker ex parte, 107-340; Dobbins v. Rex, 106-444; Sutton v. Edwards, 40-425—**against a cestui que trust in possession:** Norton v. McDevit, 122-755; Stith v. McKee, 87-389.

361. Deemed pleaded by insane party. On the trial of any action or special proceeding to which an insane person has been made a party, such insane person shall be deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. And the court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of such insane person, and may

make such other order as it may deem necessary for his proper defense.

1889, c. 89, s. 2. **Insane person deemed to have pleaded the statute of limitations:** Hospital v. Fountain, 129-90; In re Hybart, 119-366.

362. Disabilities. If a person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either,

1. Within the age of twenty-one years; or

Self v. Shugart, 135-185; Lafferty v. Young, 125-296; Amis v. Stephens, 111-174; Gudger v. R. R., 106-481; Frederick v. Williams, 103-189; Chancey v. Powell, 103-159; Campbell v. Crater, 95-162. **Infant having guardian nevertheless protected:** Cross v. Craven, 120-331; see Norman v. Walker, 101-24.

2. Insane; or

Outland v. Outland, 118-138; Asbury v. Fair, 111-251; Warlick v. Plonk, 103-81; Ellington v. Ellington, 103-55. **Insanity once shown to exist, the presumption is that it continues, but this is rebuttable:** Beard v. R. R., 143-137.

3. Imprisoned on a criminal charge, or in execution under sentence for a criminal offense:

Then such person may bring his action within the times herein limited, after the disability shall be removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he shall commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

Code, ss. 148, 163; C. C. P., ss. 27, 142; 1899, c. 78.

For disabilities in an action to recover land sold for taxes, see section 2999. Adverse possession relates only to the true title and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action: Berry v. Lumber Co., 141-386.

363. Disability of marriage. In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine.

162-87

1899, c. 78, ss. 2, 3. **Adverse possession prior to February 13, 1899, as to married woman:** Berry v. Lmbr. Co., 141-386; Norcum v. Savage, 140-472; Gaskins v. Allen, 137-426; Earnhardt v. Clement, 137-91; Fowler v. McLaughlin, 131-209.

364. Cumulative disabilities. When two or more disabilities shall co-exist at the time the right of action accrues, or when one

disability shall supervene an existing one, the limitation shall not attach until they all be removed.

Code, ss. 149, 170; C. C. P., ss. 28, 49. **Cases directly supporting statute:** Epps v. Flowers, 101-160; Campbell v. Crater, 95-162; Davis v. Perry, 89-422; Lippard v. Troutman, 72-553, Davis v. Cooke, 10-608. **Cases merely citing statute:** Smith v. Tew, 127-301; Boone v. Peebles, 126-826.

365. Disability must exist when right of action accrues. No person shall avail himself of a disability, unless it existed when his right of action accrued.

Code, s. 169; C. C. P., s. 48. **Where right accrued before disability began, it avails nothing:** Self v. Shugart, 135-187; Kennedy v. Cromwell, 108-1; Causey v. Snow, 122-326; Erwin v. Brooks, 111-358. **Where right accrued during lifetime of ancestor, it does not stop, even though heir under disability:** Chancy v. Powell, 103-159; Frederick v. Williams 103-189. **That disability existed when right of action accrued should be set out in pleading:** Gudger v. R. R., 106-481.

366. Defendant out of state; action begun, judgment enforced, when. If, when the cause of action accrue or judgment be rendered or docketed against any person, he shall be out of the state, action may be commenced, or judgment enforced, within the times herein respectively limited, after the return of such person into this state, and if, after such cause of action shall have accrued or judgment rendered or docketed, such person shall depart from and reside out of this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment. This section shall apply to all actions that have accrued and judgments rendered, transferred or docketed since the twenty-fourth day of August, one thousand eight hundred and sixty-eight.

Code, s. 162; C. C. P., s. 41; 1881, c. 258, ss. 1, 2. **Every phase of this section discussed in** Armfield v. Moore, 97-34. **Statute of limitations does not run in favor of a nonresident whether an individual or corporation:** Green v. Ins. Co., 139-309; Williams v. B. & L. Asso., 131-267; Alpha Mills v. Engine Co., 116-797; Armfield v. Moore, 97-34; but see also Williams v. B. & L. Asso., 131-270; Green v. Ins. Co., 139-309. **"After return of such person" does not mean a casual passing through state,** Lee v McKoy, 118-518; Armfield v. Moore, 97-34. **A nonresident owning property in this state does not affect this section:** Grist v. Williams, 111-53. **Section referred to** in Navigation Co. v. Williams, 111-36. **Foreign corporation can not set up statute of limitations in bar of action for false warranty:** Alpha Mills v. Engine Co., 116-797. **This section applies to obligations of nonresidents as much as to those of residents:** Armfield v. Moore, 97-34. **This section does not apply to causes of action accruing prior to Aug. 24, 1868:** Johnston v. Lumber Co., 144-719; Blue v. Gilchrist,

84-239. **One tenant in common being a nonresident, a party bringing action against him can not defeat the bar of the statute when one tenant in common is a resident:** Weaver v. Love, 146-.

367. Death before limitation expires; action by or against executor, when. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided such letters are issued within ten years of the death of such person. But if the claim upon which such cause of action is based be filed with the personal representative within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar: Provided, that no action shall be brought against the personal representative upon such claim after his final settlement.

Code, s. 164; C. C. P., s. 43; 1881, c. 80. **See sections 39 and 91-94 inclusive. Cases generally sustaining section:** Winslow v. Benton, 130-58; Coppersmith v. Wilson, 107-31. **Creditor's representative must bring action within a year whether administrator appointed or not:** Coppersmith v. Wilson, 107-31. **Cases where debtor died before statute barred creditor from suing:** Harris v. Davenport, 132-697; Phifer v. Ford, 130-208; Winslow v. Benton, 130-58; Hinton v. Pritchard, 126-8; Stonestreet v. Frost, 123-640; Copeland v. Collins, 122-619; Benson v. Bennett, 112-505; Turner v. Shuffler, 108-642; Woodlief v. Bragg, 108-571; Robertson v. Dunn, 87-191. **This section is an enabling statute, not a disabling one:** Redmond v. Pippen, 113-93; Benson v. Bennett, 112-505—**and does not cut down the time given by the general statute, but extends it:** Person v. Montgomery, 120-111—**and only applies when defendant dies before expiration of time limited:** Parker v. Harden, 121-57; Vaughan v. Hines, 87-450.

What "filing" prevents the bar of the statute: Harris v. Davenport, 132-697; Hinton v. Pritchard, 126-8; Stonestreet v. Frost, 123-640; Justice v. Gallert, 131-393; Whitehurst v. Dey, 90-542.

Effect of section on judgment taken prior to death of intestate: Stonestreet v. Frost, 123-640; Mauney v. Holmes, 87-428; Daniel v. Laughlin, 87-433; Brittain v. Dickson, 104-547; Benson v. Bennett, 112-505; Hughes v. Boone, 114-54. **Effect when administrator dies or is removed:** Burgwyn v. Daniel, 115-115; Smith v. Brown, 99-377; Brawley v. Brawley, 109-524; Dunlap v. Hendley, 92-115.

Cases merely citing section: Grady v. Wilson, 115-347; Gilchrist v. Middleton, 107-669; Smith v. Brown, 101-353; Syme v. Badger, 96-210;

Vaughan v. Hines, 87-450; Hall v. Gibbs, 87-4; Flemming v. Flemming, 85-130.

368. Time of stay by injunction or prohibition. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

Code, s. 167; C. C. P., s. 46. **Time of stay by appeal not counted,** Adams v. Guy, 106-275—**by injunction not counted:** Walton v. Pearson, 85-35.

369. Time during controversy on probate of will or granting letters. In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there be an administrator appointed during the pendency of the action, and it be provided that an action may be brought against him.

Code, s. 168; C. C. P., s. 47. **This section applies only where there is no administrator or collector during the contest:** Hughes v. Boone, 114-54. **Merely referred to** in Frederick v. Williams, 103-191.

370. New action within one year after nonsuit, etc. If an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, or a judgment therein be reversed on appeal, or be arrested, the plaintiff, or if he die and the cause of action survive, his heir or representative, may commence a new action within one year after such nonsuit, reversal, or arrest of judgment.

Code, ss. 142, 166; C. C. P., ss. 21, 45. **Section intended to extend the period of limitation, not to abridge it:** Keener v. Goodson, 89-273. **Cases where nonsuit taken or action dismissed and another action brought within a year:** Timber Co. v. Butler, 134-50; Hood v. Tel. Co., 135-622; Evans v. Alridge, 133-378; Locklear v. Bullard, 133-260; Harris v. Davenport, 132-697; Prevatt v. Harrelson, 132-250; Halcombe v. Commrs., 89-346; Wharton v. Commrs., 82-11; Straus v. Beardsley, 79-59; Freshwater v. Baker, 52-255; Long v. Orrell, 35-123; Skillington v. Allison, 9-347; Williams v. B. & L. Asso. 131-270; Meekins v. R. R., 131-1; Bank v. Loughran, 122-671. **Where judgment reversed and new action within a year:** Woodcock v. Bostic, 128-243. **Where partner after bringing action in his own name was nonsuited, he may bring action in name of partnership within a year;** Martin v. Young, 85-156. **Cases merely referring to section:** Webb v. Hicks, 125-203; Collins v. Smith, 109-470; McIlhenny v. Savings and Trust Co., 108-311; Mfg. Co. v. Brooks, 106-112; Currie v. Clark, 101-331; Royster v. Commrs., 98-152.

371. New promise must be in writing. No acknowledgment or promise shall be received as evidence of a new or continuing con-

tract, from which the statutes of limitations shall run, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

Code, s. 172; C. C. P., s. 51. **This section does not apply to judgments:** McCaskill v. McKennon, 121-190; Hughes v. Boone, 114-54; McDonald v. Dickson, 87-404—**nor to promises not to plead statute if plaintiff will delay suing:** Cecil v. Henderson, 121-246—**but see concurring opinion of Smith, C. J.,** in Joyner v. Massey, 97-153. **A new promise, if not in writing, can not defeat operation of statute of limitations:** Raby v. Stuman, 127-463; Helm Co. v. Griffin, 112-356; Greenleaf v. R. R., 91-33; Pool v. Bledsoe, 85-2; Kull v. Farmer, 78-340; Faison v. Bowden, 74-45; Flemming v. Flemming, 85-127. **Not necessary to be formal writing, but may be by letters, entries, etc.:** Taylor v. Miller, 113-340; Morris v. Osborne, 104-609.

WHAT AMOUNTS TO "ACKNOWLEDGMENT" OR "PROMISE." **Must be express, specific and unconditional:** Cooper v. Jones, 128-40; Helm Co. v. Griffin, 112-356; Taylor v. Miller, 113-340; Greenleaf v. R. R., 91-33; Riggs v. Roberts, 85-152. **Must be clear, positive and distinctly refer to debt:** Hussey v. Kirkman, 95-63. **Must show a clear intention to renew the debt:** Simonton v. Clark, 65-525. **Must extend to entire debt and to pay in money:** Wells v. Hill, 118-900; **but see as to payment in specific articles,** Young v. Alford, 113-130. **Must be certain in its terms or able to be so made:** Long v. Oxford, 104-408. **Must be made to party or agent or attorney:** Hussey v. Kirkman, 95-63—**not to stranger:** Parker v. Shuford, 76-219; Faison v. Bowden, 76-425. **"I propose to settle:"** Taylor v. Miller, 113-340. **"Renewed" marked on note and signed and dated by maker:** Morris v. Osborne, 104-609. **Offer of compromise at specific sum after suit brought:** Pope v. Andrews 90-401. **Memorandum between mortgagor and mortgagee:** Royster v. Farrell, 115-306.

WHAT DOES NOT AMOUNT TO "ACKNOWLEDGMENT" OR "PROMISE." **Can't pay what I owe you, but will pay soon or next winter:"** Faison v. Bowden, 72-406. **"You have my due bill and I'm going to pay it as soon as I possibly can:"** Cooper v. Jones, 128-41. **"As soon as I can, I'm going to settle all my indebtedness:"** Ibid.

PARTIAL PAYMENT. **Must be made as recognition of debt and of obligation to pay balance:** Battle v. Battle, 116-161—**and if not so made it is ineffectual to defeat the bar of the statute,** Cashmar-King Supply Company v. Dowd and King, 146-[illegible] **Where several debts against defendant and he pays something without specifying on which debt,** see White v. Beaman, 96-122; Raymond v. Newman, 122-52; Moss v. Adams, 39-42. **Where one rebutting account credited on another:** Bank v. Harris, 96-118.

Partial payment does not stop the statute from running but renews debt: Copeland v. Collins, 122-619. **When made before debt barred, renews the debt as to principal:** Garrett v. Reeves, 125-529; Moore v. Goodwin, 109-218—**as to joint obligors, when,** Wood v. Barber, 90-76; **Campbell** v. Brown, 86-376—**as to sureties, when,** Garrett v. Reeves, 125-529; **Moore** v. Goodwin, 109-218; Copeland v. Collins, 122-619—**as to indorsers,** Garrett v. Reeves, 125-529. **When made by principal after debt barred, renews debt as to principal:** Garrett v. Reeves, 125-529—**but not as to partners**

after partnership dissolved who do not assent to it, Wood v. Barber, 90-79—**nor as to indorsers, unless approving,** Garrett v. Reeves, 125-529—**nor as to sureties,** Garrett v. Reeves, 125-529—**but otherwise when surety pays,** Long v. Miller, 93-233. See section 372.

Cases merely referring to section: Christmas v. Haywood, 119-134; Grady v. Wilson, 115-348; Grant v. Burgwyn, 84-560.

372. Admission by partner after dissolution; effect. No act, admission or acknowledgment by any partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitation shall have barred the same, shall be received as evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment.

Code, s. 171; C. C. P., s. 50. **As to effect of payments by principal, joint obligors or sureties, see section 371. Judgment suffered by one of several obligors does not bind the others:** Lane v. Richardson, 79-159; Rogers v. Clements, 98-180. **Part payment by payee, who is endorser, will not repel the bar, as this section does not apply:** Le Duc v. Butler, 112-458. **Cases merely referring to section:** Moore v. Goodwin, 109-219; Wood v. Barber, 90-79.

373. Undisclosed partner. The statutes of limitations prescribed by law shall apply to a civil action brought against an undisclosed partner only from the time when such partnership became known to the plaintiff.

1893, c. 151.

374. Cotenants; part barred, when. If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for the detention of, or injury thereto, any of them shall be barred of their recovery by limitation of time, the rights of the others shall not be affected thereby, but they may recover according to their right and interest, notwithstanding such bar.

Code, s. 173; C. C. P., s. 52. **Only affects personalty, never realty:** Cameron v. Hicks, 141-36.

375. Applicable to actions by state. The limitations prescribed by law shall apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties.

Code, s. 159; C. C. P., s. 38. **Insane person pleading statute as against state:** Hospital v. Fountain, 129-90. **State can plead the statute to prevent recommendatory decision by the Supreme Court:** Cowles v. The State, 115-173. **The maxim "nullam tempus occurrit regi" does not now apply:** Furman v. Timberlake, 93-67; City of Wilmington v. Cronly, 122-387. **No statute of limitations runs against the state in an action to recover tax**

money, unless special provision in revenue act: Wilmington v. Cronly, 122-388.

376. Action on account current. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the latest item proved in the account on either side.

Code, s. 160; C. C. P., s. 39. **A mutual open and current account defined** in Stokes v. Taylor, 104-394. **One may be by direct agreement or may be inferred from circumstances:** Stancill v. Burgwyn, 124-69. **Such inferred agreement may be when one party, with the knowledge of the other, keeps an account of the debits and credits:** Stokes v. Taylor, 104-394; Mauney v. Coit, 86-463; Hussey v. Burgwyn, 51-385; Green v. Caldeleugh, 18-321. **Where there are mutual accounts statute runs from the last dealing between the parties:** Robertson v. Pickerell, 77-303—**from last item,** Stokes v. Taylor, 104-394.

377. Not applicable to bank bills. The limitations prescribed by law shall not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by moneyed corporations incorporated under the laws of the state.

Code, s. 174; C. C. P., s. 53; 1874-5, c. 170.

378. Actions against bank officers and stockholders. The limitations prescribed by law shall not affect actions against directors or stockholders of any moneyed corporation, or banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

Code, s. 175; C. C. P., s. 54. **See** Houston v. Thornton, 122-375.

379. Aliens in time of war. When a person shall be an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

Code, s. 165; C. C. P., s. 44.

IV. Limitations, Real Property.

380. Title against state. The state will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the state to the same—

1. When the person in possession thereof, or those under whom he claims, shall have been in the adverse possession thereof for thirty

years, such possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

Thirty years adverse possession takes title out of state even though possession not continuous nor chain of title complete: Wilson v. Wilson, 125-525; Walden v. Ray, 121-237; Dills v. Hampton, 92-565; Yount v. Miller, 91-331; Bryan v. Spivey, 109-57; Mallett v. Simpson, 94-37; Cowles v. Hall, 90-330; Davis v. McArthur, 78-357; Reed v. Earnhart, 32-516; Candler v. Lunsford, 20-542; Fitzrandolph v. Norman, 4-564; Pearson v. Simmons, 98-281; Davidson v. Arledge, 97-172; Osborne v. Anderson, 89-261; Melvin v. Waddell, 75-361. **But see** Price v. Jackson, 91-11; Phipps v. Pierce, 94-514.

2. When the person in possession thereof, or those under whom he claims, shall have been in possession under colorable title for twenty-one years, such possession having been ascertained and identified under known and visible lines or boundaries.

Code, s. 139; C. C. P., 18; R. C., c. 65, s. 2. **See section 360. For cases on colorable title, possession, adverse possession and known and visible lines and boundaries, and lappage, see under section 382.**

GENERAL OBSERVATIONS. General doctrine of subsection 2 substantiated and explained: Gordner v. Lumber Co., 144-110; Walker v. Moses, 113-527. **Constructive possession hereunder not interrupted by issuance to another of patent for part of the land where the plaintiff has possession of lappage:** Hamilton v. Icard, 114-532. **How plaintiff can make out his case as against the world:** Campbell v. Everhart, 139-503; Alexander v. Gibbon, 118-796; Mobley v. Griffin, 104-115; Conwell v. Mann, 100-234; Pearson v. Simmons, 98-281. **He must show title as against the world or good against defendant by estoppel:** Campbell v. Everhart, 139-503. **Adverse possession under color of title must be continuous:** Malloy v. Bruden, 86-251; also see under section 382. **When trustee in an active trust is barred, the cestui que trustent are also barred:** Kirkman v. Holland, 139-185. **Not necessary to plead the statute, but defendant can make simple denial:** Whitaker v. Jenkins, 138-476; Ins. Co. v. Edwards, 124-117; Freeman v. Sprague, 82-366; Asbury v. Fair, 111-251; Shelton v. Wilson, 131-501; see section 360. **Both parties claiming under same source, plaintiff's deed being younger but first registered, defendant can overcome it, how:** Austin v. Staten, 126-783. **No constructive possession will ripen a defective will into a good one:** Williams v. Wallace, 78-354. **What does and what does not amount to an ouster:** Day v. Howard, 73-1; Ward v. Farmer, 92-93; Dobbins v. Dobbins, 141-210.

381. Such possession valid against claimants under state. All such possession as is described in the preceding section, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the state.

Code, s. 140; C. C. P., s. 19. **Referred to casually** in Prevatt v. Harrelson, 132-350.

382. Seven years' possession under color. When the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under colorable title for seven years, no entry shall be made or action sustained against such possessor by any person having any right or title to the same, except during the seven years next after his right or title shall have descended or accrued, who in default of suing within the time aforesaid, shall be excluded from any claim thereafter to be made; and such possession, so held, shall be a perpetual bar against all persons not under disability.

158-847

Code, s. 141; C. C. P., s. 20. **For cases as to adverse possession of tenants in common, see under section 384. Cases directly supporting section:** Gudger v. Hensley, 82-481; Johnson v. Parker, 79-475; Williams v. Wallace, 78-354; Moore v. Thompson, 69-120; Cox v. Ward, 107-507; Hamilton v. Icard, 114-532; Walker v. Moses, 113-527; Broadwell v. Morgan, 142-475; Brown v. Brown, 106-452; Simpson v. Simpson, 107-552; Mfg. Co. v. Brooks, 106-107; Ellington v. Ellington, 103-54; Allen v. Salinger, 103-14; Campbell v. Crater, 95-162; Logan v. Fitzgerald, 92-645. **Not necessary that entry should be under color, when color obtained later:** Hawkins v. Cedar Works, 122-87. **Adverse possession under color for seven years before, and three years after, death of married woman, bars the heirs:** Swift v. Dixon, 131-42. **The tacking of possessions together to make up the seven years:** Morrison v. Craven, 120-327; Atwell v. Shook, 133-387; Alexander v. Gibbon, 118-796; Scarboro v. Scarboro, 122-234. **Seven years possession and cultivation of land under junior grant makes title as against senior grant:** Asbury v. Fair, 111-251. **Tenant in common's possession as against cotenants, where tenant has title through a judicial sale of the whole, will ripen into title after seven years:** Vickers v. Henry, 110-371; also see Gaylord v. Respass, 92-553; Amis v. Stephens, 111-172; Pope v. Mathis, 83-169. **The seven years adverse possession need not be the seven years next preceding action:** Christenbury v. King, 85-229—**but it must be continuous and uninterrupted,** Bland v. Beasley, 145-168. **What possession will protect under this section:** Cox v. Ward, 107-507; Williams v. Wallace, 78-356; see also under paragraphs hereunder concerning possession and adverse possession. **Not necessary to plead the statute; a general denial will do:** Mnfg. Co. v. Brooks, 106-107 and cases cited under section 360—**but where lost deed is relied on defendant must plead it:** Wilson v. Wilson, 117-351; Hinton v. Pritchard, 102-94. **Seven years adverse possession of the second story of a house under color of title will give title:** Asheville Div. v. Aston, 92-578. **Adverse possession relates only to the true title and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action:** Berry v. Lumber Co., 141-386. **Not presumed that father is agent of his child in holding possession:** Barrett v. Brewer, 143-88. **When trustee of active trust barred, cestui que trust also barred. When one joint tenant barred, other joint tenants also barred:** Cameron v. Hicks, 141-21; Kirkman v. Holland, 139-185.

CASES WHERE THIS SECTION REFERRED TO, BUT ESSENTIAL POINTS ANNOTATED ELSEWHERE: Norcum v. Savage, 140-472; Lindsay v. Austin, 139-463; Campbell v. Everhart, 139-504; Johnston v. Case, 131-491; Brown v. Morisey, 128-138; Britton v. Ruffin, 122-113; McLean v. Smith, 114-357; Zimmerman v. Robinson, 114-39; Cheatham v. Young, 113-161; Miller v. Bumgardner, 109-412; Gilchrist v. Middleton, 108-705; Lenoir v. Mining Co., 106-473; Staton v. Mullis, 92-623; Lewis v. McDowell, 88-261; Clayton v. Rose, 87-106; Isler v. Dewey, 84-345; Hill v. Averton, 81-393; Day v. Howard, 73-1.

CASES WHERE THERE IS LAPPAGE: McLean v. Smith, 114-357; Zimmerman v. Robinson, 114-39; Logan v. Fitzgerald, 92-645; Brady v. Maness, 91-135; Asbury v. Fair, 111-251; Scott v. Elkins, 83-424; McAlister v. Devane, 76-57; McCormick v. Monroe, 48-332; Baker v. McDonald, 47-244; Brown's Heirs v. Potter's Heirs, 44-461; Bryson v. Slagle, 44-449; Williams v. Miller, 29-186; Williams v. Buchanan, 23-535; Williams v. Wallace, 78-354; Kitchen v. Wilson, 80-191; King v. Wells, 94-344.

WHAT CONSTITUTES "POSSESSION" HEREUNDER. Exercising such dominion over land and making that use of it to which it is capable of being put in its then state in such repeated manner as to show it is done in the character of owner: Baum v. Shooting Club, 96-310; Hamilton v. Icard, 114-538; Patterson v. Mills, 121-258—**but when not capable of use at all,** see McLean v. Smith, 114-357. **Fence built around land unoccupied for purpose of pasture** is an inference drawn from Osborne v. Johnston, 65-22. **Using land for pasture every winter:** Wall v. Wall, 142-387. **Actual, open, visible occupation of land:** Malloy v. Bruden, 86-251. **Unequivocal acts of ownership that would have exposed occupant to possessory action at common law:** Bland v. Beasley, 145-168; Fuller v. E. City, 118-25; Hamilton v. Icard, 114-532; Shaffer v. Gaynor, 117-15; Everett v. Newton, 118-919; Boomer v. Gibbs, 114-76; Osborne v. Johnston, 65-22. **Using a spring and building a spring house over it:** Brittain v. Daniels, 94-981. **Building shed, quarrying rock, erecting lime kiln, and cutting wood for fuel in making lime:** Moore v. Thompson, 69-120. **Constructive possession:** Staton v. Mullis, 92-623; Hamilton v. Icard, 114-532; see cases under other paragraphs under this section. **One tenant in common holds possession for all:** Dobbins v. Dobbins, 141-210; Johnston v. Case, 131-491; Tharpe v. Holcombe, 126-365; Carson v. Carson, 122-645; Page v. Branch, 97-97; Vickers v. Henry, 110-371; Gaylord v. Respass, 92-553; Neely v. Neely, 79-478; Linker v. Benson, 67-150. **Every possession is taken to be under possessor's own title:** Bryan v. Spivey, 109-57; Nixon v. Williams, 95-103; Hawkins v. Cedar Works, 122-87. **Cases as to possession under former similar statutes:** Blackstock v. Cole, 51-560; Morris v. Hayes, 47-93; Lenoir v. South, 32-237; Bynum v. Carter, 26-310; Berryman v. Kelly, 35-269; Bynum v. Thompson, 25-578; Flanniken v. Lee, 23-293; Tredwell v. Reddick, 23-56.

WHAT IS NOT SUFFICIENT "POSSESSION." Grantor and plaintiff had raked and hauled straw off of land and father of plaintiff had farmed on an acre or two: Prevatt v. Harrelson, 132-250. **Planting part of land in tobacco every year, but no one part for over two years, only inclosing while crop growing:** Hamilton v. Icard, 114-532. **Paying taxes on land and employing agents with respect to it:** Ruffin v. Overby, 88-369. **No**

constructive possession of land named in deed as previously granted: Basnight v. Smith, 112-229; see also Mfg. Co. v. Frey, 112-160; Melton v. Monday, 64-295; McCormick v. Monroe, 46-13; Wyman v. Taylor, 124-430. **Occasional entries not sufficient:** Williams v. Wallace, 78-354; Shaffer v. Gaynor, 117-15; Hamilton v. Icard, 114-532; Asbury v. Fair, 111-251; Ruffin v. Overby, 105-78.

WHEN POSSESSION IS "ADVERSE." **"Adverse possession" defined and discussed:** Parker v. Banks, 79-480. **Possession by tenant under a parol gift:** Wilson v. Wilson, 125-525; Dean v. Gupton, 136-141. **Every possession of land by other than the claimant:** Ruffin v. Overby, 88-369. **No presumption that possession is adverse:** Bland v. Beasley, 145-168; Monk v. Wilmington, 137-322, but see Ruffin v. Overby, 88-369; Alexander v. Gibbon, 118-797. **An actual, open, visible occupation of land by another:** Malloy v. Bruden, 86-251; Patterson v. Mills, 121-258. **By whom adverse possession can be taken:** Williams v. Wallace, 78-354. **Unequivocal acts of ownership which would have subjected the occupant to a possessory action at common law:** Fuller v. Elizabeth City, 118-25; Hamilton v. Icard, 114-532; Shaffer v. Gaynor, 117-15; Lewis v. Covington, 130-543; Worth v. Simmons, 121-357; Everett v. Newton, 117-919; Osborne v. Johnston, 65-22. **One tenant in common against another:** Dobbins v. Dobbins, 141-210; Woodlief v. Woodlief, 136-133; Shannon v. Lamb, 126-38; Jolly v. Bryan, 86-458; Neely v. Neely, 79-478; Covington v. Stewart, 77-148; Page v. Branch, 97-97; Vickers v. Henry, 110-371; Shannon v. Lamb, 126-38; McGill v. Buie, 106-242; Linker v. Benson, 67-150; see also Hicks v. Bullock, 96-164, and other cases cited hereunder under "What constitutes possession." **Person entering under a void deed, claiming to own land in fee:** Kirkman v. Holland, 139-185. **As between heir and widow:** Brown v. Morrisey, 124-292; Campbell v. Murphy, 55-357. **As against remainderman after death of life tenant:** Bullin v. Hancock, 138-198; Wilson v. Brown, 134-400; Hauser v. Craft, 134-319; Staton v. Mullis, 92-623. **Possession of father, of widow as homesteader, all tacked together to perfect title by adverse possession:** Atwell v. Shook, 133-387. **As between mortgagor and mortgagee:** Stancill v. Spain, 133-76; Williams v. Kerr, 113-306; Edwards v. Tipton, 85-479; Parker v. Banks, 79-481. **Building fence along marked line supposed to be dividing line, when in fact 25 yards over on his neighbor:** Mode v. Long, 64-433. **Cases as to adverse possession under former similar statutes:** Smith v. Reid, 51-494; Loftin v. Cobb, 46-406; Powell v. Felton, 33-469; Gilchrist v. McLaughlin, 29-310; Montgomery v. Wynns, 20-667; Murray v. Shanklin, 20-431; Ring v. King, 20-307.

WHEN POSSESSION NOT "ADVERSE." **Possession by tenant and those claiming under him:** Wilson v. Wilson, 125-525; Dills v. Hampton, 92-566; Alexander v. Gibbon, 118-796; McNeill v. Fuller, 121-209; Bonds v. Smith, 106-553; but see Worth v. Simmons, 121-357. **When defendant claiming under color can not show continuous possession under his title:** Johnston v. Case, 131-491. **When claimant has good title to tract part of which he holds adversely, his possession is not adverse as to another part of tract, which is not actually occupied and to which he claims title by possession under color of title:** Lewis v. Covington, 130-541. **Possession of widow not adverse to husband's heirs:** Everett v. Newton, 118-919. **One**

holding land under bond for title not adverse to vendor: Bradsher v. Hightower, 118-399; McNeill v. Fuller, 121-209. **Possession of tenant in common not adverse to others,** see annotations under this section headed "what constitutes possession hereunder;" also see under section 384. **Widow putting son-in-law in possession, who deeds to another, held not adverse as to husband's heirs:** Melvin v. Waddell, 75-361.

WHAT IS "COLORABLE TITLE." See section 333. **Deeds made after verdict and judgment fixing parol trust on land:** Taylor v. Smith, 121-76. **A return upon an execution showing sale of land, with description, purchaser's name and payment of purchase price:** Neal v. Nelson, 117-393; Jones v. Putney, 7-562. **Judge Gaston's definition:** Dobson v. Murphy, 18-586; approved in Ellington v. Ellington, 103-54; Utley v. R. R., 119-720 and Avent v. Arrington, 105-390; Keener v. Goodson, 89-273; but see Austin v. Staten, 126-783; Lindsay v. Beaman, 128-192; distinguished, however, in Janney v. Robbins, 141-400. **Judge Hoke's definition** in Smith v. Proctor, 139-314. **Judge Henderson's definition** in Tate v. Southard, 10-119. **Where several entered land without color and occupied different portions in severalty, then deed was made conveying land in trust for all collectively, but they continued to hold as before:** Bryan v. Spivey, 109-57. **A deed is colorable title only for land described in it:** Davidson v. Arledge, 88-326; Carson v. Carson, 122-645; McRea v. Williams, 52-430. **Ancient deed, unproven, accompanied by possession:** Davis v. Higgins, 91-382. **Deed improperly registered:** Brown v. Brown, 106-451; see cases next following. **Unregistered deed, when party holding same claims he has held possession under title from independent source:** Janney v. Robbins, 141-400, distinguishing Austin v. Staten, 126-783; Lindsay v. Beaman, 128-192; see also Davis v. Higgins, 91-382; Hunter v. Kelly, 92-285; Utley v. R. R., 119-720; Avent v. Arrington, 105-377; Hardin v. Barrett, 51-159; Campbell v. McArthur, 9-33. **Record of partition proceedings:** Lindsay v. Beaman, 128-192; Smith v. Tew, 127-299; Bynum v. Thompson, 25-578. **Deed purporting to convey title is color whether grantor owner or not:** Britton v. Ruffin, 122-113; Taylor v. Smith, 121-77; Hill v. Wilton, 6-14. **Deed by clerk after he goes out of office for land sold while in office:** Williams v. Council, 49-206. **Sheriff's deed color, when:** Worth v. Simmons, 121-357; Mnfg. Co. v. Brooks, 106-107. **Deed by attorney in fact though power not produced:** Smith v. Allen, 112-223. **Trustee's deed, though private examination of cestui que trust, a married woman, not taken:** Smith v. Allen, 112-223. **A deed to be color must attach to some particular tract:** Barker v. Railway, 125-596—**and land must be described in it:** Cook v. Pittman, 144-530; King v. Wells, 94-344; Smith v. Fite, 92-319; Davidson v. Arledge, 88-326; Dickens v. Barnes, 79-490. **Deed for land in two counties, proven and recorded in one:** Lewis v. Roper, 109-19. **Deed by non compos:** Ellington v. Ellington, 103-54. **Deed signed by husband and wife, but no private examination taken,** Perry v. Perry, 99-270; Pearse v. Owens, 3-234; but see Cook v. Pittman, 144-530. **Deed conveying life estate:** Staton v. Mullis, 92-623. **Color of title inoperative unless accompanied by possession:** Barber v. Railway, 125-596. **Mortgage deed with unexecuted trusts:** Edwards v. Tipton, 85-479. **A will as color of title:** Henley v. Wilson, 81-405; McConnell v. McConnell, 64-342; Trustees v. Blount, 4-455; Evans v. Satterfield, 5-413. **Grants from state:** Weaver v. Love, 146-; Kron v.

Hinson, 53-347; but see section 1692. **Deed of land calling bounded by a river, is color to the thread of unnavigable stream:** Wall v. Wall, 142-387.

WHAT IS NOT "COLORABLE TITLE." **An assignment of a homestead is not color of title:** Keener v. Goodson, 89-273. **Paper writing without seal, though registered:** Johnston v. Case, 131-491. **Deed though signed, not color unless delivered:** Avent v. Arrington, 105-377. **Deed is not color beyond line called for even though distance call would carry it beyond:** Smith v. Headrick, 93-210. **Former title of one who mortgaged land which was sold and deeded to purchaser but mortgagor retained possession:** Call v. Dancy, 144-494. **Original deed to defendant, after his land sold by sheriff and deed made to another:** Wilson v. Brown, 134-400. **Deed that does not cover the locus in quo:** Fincannon v. Sudderth, 144-587. Deed **by tenants in common to husband of wife who was one of the tenants yet did not sign deed:** Carson v. Carson, 122-645. **Deed by husband and wife with insufficient probate:** Cook v. Pittman, 144-530. **No color of title without some paper writing attempting to convey title, which must not be so plainly and obviously defective as to mislead:** Williams v. Scott, 122-545. **Void deed by sheriff:** Ferguson v. Wright, 113-537; but see Worth v. Simmons, 121-357; Mnfg. Co. v. Brooks, 106-107. **Deed by devisees of remainder in land where will provided for it to be sold by executor and divided as personalty:** Orrender v. Call, 101-399. **Deed with insufficient description:** Fincannon v. Sudderth, 144-587; Dickens v. Barnes, 79-490; see also Perry v. Scott, 109-380; Blow v. Vaughan, 105-198; Reed v. Reed, 93-462; Harell v. Butler, 92-20; Radford v. Edwards, 88-347; Wharton v. Eborn, 88-344; Farmer v. Batts, 83-387; Capps v. Holt, 58-153. **Unregistered deed, where plaintiff and defendant claim under common grantor:** Janney v. Robbins, 141-400; Austin v. Staten, 126-783; Lindsay v. Beaman, 128-192.

"KNOWN AND VISIBLE LINES AND BOUNDARIES." **Existence of visible and definite boundary marks necessary in constructive possession:** Scott v. Elkins, 83-424. **Deed containing no metes and bounds or other description is no evidence of known and visible lines and boundaries:** Price v. Jackson, 91-11. **See cases under paragraph headed "What constitutes possession hereunder."**

383. Seizin within twenty years, when necessary. No action for the recovery of real property, or the possession thereof, shall be maintained, unless it appear that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of such action, unless he was under the disabilities prescribed by law.

Code, s. 143; C. C. P., s. 22. **This and section 386 are to be construed together:** Conkey v. Lumber Co., 126-499. **Where plaintiff has title he is presumed to have in possession within the twenty years:** Ibid; Bland v. Beasley, 145-168. **Possession must be within the twenty years:** Honeycutt v. Brooks, 116-788. **Referred to** in Dean v. Gupton, 136-142; Covington v. Stewart, 77-151.

384. Twenty years' adverse possession. No action for the recovery of real property, or the possession thereof, or the issues and profits

thereof, shall be maintained when the person in possession thereof, or the defendant in such action, or those under whom he claims, shall have possessed such real property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held, shall give a title in fee to the possessor, in such property, against all persons not under disability.

Code, s. 144, C. C. P., s. 23. **For cases on "colorable title," "possession," "adverse possession" and "known and visible lines and boundaries" see under section 382. For cases on pleading the statute, see section 360, Cases directly supporting this section:** Wilson v. Wilson, 125-525; Walden v. Ray, 121-237; Batts v. Staton, 123-45; Shaffer v. Bledsoe, 118-279; Covington v. Stewart, 77-148; Melvin v. Waddell, 75-361. **Where land conveyed to children by parents, and parents held on to possession for 20 years, title reinvested:** Scarboro v. Scarboro, 122-234.

AS BETWEEN TENANTS IN COMMON: Church v. Bragaw, 144-126; Dobbins v. Dobbins, 141-210; Rhea v. Craig, 141-602; Bullin v. Hancock, 138-198; Tharpe v. Holcombe, 126-365; Rascoe v. Lumber Co., 124-42; Hampton v. Wheeler, 99-222; Breeden v. McLaurin, 98-307; Hicks v. Bullock, 96-164; Ward v. Farmer, 92-93; Covington v. Stewart, 77-148; Carson v. Carson, 122-645; Ferguson v. Wright, 113-537; Page v. Branch, 97-97; Amis v. Stephens, 111-172; Gaylord v. Respass, 92-553; Neely v. Neely, 79-478; Shannon v. Lamb, 126-38; Whitaker v. Jenkins, 138-476; Caldwell v. Neely, 81-114; McMillan v. Gambill, 106-359; Jeter v. Davis, 109-458; Gilchrist v. Middleton, 107-663; Pope v. Mathis, 83-169.

When tenant in common claims by independent title covering all, his possession adverse: Amis v. Stephens, 111-172; Gaylord v. Respass, 92-553.

385. Action after entry. No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within the time prescribed in this chapter.

Code, s. 145; C. C. P., s. 24; Clayton v. Cagle, 97-303.

386. Possession follows legal title, when. In every action for the recovery of real property, or the possession thereof, or damages for a trespass on such possession the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to, the legal title, unless it appears that such premises have been held and possessed adversely to such legal title, for the time prescribed by law before the commencement of such action.

Code, s. 146; C. C. P., s. 25. **Where neither claimant is seated on the lappage, the legal title prevails, possession being deemed to follow the title:** Asbury v. Fair, 111-251. **In absence of actual possession, possession follows title:** Gadsby v. Dyer, 91-311; Kitchen v. Wilson, 80-191; Williams v. Wallace, 78-354; Dobbs v. Gullidge, 20-197; Denning v. Gainey, 95-528;

London v. Bear, 84-266; Knight v. Holden, 104-107. **Presumption as to possession being adverse:** Bland v. Beasley, 145-168; Monk v. Wilmington, 137-322; but see Ruffin v. Overby, 88-369; Alexander v. Gibbon, 118-796. —**Where two in possession, the ownership draws to it possession:** Gaylord v. Respass, 92-553. **Where the entire family live on land, but title in one, the title draws to it the possession,** Straughan v. Tysor, 124-229. **Cases merely referring to section:** Berry v. Lumber Co., 141-396; Dobbins v. Dobbins, 141-219; Kirkman v. Holland, 139-189; Monk v. Wilmington, 137-326, 327; Woodlief v. Wester, 136-166; Roscoe v. Lumber Co., 124-47.

387. Tenant's possession is landlord's. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Code, s. 147; C. C. P., s. 26. **Tenant's possession is landlord's:** McNeill v. Fuller, 121-209; also cases infra, this section. **Tenant holding possession under parol gift holds adversely to landlord:** Dean v. Gupton, 136-141; Wilson v. Wilson, 125-525. **Tenant estopped to deny landlord's title:** Mobley v. Griffin, 104-115; Conwell v. Mann, 100-234; Melvin v. Waddell, 75-361; Springs v. Schenck, 99-551; Benton v. Benton, 95-559; Pate v. Turner, 94-47; Abbott v. Cromartie, 72-292. **Cases merely citing section:** Bullock v. Bullock, 131-30; Day v. Howard, 73-7.

388. No title by possession of right of way. No railroad, plank road, turnpike or canal company shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station-house or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

Code, s. 150; C. C. P., s. 29; R. C., c. 65, s. 23. **Discussed at length in** Beattie v. R. R., 108-432, 433; see also Purifoy v. R. R., 108-100; R. R. v. McCaskill, 94-746. **Cases merely citing section:** Bass v. Navigation Co., 111-455; Durham v. R. R., 104-264. **Does not apply to right of way not actually condemned, or purchased or taken possession of:** R. R. v. Sturgeon, 120-225; also see Beattie v. R. R., 108-432, 433.

389. No title by possession of streets and highways. No person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or

criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not be competent for any court to hold that such action is barred by any statute of limitations.

1891, c. 224. **For case decided prior to passage of statute:** Moose v. Carson, 104-431. **Possession of street by anyone claiming it adversely can not divest or destroy the right of the public therein:** State v. Godwin, 145-461.

V. Limitations, Other Than Real Property.

390. Periods prescribed. The periods prescribed for the commencement of actions, other than for the recovery of real property, shall be as set forth in this subchapter.

Code, s. 151; C. C. P., s. 30. **The statute must be pleaded to be available as a defense; see section 360. For how to plead the statute, see section 360. Question of whether claim is barred is for the jury:** Wright v. Cain, 93-296. **For instances of when statute begins to run, see section 360. It does not run when there is no one capable of suing:** Grant v. Hughes, 94-231. **No statute applicable to the testing of validity of election for bonds:** Jones v. Commrs., 107-248. **For instances of cases where no statute applies, see annotations of section 360, under head "Statute does not run." Where distinct cause of action put in complaint by amendment it is tantamount to a new cause of action:** Ely v. Early, 94-1; Hester v. Mullen, 107-724. **Where amendment to complaint will cause defendant to lose the benefit of his plea of the statute, it will not be allowed:** Gillam v. Life Ins. Co., 121-369.

Legislature can change time of limitation, but can not put it into effect without giving reasonable time for the beginning of actions: Culbreth v. Downing, 121-205; Strickland v. Draughan, 91-103; Nichols v. R. R., 120-495.

Where original summons not served and not followed by chain of appropriate processes, suit can not relate back to original process so as to escape bar of the statute: Penniman v. Daniel, 93-332; Etheridge v. Woodley, 83-11; Koonce v. Pelletier, 115-233.

391. Ten years. Within ten years—

1. An action upon a judgment, or decree of any court of this state, or of the United States, or of any state or territory thereof, from the date of the rendition of said judgment or decree. But no such action shall be brought more than once, nor have the effect to continue the lien of the original judgment.

ACTIONS UPON JUDGMENT BARRED. McIlhenny v. Savings & Trust Co., 108-311; Brittain v. Dickson, 104-547; Rogers v. Kimsey, 101-559; Lilly v. West, 97-276; Cook v. Moore, 95-1; Gaither v. Sain, 91-304; McDonald v. Dickson, 87-404. **Foreign judgments:** Arrington v. Arrington, 127-190; Miller v. Leach, 95-231. **Proceedings for leave to issue execution is "an action" within this section:** Smith ex parte, 134-495; also see sec-

tion 620. **Cases merely referring to section:** Berry v. Corpening, 90-398; Shankle v. Ingram, 133-259; Owen v. Paxton, 122-772; Miller v. Leach, 95-231. **This section does not preclude using judgment as a counterclaim:** McClennahan v. Cotten, 83-332. **Partial payment on judgment does not arrest the statute:** McCaskill v. McKinnon, 121-192; Hughes v. Boone, 114-54; McDonald v. Dickson, 87-404. **Can not continue lien:** Lyon v. Russ, 84-588; Fox v. Kline, 85-173; **but judgment can be made to levy on property if execution issued every three years:** Williams v. Mullis, 87-159; Spicer v. Gambill, 93-378; Sawyers v. Sawyers, 93-321; **but see** Coward v. Chastain, 99-444; Berry v. Corpening, 90-395. **Statute does not run against judgment during existence of a homestead:** Formeyduval v. Rockwell, 117-320; see also section 685.

ACTIONS UPON DECREE OF COURT. Of this state: Smith ex parte 134-495. **Of another state:** Arrington v. Arrington, 127-190. **As to expiration of lien of judgment, see section 574. As to justice's judgments, see section 392. This section does not bar plaintiff's right to a sale of property in an action to enforce vendor's lien:** Williams v. McFayden's Admr, 145-156.

2. An action upon a sealed instrument against the principal thereto.

Bond v. Wilson, 129-387; Broadfoot v. Fayetville, 124-478. **Guaranty under seal:** Coleman v. Fuller, 105-328. **Interest on sealed instrument not barred until the principal is:** Knight v. Braswell, 70-709. **No statute of limitations as to sealed notes prior to 1868; but presumption of payment arose after ten years:** Glover v. Flowers, 95-57. **For effect of part payments, see section 371. This subsection has no application to bonds due prior to 1868:** Crawford v. McLellan, 87-169. **As to when barred as to sureties to sealed instruments, see section 395. Specialties, when reduced to judgment, one merged and the statute as to judgments being barred applies:** Brittain v. Dickson, 104-547.

3. An action for the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

Foreclosure of mortgage or deed in trust: Bunn v. Braswell, 142-113; 139-135; Miller v. Coxe, 133-578; Stancill v. Spain, 133-76; Harper v. Edwards, 115-246; Williams v. Kerr, 113-306; Woody v. Jones, 113-255; Redmond v. Pippen, 113-93; Capehart v. Dettrick, 91-344; Fraser v. Bean, 96-327; Hill v. Hilliard, 103-34; but see Simmons v. Ballard, 102-111. **Foreclosure of mortgage not barred simply from the fact that debt which mortgage secures is barred:** Menzel v. Hinton, 132-660; Capehart v. Dettrick, 91-344; Parker v. Grant, 91-338; Rouss v. Ditmore, 122-775; Taylor v. Hunt, 118-172; Jenkins v. Wilkinson, 113-532; Hedrick v. Byerly, 119-420; Arrington v. Rowland, 97-127; Fraser v. Bean, 96-327. **Remainderman giving mortgage, time counted, how:** Woodlief v. Wester, 136-162. **Where mortgage was foreclosed and mortgagor still held possession, ques-**

tion arose as to estoppel of mortgagor to assert claim under original title: Call v. Dancy, 144-494. **Foreclosure of mortgage barred by the statute, purchaser gets no title:** Hutaff v. Adrian, 112-259. **This section does not apply to foreclosure of equities by vendor:** Overman v. Jackson, 104-4. **In case where neither mortgagor nor mortgagee in possession:** Simmons v. Ballard 102-105.

4. An action for the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him shall have been in possession, within ten years after the right of action accrued.

ACTION FOR REDEMPTION OF LAND UNDER MORTGAGE OR TRUST DEED BARRED. Bernhart v. Hagamon, 144-526; Gray v. Williams, 130-53; Frederick v. Williams, 103-189; Edwards v. Tipton, 85-479; Smith v. Smith, 123-229. **In case where neither mortgagor nor mortgagee in possession:** Simmons v. Ballard, 102-105. **Second mortgagee can not have first mortgage cancelled because it is barred:** Miller v. Coxe, 133-578. Code, s. 152; C. C. P., ss. 14, 31.

392. Seven years. Within seven years—

1. An action on a judgment rendered by a justice of the peace, from the date thereof.

For how to plead statute, see section 360. Where rehearing had before justice, the statute begins to run at the date of second judgment: Salmon v. McLean, 116-209. **Death of debtor will not arrest running of statute:** Mauney v. Holmes, 87-429; Daniel v. Laughlin, 87-433. **This section applies to signers of stay of execution:** Barringer v. Allison, 78-79; Humphreys v. Buie, 12-378. **Docketing in superior court does not extend the limitation to ten years:** Daniel v. Laughlin, 87-433; Broyles v. Young, 81-315; but see Adams v. Guy, 106-275.

2. By any creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law, for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor; and a creditor thus barred of a recovery against the representative of any principal debtor shall also be barred of a recovery against any surety to such debt.

Barred as to administrator: McIlhenny v. Savings and Trust Co., 108-312; Woody v. Brooks, 102-334; Morris v. Syme, 88-453; Lee v. McKoy, 118-518; Bobbitt v. Jones, 107-658, but see Clanton v. Price, 90-96. **This subsection does not stop the operation of three-year statute as to sureties:** Redmond v. Pippen, 113-90. **Where administrator holds money in trust for creditors, statute does not run:** Phifer v. Berry, 110-463. **Claim filed with clerk taking account, statute does not run:** Warden v. McKinnon, 94-378. **This section applies only to rights already accrued when administrator qualified:** Miller v. Shoaf, 110-319. **Administrator must show that**

he made the advertisement: Love v. Ingram, 104-600; Cox v. Cox, 84-138—**but this does not apply to administrator d. b. n.:** Smith v. Brown, 99-377.

Code, s. 153; C. C. P., s. 32.

393. Six years. Within six years—

1. An action upon the official bond of any public officer.

Barred in six years: Commrs. v. McRae, 89-95. **Statute runs from breach of bond:** Comrs. v. McRae, 89-95; see also section 360. **Clerk, superior court:** Shackleford v. Staton, 117-73. **County treasurer's bond:** Comrs. v. McRae, 89-95. **Register of deeds' bond:** Daniel v. Grizzard, 117-105. **Sheriff's bond:** Hobbs v. Barefoot, 104-224; Hughes v. Newsom, 86-424; Hewlett v. Schenck, 82-234; Furman v. Timberlake, 93-66.

2. An action against any executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final accounts by the proper officer, and the filing of such audited account as required by law.

Executor, administrator or collector's bonds: Nunnery v. Averitt, 111-394; Gill v. Cooper, 111-311; Culp v. Lee, 109-675; Woody v. Brooks, 102-334; Reeves v. Davis, 99-425; Andres v. Powell, 97-168, Vaughan v. Hines, 87-445. **"Final Account" of administrator;** Vaughan v. Hines, 87-445; Burgwyn v. Daniel, 115-115. **Time between death of administrator and appointment of administrator d. b. n. not counted:** Brawley v. Brawley, 109-524. **Guardian's bond: See sections 323 and 360.** Self v. Shugart, 135-185; Kennedy v. Cromwell, 108-1; Norman v. Walker, 101-24; Williams v. McNair, 98-332; Davis v. Perry, 89-420; Humble v. Mebane, 89-414.

3. An action for injury to any incorporeal hereditament.

Code, s. 154; C. C. P., s. 33.

394. Five years. Within five years—

1. No suit, action or proceeding shall be brought or maintained against any railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by said company for use of its railroad unless such suit, action or proceeding shall be commenced within five years after said lands shall have been entered upon for the purpose of constructing said road, or within two years after said road shall be in operation.

47-362
47-428
53-148

Parks v. R. R., 143-289. **Under special statute making limitation two years:** Baker v. R. R., 137-214; Dargan v. R. R., 131-623; Railroad v. McCaskill, 94-746; Gudger v. R. R., 106-481; Purifoy v. R. R., 108-100; Liverman v. R. R., 109-52.

2. No suit, action or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road, or the repairs thereto, unless such suit, action or proceeding shall be commenced within five years

after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property.

1893, c. 152; 1895, c. 224; 1897, c. 339. Parks v. R. R., 143-289; Stack v. R. R., 139-366; Carson v. R. R., 128-95; Wiley J. Lassiter v. R. R., 126-509; Beach v. R. R., 120-498. **Under the old statute and under this section discussed:** Ridley v. R. R., 124-34, also 118-996; Harrell v. R. R., 122-822; Nichols v. R. R., 120-495. **This section does not apply to canal companies:** Cherry v. Canal Co., 140-422—**nor to water companies,** Geer v. Water Co., 127-349—**but to railroads only:** Ibid.

395. Three years. Within three years—

1. An action upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

For when statute begins to run, see section 360. For how to plead the statute, see section 360. For effect of part payment, see section 360. For new promise, see section 371. This statute can be pleaded by one creditor of decedent's estate against the claim of another: Lockhart v. Ballard, 113-293; Oates v. Lilly, 86-643. **Action against sureties to sealed instruments barred:** Jackson v. Martin, 136-196; Coffey v. Reinhardt, 114-509; Redmond v. Pippen, 113-90; Moore v. Goodwin, 109-218; Lewis v. Long, 102-206; Leak v. Covington, 99-559; Arrington v. Rowland, 97-127; Joyner v. Massey, 97-148; Torrence v. Alexander, 85-143; Kerr v. Brandon, 84-128; Capell v. Long, 84-17; Welfare v. Thompson, 83-276; Goodman v. Litaker, 84-8; Hewlett v. Schenck, 82-234; Parham v. Green, 64-436; see also under subsection 6 of this section. **Actions for reopening settlement of administrator:** Woody v. Brooks, 102-334; Slaughter v. Cannon, 94-189—**of guardian,** Timberlake v. Green, 84-658. **Action to charge guarantor under seal not within this section:** Coleman v. Fuller, 105-328. **Action for fines and penalties collected by a city which belong to school board:** School Directors v. Asheville, 128-249. **Action on contract where an individual signed and sealed it and a partnership also signed, and seal was placed after name of partnership:** Burwell v. Linthicum, 100-145. **Action against an executor who, as devisee to the extent of a piece of land which was charged with payments, took possession of such land:** Rice v. Rice, 115-43; Hines v. Hines, 95-482. **Action against trustee for commissions wrongly retained under contract, held that if contract is oral this section applies:** Adams v. Battle, 125-152.

ACTIONS ON SIMPLE CONTRACTS. Bill of lading: Watch Case Co. v. Express Co., 120-352. **Promissory note:** Wells v. Hill, 118-900; Benson v. Bennett, 112-505; Copeland v. Collins, 122-619. **Contract for labor:** Fulps v. Mock, 108-601. **Services to intestate:** Miller v. Lash, 38-51.

2. An action upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statue creating it.

Action to wind up corporations: Von Glahn v. DeRossett, 81-467—**against clerk individually for failing to index judgment:** Shackleford v. Staton,

117-73—**against authorities for the recovery of illegal taxes paid under protest,** Hatwood v. Fayetteville, 121-207.

3. An action for trespass upon real property. When the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter.

See section 394, which makes the limitation five years as to railroads trespassing. Actions for permissive waste: Sherrill v. Connor, 107-630—**for damages for construction of canals,** Cherry v. Canal Co., 120-422—**for damages for construction of telegraph line,** Hodges v. Tel. Co., 133-225—**for damages for unlawful diversion of water:** Geer v. Water Co., 127-349.

4. An action for taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

Adams v. Battle, 125-153; Parker v. Harden, 121-57; Shuffler v. Turner, 111-297; Bd. Education v. Bd. Education, 107-366; Osborne v. Wilkes, 108-651; University v. Bank, 96-280; Robertson v. Dunn, 87-191; Currie v. McNeill, 83-176; Edgerton v. Logan, 81-172; Dunn v. Dunn, 137-533. **For time when right of action accrues, see section 360.**

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated.

6. An action against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

Actions against sureties of executor or administrator barred: Settle v. Settle, 141-574; Burgwyn v. Daniel, 115-115; Kennedy v. Cromwell, 108-1; Gill v. Cooper, 111-311; Stonestreet v. Frost, 123-290; Brawley v. Brawley, 109-526; Wilson v. Pearson, 102-317; Reaves v. Davis, 99-425; Andres v. Powell, 97-168; see also Humble v. Mebane, 89-410. **Actions against sureties of guardian barred:** Self v. Shugart, 135-185; Norman v Walker, 101-24; Hodges v. Council, 86-181.

7. An action against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

Navigation Co. v. Williams, 111-35.

8. Fees due to any clerk, sheriff or other officer, by the judgment of a court; within three years from the time of the judgment rendered, or of the issuing of the last execution therefor.

9. An action for relief, on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake.

ACTIONS BARRED OR NOT BARRED. Tuttle v. Tuttle, 146-; Bonner v. Statesbury, 139-3; Hooker v. Worthington, 134-283; Barden v. Stickney, 132-416; Lanning v. Comrs., 106-511; Cotton Mills v. Cotton Mills, 116-650; Osborne v. Wilkes, 108-651; Houston v. Thornton, 122-375;

Edgerton v. Logan, 81-172; Kahnweiler v. Anderson, 78-133; but see Briggs v. Smith, 83-306; Dunn v. Beaman, 126-766.

CAUSE OF ACTION ACCRUES, WHEN. Modlin v. Roanoke R. R. and Lumber Co., 145-218; Tuttle v. Tuttle, 146-; Alpha Mills v. Engine Co., 116-797; Stubbs v. Motz, 113-458; Bonner v. Statesbury, 139-3; Hooker v. Worthington, 134-283; Rouss v. Ditmore, 122-775; Barden v. Stickney, 132-416; Lanning v. Comrs., 106-511; Ely v. Early, 94-1; Knight v. Houghtaling, 85-17; Hughes v. Whitaker, 84-640; Day v. Day, 84-408; Barham v. Lomax, 73-76; Kahnweiler v. Anderson, 78-133; see also section 360.

This subsection does not prevent statute running in an action for fraudulent conversion from the conversion and not from the discovery: Spruill v. Sanderson, 79-466; Blount v. Parker, 78-128.

This subsection does not apply to actions for breach of covenant of warranty in deed: Shankle v. Ingram, 133-259; Burwell v. Linthicum, 100-149.

10. An action for the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed.

For actions against bank officers, see section 378. In bastardy, see Bastardy, section 260, Lyman v. Hunter, 123-508. **For procedure and evidence in actions to recover land sold for taxes see sections 2909, 2912. This subsection does not apply in an action to remove tax deed as a cloud upon title:** Beck v. Meroney, 135-532.

Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 269, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23.

396. Two years. Within two years—

1. All claims against the several counties, cities and towns of this state, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of such claims, or the holders of such claims shall be forever barred from a recovery thereof.

This section construed to be a statute of limitations: Wharton v. Commrs., 82-11—**but does not cover debts ascertained and audited:** Ibid. **Cases directly supporting statute:** Bd. of Ed. v. Town of Greenville, 132-4. Lanning v. Commrs., 106-505; Royster v. Commrs., 98-148; Moore v. Commrs., 87-215; Hawley v. Commrs., 82-22; Wharton v. Commrs., 82-11.

2. An action to recover the penalty for usury.

Barred in two years: Williams v. B. & L. Asso., 131-267; Carter v. Ins. Co., 122-338; Roberts v. Ins. Co., 118-429; Rogers v. Bank, 108-574; Pritchard v. Meekins, 98-244.

The cases above are the latest as to the time within which actions are barred, but neither they nor the score that could be cited are exactly in point with the present statute, since there have been amendments as to time when right of action accrues. The Revisal of 1905 did not bring for-

ward the words "from the time the usurious transaction occurred." See also section 1951.

Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69.

397. One year. Within one year—

1. An action against a sheriff, coroner or constable, or other public officer, for a trespass under color of his office.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part, to the party grieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

147-217

Action against clerk for penalty for failure to pay over costs and fines: Hewlett v. Nutt, 79-263.

3. An action for libel, assault, battery or false imprisonment.

4. An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. An application for a widow's year's provision.

Cook v. Sexton, 79-305; Perkins v. Brinkley, 133-87.

Code, s. 156; C. C. P., s. 35; 1885, c. 96. **For time within which personal representative may bring action for wrongful death, see section 59. For minimum limit in contract of insurance, within which to bring suit, see section 4755. For limit of time for creditors to present claims to personal representative, and effect, see section 94.**

398. Six months. Within six months—

An action for slander.

Code, s. 157; C. C. P., s. 36. **Claim against decedent disputed by personal representative, barred in six months,** see section 93; Hester v. Mullen, 107-724. **Effect of amendment to complaint on statute of limitation:** Ibid; see also Bray v. Creekmore, 109-49.

399. All other actions, ten years. An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued.

146-477
151-519

Code, s. 158; C. C. P., s. 37. **Actions to try title to office, ninety days after induction into office,** see section 834.

ACTIONS WITHIN THIS SECTION. To have party declared trustee: Johnson v. Lumber Co., 144-717; Norcum v. Savage, 140-472; McAden v. Palmer, 140-258; Ritchie v. Fowler, 132-788; Norton v. McDevit, 122-759. **To recover Cherokee lands, relying on a grant:** Frasier v. Gibson, 140-272. **This section covers all causes equitable and legal not otherwise provided for:** McAden v. Palmer, 140-258. **To recover funds held under an implied trust where no demand and refusal:** Dunn v. Dunn, 137-533; Edwards v. Lemmond, 136-329. **To foreclose mortgage, by remainderman,** Woodlief v. Webster, 136-162. **To issue execution on owelty of partition:** Smith, ex parte, 134-495. **To recover damages for breach of covenant in deed:** Shankle v. Ingram, 133-255. **By ward, to cause guardian to settle:** Dunn

v. Beaman, 126-766. **By an administrator to recover his intestate's share of an estate:** Hunt v. Wheeler, 116-422. **By a mortgagor to avoid a sale where mortgagee purchased:** Jones v. Pullen, 115-471—**to call upon mortgagee for account of sale:** Bruner v. Threadgill, 88-361. **To recover a charge upon land:** Rice v. Rice, 115-43. **To surcharge and falsify an account of administrator:** Nunnery v. Averitt, 111-394; Woody v. Brooks, 102-334. **To obtain a divorce:** O'Connor v. O'Connor, 109-139; see also Smith v. Smith, 72-139. **Quaere, as to action against guardian after settlement when no demand and refusal:** Kennedy v. Cromwell, 108-1. **To foreclose bond for title:** Worth v. Wrenn, 144-656; Overman v. Jackson, 104-1; Barnes v. McCullers, 108-46.

VI. Parties.

400. Real party in interest; actions by assignees. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of real estate in his own name, whenever he or any grantor or other person through whom he may derive title, might maintain such action, notwithstanding the grant of such grantor or other conveyance be void, by reason of the actual possession of a person claiming under a title adverse to that of such grantor, or other person, at the time of the delivery of such grant or other conveyance. In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any setoff or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

Code, s. 177; C. C. P., s. 55; 1874-5, c. 256. **The real party in interest may sue and recover in his own name upon a contract made in his behalf under our Code system:** Faust v. Faust, 144-383. **If change of ownership during suit, new owner becomes party and files supplemental complaint:** Burnett v. Lyman, 141-500; Field v. Wheeler, 120-264; Leavering v. Smith, 115-385; Richards v. Smith, 98-509; Murray v. Blackledge, 71-492—**but if grantee is not made a party, judgment of nonsuit on motion:** Burnett v. Lyman, 141-500. **Any claim can be assigned and assignee bring action in his own name except to recover damages for personal injury or breach of promise, or when founded on grant made void by statute, or when transfer forbidden by statute, or when it would contravene public policy,** Petty v. Rousseau, 94-355. **Sections 414 and 415 construed with this section in certain cases:** Burnett v. Lyman, 141-500. **For proper relators in actions on official bonds, see sections 281; in actions on fiduciary bonds, see sections 30, 319, 323.**

148-323

WHO SHOULD PROSECUTE. In action for recovery of equitable interest in land: Taylor v. Eatman, 92-601; Condry v. Cheshire, 88-375; Farmer v. Daniel, 82-152; Murray v. Blackledge, 71-492; Lackey v. Mar-

tin, 120-391; Geer v. Geer, 109-679; Grubb v. Lookabill, 100-267; Graves v. Trueblood, 96-495; Henley v. Wilson, 77-216; Black v. Justice, 86-504; Davis v. Evans, 27-525—**for recovery of property belonging to religious society,** Nash v. Sutton, 117-231, also 109-550—**for recovery of corporate property,** Moore v. Mining Co., 104-534; Gray v. Lewis, 94-392; Battle v. Davis, 66-252; see also section 1222—**for recovery of damages for seduction,** Snider v. Newell, 132-616; Willeford v. Bailey, 132-404; Abbott v. Hancock, 123-99; Scarlett v. Norwood, 115-284; Hood v. Sudderth, 111-215—**for recovery of burial expenses of intestate:** Ray v. Honeycutt, 119-510—**for recovery of damages for wrongful death, see under sections 59, 60—for recovery of mortgaged land,** Kiser v. Combs, 114-640; Wright v. Fort, 126-615—**for recovery on life insurance policy,** Ormond v. Connecticut Mut. Life, 145-140—**for recovery on note executed to intestate for purchase money of land,** Blankenship v. Hunt, 76-377;—**for foreclosure of mortgage,** Etheridge v. Vernoy, 71-184;—**for recovery of land embraced in will charging executor with management of same,** Smathers v. Moody, 112-792;—**for recovery of land by grantee, as described in this section,** Burnett v. Lyman, 141-500; Justice v. Eddings, 75-581; Buie v. Carver, 75-559; Johnson v. Prairie, 94-773; Osborne v. Anderson, 89-261,—**for recovery of a distributive share from some person other than the administrator,** Brooks v. Holton, 136-306; Varner v. Johnston, 112-570; Norwood v. O'Neal, 112-127; Redfearn v. Austin, 88-413—**the recovery of property belonging to intestate's estate,** Shields v. Life Insurance Company, 119-380; Page v. Insurance Company, 131-116; Rogers v. Gooch, 87-442; Cowles v. Hayes, 71-230; Sharpe v. Connelly, 105-87; Morefield v. Harris, 126-628; see section 159—**for subjection of real estate to payment of intestate's debts,** Lee v. McKoy, 118-519; Sinclair v. McBryde, 88-438; see also sections 68 and 130—**for recovery of intestate's property after death of administrator and for the distribution of it,** Gilliam v. Watkins, 104-180; Ballinger v. Cureton, 104-474; Tulburt v. Hollar, 102-407; Merrill v. Merrill, 92-657; Hardy v. Miles, 91-131; University v. Hughes, 90-537; Alexander v. Wolfe, 88-398; Grant v. Bell, 87-34; Ham v. Kornegay, 85-119; Goodman v. Goodman, 72-508—**for recovery on assigned judgment,** Moore v. Nowell, 94-265—**to enforce mechanic's lien on property held in trust,** Cheatham v. Rowland, 92-340; Boyle v. Robbins, 71-130—**for recovery of property of which one is trustee with an interest,** Willey v. Gatling, 70-410—**for recovery of a public office,** Dalby v. Hancock, 125-325; Barnhill v. Thompson, 122-493; Hines v. Vann, 118-3; Foard v. Hall, 111-369; Saunders v. Gatling, 81-298; People v. Hilliard, 72-169; Brown v. Turner, 70-93; see also section 828—**for recovery of property where receiver appointed,** Boyd v. Ins. Co., 111-372; Battle v. Davis, 66-252; Gray v. Lewis, 94-392; see sections 1222, and 846-849—**for recovery of amount bid at execution sale,** McKee v. Lineberger, 69-217; see Lackey v. Pearson, 101-651—**for recovery of deposit lost by fraud or neglect of bank officers,** Tate, Treasurer v. Bates, 118-288; Lacy v. Webb, 130-545; Coble v. Beall, 130-533—**for recovery of land of wife,** Walker v. Long, 109-510—**for recovery of tenant's crop,** State v. Higgins, 126-1112; Bridgers v. Dill, 97-222—**for recovery of land belonging to several tenants in common,** Morehead v. Hall, 126-213; Foster v. Hackett, 112-546; Gilchrist v. Middleton, 107-

663; Waller v. Bowling, 108-289; Allen v. Salinger, 103-14; Shearin v. Riggsbee, 97-216; Thames v. Jones, 97-121; Lafoon v. Shearin, 95-391; Dawkins v. Dawkins, 93-283; Yancey v. Greenlee, 90-317; Fox v. Stafford, 90-296; Overcash v. Kitchen, 89-384—**for recovery of trust property,** Hartness v. Wallace, 106-430; Wynne v. Heck, 92-414; Mebane v. Mebane, 66-334; Biggs v. Williams, 66-427; Rankin v. Allison, 64-673; Warren v. Howard, 99-190—**for damages for failing to make title to assignee of bond for title,** Utley v. Foy, 70-303—**for recovery from another county the excess paid by plaintiff county toward building a fence,** Commissioners v. Commissioners, 92-180—**for testing validity of township election for the issuance of bonds, or for other purposes:** Jones v. Commrs., 107-251; Perry v. Whitaker, 71-477; also see Rigsbee v. Durham, 99-341, 98-81; Wood v. Oxford, 97-227; Goforth v. Construction Co., 96-536; McDowell v. Construction Co., 96-514; McNair v. Commrs., 93-370; Bradshaw v. Commrs., 92-278; Caldwell v. Commrs., 90-453; McCormac v. Commrs., 90-441; Smallwood v. Newbern, 90-36—**for recovery on promissory note,** Tyson v. Joyner, 139-73; Bank v. Carr, 130-479; Breese v. Crumpton, 121-122; Bank v. Bynum, 84-24; Miller v. Harel, 75-151; Jenkins v. Wilkinson, 113-532; Kiff v. Weaver, 94-274; Jackson v. Love, 82-405; Andrews v. McDaniel, 68-385; Abrams v. Cureton, 74-523; Alexander v. Wriston, 81-191; Willey v. Gatling, 70-410; see also paragraph below—**for recovery of funds set aside and dedicated to payment of claims,** Voorhees v. Porter, 134-591; Hartness v. Wallace, 106-430—**for injury to leasehold estate,** Dale v. R. R., 132-705; Norris v. Canal Co., 132-182—**to set aside senior grant when junior grant in existence on the ground of fraud,** Henry v. McCoy, 131-586; State v. Bland, 123-739—**for recovery for breach of warranty,** Ravenal v. Ingram, 131-549—**for damages on contract by others than parties,** Gastonia v. Engineering Co., 131-363; Gorrell v. Water Supply Co., 124-328; Woodcock v. Bostick, 118-822; Peacock v. Williams, 98-324; Morehead v. Wriston, 73-398—**for recovery of ward's property on his coming of age,** McNeill v. McBryde, 112-408; Usry v. Suit, 91-406—**for recovery of penalties in different cases,** Carter v. R. R., 126-427; Goodwin v. Fertilizer Co., 119-120; Maggett v. Roberts, 108-174; Sutton v. Phillips, 116-502; Burrell v. Hughes, 116-430; Hodge v. R. R., 108-24; Harrell v. Warren, 100-259; Middleton v. R. R., 95-167; Katzenstein v. R. R., 84-688—**for recovery of damages for setting insured property on fire,** Cunningham v. R. R., 139-427; Ins. Co. v. R. R., 132-75—**to recover moneys deposited by state,** Lacy v. Webb, 130-545; Tate, Treasurer, v. Bates, 118-288—**to recover from re-insurer loss on property,** Shoaf v. Ins. Co., 127-308—**to recover possession from tenant,** Cheek v. Sykes, 126-210—**concerning a partnership,** Heaton v. Wilson, 123-398—**for recovery on assigned open account,** Bank v. School Committee, 121-107—**for divorce, when plaintiff a lunatic,** Sims v. Sims, 121-297—**for damages for failure to deliver telegram,** Landie v. Tel. Co., 124-528; Sherrill v. Tel. Co., 117-352; also 109-527—**for breach of contract where one not privy to it furnished the money,** Gorrell v. Water Supply Co., 124-328—**for damages for slander,** Harper v. Pinkston, 112-296.

ACTION BY ASSIGNEE WITHOUT PREJUDICE TO SET OFF AND OTHER DEFENSES EXISTING. As to promissory notes: Triplett v.

Foster, 115-335; Loan Asso. v. Merritt, 112-243; Sutton v. Owen, 65-123; Lane v. Richardson, 104-642; Spence and Ross v. Tapscott, 93-246; Lee v. Eure, 93-5; Havens v. Potts, 86-31; McClennahan v. Cotten, 83-332; Riddick v. Moore, 65-386; Bank v. Bynum, 84-24; Harriss v. Burwell, 65-586; Moody v. Sitton, 37-382; but see Johnson v. Mangum, 65-146. **As to other choses in action, such as judgments:** Field v. Wheeler, 120-264; Rice v. Hearn, 109-150; Moore v. Nowell, 94-265—**as to insurance policies,** Blackburn v. Ins. Co., 116-821; Fertilizer Co. v. Reams, 105-283.

401. Who may sue for penalties. Where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use.

Code, s. 1212; R. C., c. 35, s. 47. Carter v. R. R., 126-439; Goodwin v. Fertilizer Works, 119-120; Burrell v. Hughes, 116-430; Sutton v. Phillips, 116-502; Maggett v. Roberts, 108-174; Middleton v. R. R., 95-167.

402. Suits for penalties brought in name of state. Whenever any penalty shall be given by statute, and it is not prescribed in whose name suit therefor may be commenced, the same shall be brought in the name of the state.

Code, s. 1213; R. C., c. 35, s. 48. **See** Maggott v. Roberts, 108-174; Middleton v. R. R., 95-167; Norman v. Dunbar, 53-319.

403. Action by purchaser under judicial sale. Any person let into possession under any judicial sale confirmed, where the title may be retained as a security for the price, shall be deemed the legal owner of the premises for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession taken or continued, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit so brought shall be under the control of the court ordering the sale.

Code, s. 942; 1858-9, c. 50. **Purchaser has no right at all before confirmation:** Vanderbilt v. Brown, 128-498—**but confirmation being made the bargain is complete and relates back to day of sale:** Vass v. Arrington, 89-10. **All that a purchaser at a judicial sale is required to know is that the court had jurisdiction of the subject matter and of the person:** Card v. Finch, 142-140.

404. Action by executor or trustee. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

Code, s. 179; C. C. P., s. 57. **For actions by executor or administrator, see sections 159 and 160. Cases in point:** Jenkins v. Wilkinson, 113-532; Wynne v. Heck, 92-414; Jones v. McKinnon, 87-294; Warren v. Howard, 99-190; Rankin v. Allison, 64-673; Alexander v. Wriston, 81-191; Davis v. Fox, 69-435; Mebane v. Mebane, 66-334; Biggs v. Williams, 66-427; Davidson v. Elms, 67-228; Hartness v. Wallace, 106-430; Salisbury v. R. R., 91-490. **Receiver appointed by U. S. Court not a trustee within this section:** Battle v. Davis, 66-257. **Section referred to** in Winders v. Hill, 141-704; Riley v. Pelletier, 134-317; Abrams v. Cureton, 74-523.

405. Infants, etc., sue by guardian or next friend. In actions and special proceedings whenever any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether said infants, idiots, lunatics or persons non compos mentis, be resident or nonresidents of this state, said infants, idiots, lunatics or persons non compos mentis shall appear by their general or testamentary guardian, if they have any within the state; but if the action or proceeding be against such guardian, of if there be no such guardian, then said infants, lunatics or persons non compos mentis may appear by their next friend: Provided, however, that the duty of the state solicitors to prosecute in the case specified in chapter entitled Guardian shall not be affected by the provisions of this section.

Code, s. 180; 1893, c. 5; C. C. P., s. 58; 1870-1, c. 233; 1871-2, c. 95. 149-51
General doctrine of section stated in Settle v. Settle, 141-553; Holloman v. Holloman, 125-29; Ward v. Lowndes, 96-367; Smith v. Smith, 106-498. **Duty of court in appointing next friend:** Morris v. Gentry, 89-248; Tate v. Mott, 96-19. **Next friend must not be hostile:** George v. High, 85-113; **—and ought always to be appointed by court,** Tate v. Mott, 96-19—**is officer of court,** Ibid—**and is not taxable personally with costs unless he acts in bad faith, etc.,** Smith v. Smith, 108-365. **Foreign guardian treated as next friend;** Tate v. Mott, 96-19. **Once recognized as next friend, appointment cannot be impeached in collateral proceedings:** Sumner v. Sessoms, 94-371. **Presumed that court protects interests of infants:** Tyson v. Belcher, 102-112. **When allegation of insanity of husband is admitted by demurrer, wife can be made next friend without inquirendo lunatico:** Abbott v. Hancock, 123-99; **Next friend can be removed:** Tate v. Mott, 96-19. **Infant and not the guardian or next friend is the real party of record and the one estopped by it:** Settle v. Settle, 141-553; Grantham v. Kennedy, 91-148; Smith v. Smith, 106-498; George v. High, 85-113; Mason v. McCormick, 75-263; Falls v. Gamble, 66-465; Branch v. Goddin, 60-493. **Defendant can not object to next friend appointed by the trial judge:** Carroll v. Montgomery, 128-278. **Objection that next friend not regularly appointed made by plea in abatement:** Carroll v. Montgomery, 128-278. **Effect where infant institutes action in his own name without guardian or next friend,** see Hicks v. Beam, 112-642. **Infant widow may dissent from will by guardian or next friend:** Hollomon v. Hollomon, 125-29. **In ex parte proceeding, when no suggestion of unfair advantage, ad-**

ministrator may represent minor as guardian: Harris v. Brown, 123-419. **Next friend has no power to agree to arbitration:** Millsaps v. Estes, 137-535—**he can only consent to a judgment when all the facts are found by the court:** Ferrell v. Broadway, 126-258.

406. Infants, etc., defend by guardian ad litem. In all actions and special proceedings whenever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, said infants, idiots, lunatics, or persons non compos mentis, shall defend by their general or testamentary guardian, if they have any within this state, whether said infants, idiots, lunatics, or persons non compos mentis, are residents or nonresidents of this state; and if said infants, idiots, lunatics, or persons non compos mentis, have no general or testamentary guardian within this state, and any of the defendants in said action or special proceeding shall have been summoned, then it shall be lawful for the court, wherein said action or special proceeding is pending, upon motion of any of the parties to the said action, or special proceeding, to appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idiots, lunatics, or persons non compos mentis, and such guardian so appointed shall, if the cause in which he is appointed be a civil action, file his answer to the complaint within the time required for other defendants, unless such time be extended by the court for good cause, and if the cause in which he is so appointed be a special proceeding, a copy of the complaint, with the summons, shall be served on said guardian ad litem, and after twenty days' notice of said summons and complaint in such special proceeding, and after answer filed as above prescribed in such civil action, the court may proceed in the cause to final judgment, and decree therein in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants, and any decree or judgment in the case shall conclude the infant, idiot, lunatic, or person non compos mentis, defendants, as effectually as if he or they had been personally summoned.

153-135

Code, s. 181; C. C. P., s. 59; 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2. **Guardian ad litem must be served with summons:** Gulley v. Macy, 81-356, Moore v. Gidney, 75-34. **Guardian ad litem not taxed with costs; exception noted:** Smith v. Smith, 108-365. **Guardian ad litem has no power to agree to arbitration:** Millsaps v. Estes, 137-535. **Service of process on infants must be made on general guardian, if any:** Chambers v. Penland, 78-53; also see section 440. **No recovery against minor unless represented by guardian ad litem:** Thorp v. Minor, 109-152—**and when he refuses to act and defend, judgment void:** Isler v. Murphy, 71-440; but see Tate v. Mott, 96-19, and cases therein cited. **Not laches on part of plaintiff if he fail to move for appointment of guardian ad litem such that it works a discontinuance:** Turner v. Douglas, 72-127. **Where infant has no guardian**

or guardian ad litem, but defends by attorney, held that judgment valid until reversed or set aside by motion: White v. Morris, 107-92 Harrison v. Harrison, 106-282; Tate v. Mott, 96-25; Burgess v. Kirby, 94-580; England v. Garner, 90-197; Turner v. Douglas, 72-127; Marshall v. Fisher, 46-111; White v. Albertson, 14-341. **Where infant never served with process or guardian ad litem appointed, judgment irregular and may be set aside:** Larkins v. Bullard, 88-35. **Where infants in partition proceeding are served with summons and guardian ad litem appointed, a judgment affirming sale can not be collaterally attacked for fraud:** Smith v. Gray, 116-311.

APPOINTMENT OF GUARDIAN AD LITEM. Only after application in writing: White v. Morris, 107-92; Ward v. Lowndes, 96-367; Morris v. Gentry, 89-248—**and after infant defendant has been personally served with summons:** Roseman v. Roseman, 127-494; Coffin v. Cook, 106-376; Cates v. Pickett, 97-21; Hare v. Holloman, 94-14; Sumner v. Sessoms, 94-371; Stancill v. Gay, 92-462; Young v. Young, 91-359; Fry v. Currie, 91-436; Matthews v. Joyce, 85-258; Nicholson v. Cox, 83-44; Moore v. Gidney, 75-34; Turner v. Douglas, 72-127; Hyman v. Jarnigan, 65-96; Allen v. Shields, 72-504; Gulley v. Macey, 81-356—**but infant can not accept service,** Nicholson v. Cox, 83-44; Bass v. Bass, 78-374—**yet if he does accept service it is cured after guardian appointed:** Cates v. Pickett, 97-21; Perry v. Adams, 98-167. **Improper for court to appoint a plaintiff as guardian ad litem:** Ellis v. Massenbury, 126-129—**even though a nominal plaintiff made party plaintiff without his consent,** Ibid. **Appointment of guardian ad litem munc pro tunc disapproved:** Ibid. **Even a colorable interest adverse to infant held by guardian ad litem or attorney disqualifies for appointment:** Ellis v. Massenburg, 126-134; Moore v. Gidney, 75-34. **Administrator may represent minor in ex parte proceeding, if no suggestion of unfairness:** Harris v. Brown, 123-419.

407. Guardian ad litem to file answer. Whenever any guardian ad litem shall be appointed, he shall file an answer in said action or special proceeding, admitting or denying the allegations thereof; the costs and expenses of which said answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of a division, shall be charged upon the land, if the sale or division shall be ordered by the court, and if not ordered in any other manner the court shall direct.

Code, s. 182; 1870-1, c. 233, s. 4. **Guardian ad litem filing answer prepared at plaintiff's instance, infant defendant not concluded:** Gulley v. Macy, 81-356; Moore v. Gidney, 75-34. **Where guardian ad litem refused and failed to file answer; effect:** Isler v. Murphy, 71-440; Faison v. Hardy, 114-61—**after lapse of many years after coming of age, defendants not allowed to assent their right:** Williams v. Williams, 94-732; see Morris v. House, 125-550.

408. Married women. When a married woman is a party, her husband must be joined with her except that—

Must be joined in action to charge wife's personalty with payment of note: Harvey v. Johnson, 133-352. **Must be joined in action to recover property fraudulently conveyed to wife:** Pender v. Mallett, 123-57. **She may be sued alone in tort when her husband abandons her:** Heath v. Morgan, 117-504—**in ejectment, when her husband is an alien, resides abroad, or has abandoned her,** Finley v. Saunders, 98-462. **She may consent to judgment fixing no personal liability upon her without husband being joined:** Roseman v. Roseman, 127-494. **If husband refuses to be made party plaintiff with wife, she can make him party defendant:** Barnes v. Barnes, 104-617; McGlennery v. Miller, 90-215.

1. When the action concerns her separate property, she may sue alone.

Right of suing alone is a personal privilege: Lippard v. Troutman, 72-551. **She may sue alone as to her separate property:** In re Beauchamp's Will, 145-; Hart v. Cannon, 133-10; Walker v. Long, 109-510; McGlennery v. Miller, 90-215; McCormac v. Wiggins, 84-278; Thompson v. Wiggins, 109-508 and cases following. **She may sue alone for tort committed against her:** Strother v. R. R., 123-197; but see Brown v. Brown, 124-20; also 121-8 **which seem to hold that wife be abandoned before suing alone for tort. She may sue alone in action for breach of promise of marriage:** Shuler v. Millsaps, 71-297. **She may sue for the probate of her father's will in solemn form without joining husband, if he is opposed:** In re Beauchamp's Will, 145-. **A married woman can accept service of summons:** Nicholson v. Cox, 83-44; Godwin v. Monds, 106-450. **Where her real estate is to be bound by an action, she must be served with process personally:** Rowland v. Perry, 64-578. **In action for specific performance of a contract, she may sue alone:** Earnhardt v. Clement, 137-91. **She can not bind herself by agreement to arbitrate the question of title of her land:** Smith v. Bruton, 137-79. **For seduction of infant daughter she can sue without husband when he is insane, how:** Abbott v. Hancock, 123-99—**and can sue without husband when he is nonresident:** Ibid. **For slander of wife, husband can not bring action in his name alone:** Harper v. Pinkston, 112-293.

2. When the action is between herself and her husband, she may sue or be sued alone.

Wife can sue husband without her husband joining as plaintiff: McCormac v. Wiggins, 84-278; Manning v. Manning, 79-293; McGlennery v. Miller, 84-215; Robinson v. Robinson, 123-137; Perkins v. Brinkley, 133-158.

And in no case need she prosecute or defend by a guardian or next friend.

Code, s. 178; C. C. P., s. 56.

409. Who may be plaintiffs. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs except as otherwise provided.

Code, s. 183; C. C. P., s. 60. **For parties in interest, see section 400. For who to bring action in different proceedings provided by statute, see under head "Party to action or proceeding" in Index. For plaintiffs in**

actions by assignees, see section 400. For relators in actions on official bonds, see section 281. For plaintiffs in action for penalties see sections 401 and 402. For plaintiffs in actions by trustees, etc., see section 404. Nonresidents can sue in this state: Thompson v. Tel. Co., 107-449. **Wholly immaterial that uninterested party is made plaintiff along with real owner in action for debt:** Perkins v. Berry, 103-131.

410. Who may be defendants. Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case may require, to any such action.

Code, s. 184; C. C. P., s. 61. **Where defendant dies after verdict and before judgment, personal representative need not be made party in order to entitle plaintiff to judgment:** Beard v. Hall, 79-506. **In hearing of motion to revive dormant judgment, defendant can not set up that he was not properly a party:** Smathers v. Sprouse, 144-637. **Action of court in refusing motion to make additional party defendant is not reviewable where such party is a proper, but not a necessary party:** Aiken v. Mfg. Co., 141-339. **Appeal from order making parties can not be allowed to other parties who do not show that some substantial right of their own is thereby affected:** Emry v. Parker, 111-261. **Joinder of unnecessary parties immaterial, save only that it may affect question of costs:** Ormond v. Life Ins. Co., 145-140; Rowland v. Gardner, 69-53. **Failure to join necessary parties is an error to which exception lies:** Ormond v. Ins. Co., 145-140.

WORDS "INTEREST IN THE CONTROVERSY" CONSTRUED: Jones v. Asheville, 116-817; Garrison v. Cox, 99-482; Asheville v. Aston, 92-588; McDonald v. Morris, 89-99; Colgrove v. Koonce, 76-363; Wade v. Sanders, 70-277.

WHO PARTIES DEFENDANT. In action to recover real property: Walton v. Parish, 95-259; Bryant v. Kinlaw, 90-341; Harkey v. Houston, 65-137; Maddrey v. Long, 86-383; Swepson v. Johnson, 84-449; Keathley v. Branch, 84-202; Lytle v. Burgin, 82-301; Cecil v. Smith, 81-285; Rollins v. Rollins, 76-264; Batchelor v. Macon, 67-181, Isler v. Foy, 66-547—**to recover from bank money loaned on individual credit of stockholders,** Bank v. Cocke, 127-467—**to subject mortgaged property to lien of attachment,** Bear v. Cohen, 65-511—**to recover debt of partnership,** Heaton v. Wilson, 123-398—**to recover price of land bought by intestate,** Paschal v. Brandon, 79-504—**to recover damages to property where reversioner refused to become party plaintiff,** Jones v. Asheville, 116-817—**to set aside fraudulent assignment,** Hancock v. Wooten, 107-9; Cheatham v. Rowland, 92-340—**to recover from corporation damages for fraudulent practices of officers,** Mining Co. v. Smelting Co., 99-445—**to restrain the enforcement of a judgment or performance of an act as public agent,** Stout v. McNeill, 98-1; Land and Lumber Co. v. Smith, 146-,—**to foreclose mortgage,** Chad-

bourne v. Johnston, 119-282; Styers v. Alspaugh, 118-631; Vanstory v. Thornton, 114-376; Nimrock v. Scanlin, 87-118—**to recover on replevin bond where two bonds taken with different sureties,** Smith v. Whitten, 117-390—**to recover damages for separate acts of several persons having like interest adverse to plaintiff,** Long v. Swindell, 77-176; Solomon v. Bates, 118-311; Mode v. Penland, 93-292; Caldwell v. Bates, 118-323; Tate, treas., v. Bates, 118-287—**to recover from state,** Reeves v. The State, 93-257; Martin v. Worth, 91-45—**to collect from city fines and penalties going to school fund,** Bearden v. Fullam, 129-477. **In proceeding by legatees and distributees against administrator for account and settlement:** Carlton v. Byers, 93-302—**by creditors to sell land of intestate to pay debts,** Perkins v. Berry, 103-131—**in the nature of creditor's bill to subject defendant's property to payment of debts,** Leduc v. Brandt, 110-289—**by administrator to sell intestate's land to pay debts,** Tilley v. Bivins, 112-348—**for partition of intestate's land,** Garrison v Cox, 99-478; Gregory v. Gregory, 69-522—**to lay off dower,** Parton v. Allison, 111-429; Welfare v. Welfare, 108-272; Carney v. Whitehurst, 64-426; Moore, ex parte, 64-90; Avery ex parte, 64-113—**to recover on life insurance policy where company had already paid amount to certain beneficiaries,** Ormond v. Connecticut Mut. Life, 145-140.

411. Several parties, how classed; action by one for a class. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties may be very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Code, s. 185; C. C. P., s. 62. **See annotations under section 410. Additional parties can be joined by amendment:** Isler v. Koonce, 83-55; but see Morehead v. R. R., 98-362; see also sections 414 and 507. **Supreme court adjudging that others are necessary parties to final determination of matters involved, case will be remanded that they be brought in:** Kornegay v. Morris, 123-128; Finlayson v. Kirby, 121-106. **Where party objects to making himself plaintiff and he is a necessary party, he is made defendant:** Plemmons v. Imp. Co., 108-614; McCormac v. Wiggins, 84-279. **Court will not join creditors as plaintiffs in creditor's bill so as to cause original plaintiffs to lose preference:** Hancock v. Wooten, 107-9; LeDuc v. Brandt, 110-289. **Where parties are numerous one can sue or defend for all:** Merrimon v. Paving Co., 142-539; Foster v. Hackett, 112-554; Bronson v. Ins. Co., 85-411; but see Williams v. Rwy., 144-502; Syme v. Bunting, 86-175; Logan v. Wallis, 76-416—**but where one sues for all because it is impracticable to bring so many before the court, he must so allege,** Foster v. Hackett, 112-554. **Joining improper parties harmless error:** Carter v. R. R., 126-444; Perkins v. Berry, 103-131; Rowland v. Gardner, 69-53; Wool v. Edenton, 113-33; McAlpine v. Daniel, 101-

550. **Appeal from order making additional parties not allowed other parties who do not show that some substantial right of their own is thereby affected:** Emry v. Parker, 111-261.

WHO ARE NECESSARY PARTIES. In proceeding to enforce mechanic's lien: Lumber Company v. Hotel Company, 109-658—**to recover property held in common,** Allred v. Smith, 135-451; Thames v. Jones, 97-121; Gregory v. Gregory, 69-522—**to wind up partnership and distribute assets,** Smith v. Summerfield, 108-284—**against partnerships,** Heaton v. Wilson, 123-398—**to recover price of land bought by intestate,** Paschal v. Brandon, 79-504—**for partition of intestate's land,** Garrison v. Cox, 99-478; Gregory v. Gregory, 69-522—**to lay off dower,** Parton v. Allison, 111-429; Welfare v. Welfare, 108-275; Carney v. Whitehurst, 64-426; Moore ex parte, 64-90; Avery ex parte, 64-113; see section 3088—**to recover damages for separate acts of several persons having like interest adverse to plaintiff,** Long v. Swindell, 77-176; Solomon v. Bates, 118-311; Mode v. Penland, 93-292; Caldwell v. Bates, 118-323; Tate, treas., v. Bates, 118-287; Von Glahn v. Harris, 73-323; Von Glahn v. Savage, 73-333; Von Glahn v. DeRossett, 76-292—**to follow land conveyed by deceased in fraud of creditors,** Webb v. Atkinson, 122-683—**to determine disposition of proceeds of sale under trust deed,** Meadows v. Marsh, 123-189—**to recover money paid clerk for distributees,** Brooks v. Holton, 136-306—**to force delinquent stockholders to pay for stock so proceeds could be used to pay debts of corporation,** Bronson v. Ins. Co., 85-411; Cooper v. Security Co., 122-463—**to recover for various trespasses on several contiguous tracts, where ownership consolidated,** Brown v. Spivey, 106-95—**to recover assets of intestate with which to pay debts when administrator d. b. n. refuses to prosecute,** Wilson v. Pearson, 102-290; Clement v. Cozart, 107-695; Tuck v. Walker, 106-285—**to recover from personal representative of deceased executor where next of kin or legatees seek a settlement,** Hardy v. Miles, 91-131—**to restore lost records,** Cowles v. Hardin, 79-577—**to recover on fire insurance policy made to further secure mortgagee,** Proctor v. Ins. Co., 124-265—**to foreclose mortgage:** Gammon v. Johnson, 126-64; Stancill v. Spain, 133-76; Patterson v. Mills, 121-258; Chadbourne v. Johnston, 119-282; Le Duc v. Brandt, 110-289; Fraser v. Bean, 96-327; Hughes v. Hodges, 94-56; Hinson v. Adrain, 86-61; Pullen v. Heron Mining Co., 71-567; Fidelity Asso. v. Lash, 135-405—**to remove trustees for unfaithfulness and incompetency and compel the conveyance by them of trust property,** Nash v. Sutton, 109-550—**to enforce provisions of trust estate in land after trustee dead,** Graves v. Trueblood, 96-495—**by legatees to secure a fund where there is a devise over,** Peacock v. Harris, 85-146—**to test the validity of a will,** Hutson v. Sawyer, 104-1; Collins v. Collins, 125-98—**by creditors to sell land of intestate to pay debts,** Perkins v. Berry, 103-131; Wall v. Fairley, 77-105; Webb v. Atkinson, 122-683—**in the nature of creditor's bill to subject defendant's property to payment of debts,** LeDuc v. Brandt, 110-289—**by administrator to sell intestate's land to pay debts,** Tilley v. Bivins, 112-348; see Webb v. Atkinson, 122-683, also annotations under section 68—**to recover land,** Burnett v. Lyman, 141-500; Hughes v. Gay, 132-50; McAlpine v. Daniel, 101-550; Arrington v. Arrington, 114-120; Ten Broeck v. Orchard, 74-409; see sec-

tion 410—**to subject unpaid subscription to corporate stock to payment of corporate debts,** Cooper v. Security Co., 122-463—**to recover against trespasser upon land of cotenants:** Lenoir v. Mining Co., 113-513; Moody v. Johnson, 112-804; Foster v. Hackett, 112-546—**to set aside fraudulent conveyances of several tracts of land made by debtor,** LeDuc v. Brandt, 110-289; Bank v. Harris, 84-206—**to recover land sold by sheriff under execution and for the execution of a deed,** McMillan v. Edwards, 75-81—**to recover penalty for sheriff making false return,** Peebles v. Newsome, 74-473—**to recover public office,** Foard v. Hall, 111-369; Tuck v. Hunt, 73-24; People v. Hilliard, 72-169—**to enjoin sale under mortgage:** Gaster v. Hardie, 75-460—**to compel a trustee to collect a bond,** Oliver v. Wiley, 75-320.

412. Persons severally liable, suit against. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff.

Code, s. 186; C. C. P., s. 63. **Where suit is brought against part of sureties on two official bonds; allowable:** Syme v. Bunting, 86-175. **Cause of action in which several are jointly liable can not be joined with one in which only part of them are liable:** Logan v. Wallis, 76-416. **Plaintiff can sue any endorser without joining the maker or other endorser:** Bank v. Carr, 130-479, also 121-113; Moore v. Carr, 123-426; Bank v. Lumber Co., 123-26. **Where one endorses a note after judgment on it, can not be joined with maker and previous endorser:** Wooten v. Maultsby, 69-462. **Note is merged into the judgment on the note, but where sureties not made parties their liability still exists:** Bank v. Lumber Co., 123-24.

413. Persons jointly liable, suits against. In all cases of joint contracts or copartners in trade or others, suit may be brought and prosecuted on the same against all, or any number of the persons making such contracts.

Code, s. 187; R. C., c. 31, s. 84; 1871-2, c. 24, s. 1. **See** Merwin v. Ballard, 65-168. **Under the Code of Civil Procedure all contracts are several in legal effect, although joined in form:** Rufty v. Claywell, 93-308. **A creditor has the right to pursue his remedy against all or any of the partners:** Hastein v. Johnson, 112-254. **Proper method to enforce liability of those not made defendants is by a new action against them:** Davis v. Sanderlin, 119-84. **Action against members of joint stock company, same as action against partners as far as joinder of members concerned:** Bain v. Loan Asso., 112-248.

414. New parties by order of court; interpleader. The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court must cause them to be brought in. And when in an action for

the recovery of real or personal property, a person not a party to the action, but having an interest in the subject matter thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific, real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court shall direct. The court, in its discretion, may make such an order.

Code, s. 189; C. C. P., s. 65. **For intervention in claim and delivery, see section 800. For intervention in attachment, see section 789. For necessary parties to actions, see section 411. For proper parties plaintiff, see sections 400 and 409—defendant, see section 410. Objection that there is defect of parties must be taken by demurrer, see section 474. This section construed with sections 400 and 415, when:** Burnett v. Lyman, 141-500.

INTERVENORS IN ACTIONS. Right to intervene given to outsiders having interest in controversy: Jones v. Asheville, 116-817; Asheville Div. v. Aston, 92-588; Colgrove v. Koonce, 76-363; Wade v. Saunders, 70-270; Sims v. Goettle, 82-268. **Wife can intervene and defend in action of ejectment brought against husband:** Taylor v. Apple, 90-343; Cecil v. Smith, 81-285; Young v. Greenlee, 82-346. **Person can interplead and assert title to property in a proceeding supplementary to execution:** Munds v. Cassidey, 98-558. **The right to interplead given by this section applies to properly constituted cases in court only:** Milliken v. Fox, 84-109; Bates v. Lilly, 65-232; Dewey v. White, 65-225. **Execution creditors can come in under this section and have disposition of fund determined:** Fox v. Kline, 85-173; Dewey v. White, 65-225. **Intervenor as to personal property controversy loses his right by delay of three years after notice of action:** Clemmons v. Hampton, 70-534. **A party may intervene when he has an interest in the controversy, but not when he has only an interest in the thing which is the subject of the controversy:** Asheville Div. v. Aston, 92-588; Colgrove v. Koonce, 76-363; Wade v. Saunders, 70-270. **In partition proceedings, the personal representative of ancestor can not be allowed to interplead and ask to sell land for assets:** Garrison v. Cox, 99-478. **Landlord let in to defend an action of ejectment is not restricted to his tenant's defenses:** Isler v. Foy, 66-547; Maddrey v. Long, 86-383. **How landlord's application must be framed,** see Bryant v. Kinlaw, 90-337. **Where creditor wants to be made a plaintiff in action by one creditor for all; requirements, etc.;** Isler v. Murphy, 76-52. **Motion to intervene will be denied when useless or calculated to obstruct justice:** Bird v. Gilliam, 125-76. **Joint owner with defendant of land the subject of litigation has a right, upon affidavit, to be let in as party defendant:** Lytle v. Burgin, 82-301. **Separate trial allowed intervenor when the court**

deems best: Cotton Mills v. Weil, 129-452. **Distributees can not intervene in a motion by administrator to set aside a judgment for irregularity:** McLeod v. Graham, 132-473. **Intervenor is entitled to only one issue and that is "Does the fund belong to him:"** Maynard v. Ins. Co., 132-711. **When plaintiff takes nonsuit action continues as to interpleader:** Dawson v. Thigpen, 137-462. **One refused the right to interplead or become a party can appeal:** Rollins v. Rollins, 76-264; Keathly v. Branch, 84-202. **Creditor allowed to intervene in proceeding for widow's dower:** Welfare v. Welfare, 108-272. **A creditor can intervene in action to vacate corporate charter:** Atty. Gen. v. Simonton, 78-57. **Where both plaintiff and third party claim to be landlord of tenant, such third party has the right to be let in as party defendant:** Rollins v. Rollins, 76-264. **No person claiming land adversely to both plaintiff and defendant should be allowed to be made a party:** McDonald v. Morris, 89-99; Colgrove v. Koonce, 76-363; Asheville Div. v. Aston, 92-588. **The burden is always on the intervenor to establish title:** Cotton Mills v. Weil, 129-452; Redman v. Ray, 123-502; Wallace v. Robeson, 100-206. **Interpleader in summary ejectment in magistrate's court:** Cheek v. Sykes, 126-210. **Tort judgment creditor can not intervene in the foreclosure of mortgage executed by a corporation:** Williams v. R. R., 126-918. **Insurance company can intervene in action against railway for negligent burning:** Dobson v. Rwy., 129-290.

ADDITIONAL PARTIES BY ORDER OF COURT. From the refusal of a motion to make an additional party defendant, there is no appeal: Aiken v. Mnfg. Co., 141-339; Jarrett v. Gibbs, 107-304; Henderson v. Graham, 84-496—**it is a matter discretionary with the trial judge:** Belding v. Archer, 131-287. **An appeal from an order making additional parties is premature:** Bennett v. Shelton, 117-103; Emry v. Parker, 111-261; Lane v. Richardson, 101-181. **No motion, after adverse verdict, to make additional parties will be allowed:** Styers v. Alspaugh, 118-631. **Case remanded by supreme court that interested persons be made parties:** Meadows v. Marsh, 123-189. **Supplemental complaint or answer is required from new parties only when the previous record of the cause does not show how they are connected with the controversy or interested in its results:** Hughes v. Hodges, 94-56.

Cases where defendant, a third party also making a demand upon him, for property sued for, asks that such party be substituted as defendant, he be allowed to surrender property to court and be discharged from all liability: Maynard v. Ins. Co., 132-711.

415. Abatement of actions. 1. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, except in suits for penalties, and for damages merely vindictive, marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of

any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action.

Abatement of action for damages for assault and battery when plaintiff dies, Bolick v. R. R., 138-370; Hannah v. R. R., 87-351—**for damages for tort of wife when wife dies,** Roberts v. Lisenbee, 86-136—**for personal injuries when plaintiff dies,** Harper v. Commrs., 123-118; Hancock v. R. R., 87-351—**for recovery of custody of children when respondent died,** Brown v. Rainor, 108-204—**for penalty on official bond of Register when Register dies,** Wallace v. McPherson, 139-297—**for recovery of damages for mental anguish,** Morton v. Tel. Co., 130-299.

No abatement of action for recovery of land by conveyance of same: Burnett v. Lyman, 141-500; Talbert v. Becton, 111-543; Davis v. Higgins, 92-203—**for recovery of damages for breach of promise of marriage when defendant dies,** Allen v. Baker, 86-92; Shuler v. Millsaps, 71-297—**for recovery of damages for wrongful death when defendant dies,** Collier v. Arrington, 61-356; also sections 59 and 60—**for recovery on official bond,** Davenport v. McKee, 98-500—**for recovery of damages on contract,** Miller v. Leach, 95-229—**for damages for waste when life tenant dies,** Shields v. Lawrence, 72-43—**for damages for conversion,** Sledge v. Reid, 73-440—**for trespass, on death of plaintiff,** Rowe v. Lumber Co., 133-433—**for foreclosure of mortgage, on death of mortgagee,** Hughes v. Gay, 132-50—**for recovery of land, on death of plaintiff,** Ibid: Rogerson v. Leggett, 145-.

2. After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of a party.

Judgment against a dead man is irregular and voidable; in favor of a dead man is not void, nor on that account irregular: Wood v. Watson, 107-52; Everett v. Reynolds, 114-366; Lynn v. Lowe, 88-481; Beard v. Hall, 79-506.

3. At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months, nor exceeding one year from the granting of the order.

The question of abatement under this subsection entirely in the discretion of court for the promotion of justice, see Coggins v. Flythe, 114-275; Baggarly v. Calvert, 70-688. **Order of court directing continuance of an action upon death of unnecessary party will not be reviewed:** Jaffray v. Bear, 98-58.

4. No action against a receiver of a corporation shall abate by reason of his death but, upon suggestion of the facts on the record, shall be continued against his successor, or against the corporation in case no new receiver be appointed.

Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46,

s. 43. **Death of party should be suggested by adverse party:** Wood v. Watson, 107-52.

416. Death of party suggested before clerk. Whenever any party to any action in the superior court shall die pending the action, the death of such party may be suggested before the clerk of the superior court where the action is pending during vacation.

1887, c. 389. **Duty of adverse party to make suggestion:** Wood v. Watson, 107-52. **Where record shows that party by counsel assumed as administrator the defense of an action, but nothing appears as to suggestion of death of defendant, nor as to service of notice on administrator, held regularity sufficiently established:** Alexander v. Patton, 90-557.

417. Clerk to summon party succeeding to rights or liabilities: answer. When the suggestion of the death of a party has been made before any clerk, it shall be the duty of such clerk to issue a summons to the party who succeeds to the rights or liabilities of the defendant commanding him to appear before him on a day to be named in said summons, which shall be at least twenty days after the service thereof, and answer the complaint, and the issue joined by the filing of the said answer shall stand for trial at the term of the superior court next following.

1887, c. 389, s. 2. **See section 416. Clerk has power to issue summons to infant defendant ordered to be made parties and appoint guardian ad litem for them:** Lowe v. Harris, 121-287. **Death of defendant suggested, executor substituted as party:** Grant v. Bell, 91-495. **Where party dies before summons served it is within this section and sections 437 and 438 do not apply:** Rogerson v. Leggett, 145-.

418. Clerk to notify party succeeding to rights of deceased plaintiff. When the plaintiff shall die and the suggestion of the death of a party is made, it shall be the duty of the clerk before whom the suggestion is made to issue a notice to the party succeeding to the rights of party deceased who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff, and in the event the party made plaintiff shall file an amended complaint, then the defendant shall have twenty days after notice of the amended complaint being filed in which to file an answer thereto, and the issue thus made up shall stand for trial at the succeeding term.

1887, c. 389, s. 3. **For substitution of administrator d. b. n., see section 154. Where one of two plaintiffs in trespass dies his devisee can not be made a party in his stead, but the administrator must be joined:** Rowe v. Lumber Co., 133-433. **Presumption as to administrator being properly substituted where no order of substitution or notice appears:** Alexander v. Patton, 90-557.

VII. Venue.

419. Place of subject of action. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by law:

See paragraph of annotations under section 425 headed "Waiver." 182-120

Venue is under the control of the legislature: State v. Woodard, 123-710.

For venue in criminal actions, see section 3239.

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

See section 425 which applies to actions concerning real estate as well as personalty: Lafoon v. Shearin, 91-370. **For recovery of an interest or estate in real property:** Lucas v. Railway, 121-506; Askew v. Bynum, 81-350; Springer v. Colwell, 116-524. **Injunction to prevent secretary of state from issuing grant to land:** McNamee v. Alexander, 109-242. **Action for damages for breach of covenant of seizin and right to convey is not within this subsection, being a personal action:** Eames v. Armstrong, 136-392; Phillips v. Holmes, 71-250. **A docketed judgment creating a lien on land is not within this subsection, being no interest in land:** Baruch v. Long, 117-509. **Oysters served from the bed are not real property and action for wrongful conversion need not be tried where beds are located:** Makely v. Booth Co., 129-11—**nor is timber cut from land an interest in realty,** Ibid. **For laying off dower:** Askew v. Bynum, 81-350. **Action on note secured by land mortgage need not be brought where land lies:** Max v. Harris, 125-345.

2. For the partition of real property.

See section 2486.

3. For the foreclosure of a mortgage of real property.

Cases directly supporting subsection: Connor v. Dillard, 129-50; Fraley v. March, 68-160.

4. For the recovery of personal property.

This subsection reviewed as to whether it applies to all personal property actions or merely where claim and delivery resorted to: Brown v. Cogdell, 136-32; see Woodard v. Sauls, 134-274; Mnfg. Co. v. Brower, 105-440; Connor v. Dillard, 129-50; **see also the following case before amendment of 1889, c. 219;** Smithdeal v. Wilkerson, 100-52. **An action for damages for breach of covenant in a deed to land is not an action concerning real property and is not required to be tried where land located:** Eames v. Armstrong, 136-392. **An action to set aside a transfer of personal property and appoint a receiver is not an action for recovery of personal property:** Baruch v. Long, 117-509. **Where three causes of action set out, one of which is for the recovery of personalty, case removed to county where such property situated:** Edgerton v. Gaines, 142-223.

Code, s. 190; 1889, c. 219; C. C. P., s. 66.

420. Where cause of action arose. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial, in the cases provided by law:

146-568
151-588
153-120

Semble that this section does not apply to magistrates' courts: Fisher v. Bullard, 109-574.

1. For the recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such sound, bay, river, or other body of water, and opposite to the place where the offense was committed.

Action for false return of sheriff: Watson v. Mitchell, 108-364. **This subsection as to penalties not applicable to magistrates' courts:** Fisher v. Bullard, 109-574. **An action for penalty against a foreign corporation may be brought in the county in which cause arose or where plaintiff resides:** Allen-Fleming Co. v. Rwy., 145-37; **see section 423.**

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid, shall do anything touching the duties of such officer.

Actions against county commissioners must be brought in county of which they are commissioners: Commrs. v. Commrs., 70-657; Steele v. Commrs., 70-137; Jones v. Commrs., 69-412; Alexander v. Commrs., 67-330; Johnston v. Commrs., 67-101. **Actions for false imprisonment:** Shaver v. Huntley, 107-623. **Action against obligors in indemnifying bond is not an action against one who by sheriff's "command or in his aid" does anything touching his duties:** Harvey v. Brevard, 98-93. **Actions against cities and towns:** Jones v. Statesville, 97-86. **Referred to casually** in Phillips v. Holmes, 71-252.

Code, s. 191; C. C. P., s. 67.

421. Official bonds, executors and administrators. All actions upon official bonds or against executors and administrators in their official capacity shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county.

153-120

Code, s. 193; 1868-9, c. 258. **Actions against personal representative on his bond:** Alliance v. Murrell, 119-124; Wood v. Morgan, 118-749; Foy v. Morehead, 69-512; Bidwell v. King, 71-287; Stanley v. Mason, 69-1, see section 30. **Where administrator gave bond and qualified in one county, but died in another and his administratrix qualified there. Suit on bond of administrator, where brought,** see Clark v. Peebles, 100-348. **Guardian bond is within the provisions of this section:** McNeill v. Currie, 117-341; Clarke v. Peebles, 100-348; Cloman v. Staton, 78-235. **Where personal representative sued as to execution of a trust committed to him in a will:** Roberts v. Connor, 125-45. **Where executor continuing the bus-**

iness of intestate as a private banker is sued as banker, it is not the executor sued but the bank and this section does not apply: Roberts v. Connor, 125-45. Action to construe a will: Devereux v. Devereux, 81-12.

422. Domestic corporations. For the purpose of suing and being sued the principal place of business of a domestic corporation shall be its residence.

1903, c. 806. This section nullifies the decisions of Cline v. Mnfg. Co., 116-837 and Alliance v. Murrell, 119-125, and like cases holding that a domestic corporation can be sued by a nonresident anywhere in the state. The "principal place of business" is the place the charter designates, the corporation having no power to change it: Garrett v. Bear, 144-23. 153-171 153-120

423. Foreign corporations. An action against a corporation created by or under the laws of any other state, government, or country, may be brought in the superior court of any county in which the cause of action arose, or in which it usually did business, or in which it has property, or in which the plaintiffs, or either of them, shall reside, in the following cases:

REMOVAL TO FEDERAL COURT. Grounds for removal: Staton v. R. R., 144-135; Tobacco Co. v. Tobacco Co., 144-352; Dobson v. R. R., 129-289; Springer v. Sheets, 115-370; Tucker v. Life Asso., 112-796; Tate v. Douglas, 113-190. Where one of two defendants is a nonresident it is no ground for removal: Staton v. R. R., 144-135; Hough v. R. R., 144-692; Faison v. Hardy, 114-429; Lawson v. R. R., 112-390; Bowley v. R. R., 110-315. A suit can not be removed from the State to the Federal Court upon the ground of diversity of citizenship by a corporation of another state which became the purchaser of a corporation of this state under a sale made pursuant to a deed of trust or mortgage: Coal & Ice Co. v. Rwy. Co., 144-732. For the purpose of jurisdiction a corporation is a citizen and resident of the state creating it, and can not remove a suit to the federal court upon the ground of diversity of citizenship by actual and authorized consolidation with a foreign corporation and a change of its principal place of business or domicile to another state prior to the commencement of the action: Staton v. R. R., 144-135. As to actions against tort feasors being separable so one nonresident defendant can remove, see White v. Rwy., 146; Davis v. Rexford, 146-; Hough v. R. R., 144-692; Staton v. R. R., 114-135; Bowley v. R. R., 110-315. The petition for removal: Bradley v. R. R., 119-744; Lawson v. R. R., 112-390; Herndon v. Ins. Co., 108-648; Baird v. R. R., 113-604; Springs v. Rwy., 130-186; Lewis v. Steamship Co., 131-652; Corp. Com. v. R. R., 135-89. Petition to remove must be filed in state courts before time of answering expires: Garrett v. Bear, 144-23; Riley v. Pelletier, 134-316; Williams v. Tel. Co., 116-558; Mecke v. Mineral Co., 122-790; Howard v. Rwy., 122-944—and extension of time to file answer in state court does not extend time to file petition to remove, Lewis v. Steamship Co., 131-652; Mecke v. Mineral Co., 122-790—but is a recognition of the jurisdiction of the court and waives right to removal, Garrett v. Bear, 144-23; Bryson v. R. R., 141-594; Howard v. R. R., 122-952; Riley v. Pelle-

tier, 134-316. **Where petitioner for removal asserts in his petition that parties resident were made defendants for the purpose of defeating removal he must prove that there was a wrongful joinder of defendants for the purpose of preventing the removal and the question of the insolvency of the resident defendants can not alone determine the right of plaintiff to join them in the action:** Hough v. R. R., 144-692. **Federal court must determine question of fraudulent joinder,** Davis v. Rexford, 145-. **When petition must be filed in federal court:** Williams v. Tel. Co., 116-558; Baird v. R. R., 113-603. **Petition must be decided upon the pleadings and record as they were when petition filed:** Davis v. Rexford, 146-.

1. By a resident of this state, for any cause of action; or by a nonresident of this state in any county where he or they are regularly engaged in carrying on business.

See Allen-Fleming Co. v. Rwy., 145-37; Goodwin v. Clayton, 137-224; Brown v. Western Union, 133-603; Howard v. Ins. Co., 125-53; Shields v. Life Ins. Co., 119-386.

2. By a plaintiff, not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state.

See Howard v. Ins. Co., 125-49. Code, s. 194; C. C. P., s. 361; 1876-7, c. 170; 1907, c. 460.

424. Where plaintiff or defendant resides; where neither is resident. In all other cases the action shall be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action; or if none of the defendants shall reside in the state, then in the county in which the plaintiffs, or any of them, shall reside; and if none of the parties shall reside within the state, then the same may be tried in any county which the plaintiff shall designate in his summons and complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by statute: Provided, in all actions against railroads the action shall be tried either in the county where the cause of action arose or in the county where the plaintiff resided at the time the cause of action arose, or in some county adjoining the county in which the cause of action arose, subject, however, to the power of the court to change the place of trial in the cases provided by statute.

152-215
153-117
153-120

Code, s. 192; C. C. P., s. 68; 1868-9, cc. 59, 277; 1905, c. 367.

The parties referred to in the statute are the parties of record: Rankin v. Allison, 64-673. **Effect on venue when nol pros taken as to part of defendants:** Harvey v. Rich, 98-95. **Actions against railroads tried where:** Allen-Fleming Co. v. Rwy., 145-37; Propst v. R. R., 139-397. **It is presumed that the residence of parties to a contract is at the place where contract was made:** Taylor v. Sharp, 108-377. **Action for breach of covenant tried where plaintiff or defendant resides:** Phillips v. Holmes, 71-250; Eames v. Armstrong, 136-392.

425. Change of. If the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

For removal of action from state to federal court, see annotations under section 423. Motion must be made before judge: Howard v. R. R., 122-944. **Failure to make demand for change of venue in apt time waives right:** Allen-Fleming Co. v. Rwy., 145-37; Garrett v. Bear, 144-26; Hines v. Vann, 118-7; McNeill v. Currie, 117-346; Baruch v. Long, 117-509; Cherry v. Lilly, 113-27; County Bd. Education v. State Bd. Education, 106-81; Morgan v. Bank, 93-355; Lafoon v. Shearin, 91-370; Devereux v. Devereux, 81-12; McMinn v. Hamilton, 77-300; Cooper v. Cooper, 127-492; Cloman v. Staton, 78-236; Herring v. Pugh, 126-852. **Motion in vacation before the clerk is invalid:** Riley v. Pelletier, 134-316; see Garrett v. Bear, 144-26; Howard v. R. R., 122-952. **How demand should be made and when heard:** Alliance v. Murrell, 119-124; see Garrett v. Bear, 144-26; Riley v. Pelletier, 134-316 and cases cited. **Injunction granted out of district without objection, venue waived,** Cooper v. Cooper, 127-492. **Can not make demand after pleading to merits:** Morgan v. Bank, 93-352; McMinn v. Hamilton, 77-300—**but must do so before time for answering expires:** Garrett v. Bear, 144-25; Lafoon v. Shearin, 91-370; Lucas v. R. R., 121-506, also 122-937; Shaver v. Huntley, 107-623—**and an agreement to extend time of answering waives the right to remove,** Garrett v. Bear, 144-26—**though under second subsection motion to remove can be made at any time during progress of cause,** Riley v. Pelletier, 134-316. **Appeal may be taken from refusal of a motion to remove hereunder when in writing and in apt time:** Brown v. Cogdell, 136-33; Mfg. Co. v. Brower, 105-440; Jones v. Statesville, 97-86; Connor v. Dillard, 129-50; Roberts v. Connor, 125-45. **Where defect in record on removal of cause, proper method of amendment outlined:** State v. Swepson, 81-571. **In criminal actions improper venue must be objected to by plea in abatement, see section 3239. The statutory expression "may" change the place of trial means "must change it:** Mnfg. Co. v. Brower, 105-440; Jones v. Statesville, 97-86. **One defendant can not object to the wrong venue as to the other defendant:** Allen-Fleming Co. v. Rwy., 145-37.

153-117

1. When the county designated for that purpose is not the proper county.

If not proper county, judge can probably remove ex mero motu: Cloman v. Staton, 78-236. **Defendant can either demand removal or move to dismiss:** Jones v. Comrs., 69-412; Stanley v. Mason, 69-1; see Cloman v. Staton, 78-235.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

Removal under this subsection entirely in discretion of court: Eames v. Armstrong, 136-392; Belding v. Archer, 131-287; Lassiter v. R. R., 126-507. **Motion to remove under this subsection can be made at any time dur-**

ing trial: Riley v. Pelletier, 134-316; Lassiter v. R. R., 126-507. **No hearing or determination of an action or of motion in a cause outside of county where action pending, except by consent:** McNeill v. Hodges, 99-248; Godwin v. Monds, 101-354; Skinner v. Terry, 107-103—**but this does not apply to applications for restraining orders, injunctions and receivers:** Ledbetter v. Pinner, 120-457; McNeill v. Hodges, 99-249; see also sections 806, 814-816, 846, 847—**nor to orders in proceedings for examination of parties,** Ledbetter v. Pinner, 120-457; Fertilizer Co. v. Taylor, 112-141; see also sections 865, 866—**nor to any ancillary remedy,** Parker v. McPhail, 112-502—**nor to special proceedings nor appeals from clerk,** Ledbettter v. Pinner, 120-457. **No appeal from refusal of judge to remove under this subsection:** Lassiter v. R. R., 126-507. **After removal hereunder if no transcript docketed at first term of county to which removed, order may be stricken out:** Cline v. Mnfg. Co., 116-837.

3. When the judge shall have been, at any time, interested as party or counsel.

See Carter v. R. R., 68-346.

Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118; 1870-1, c. 20.

426. Removal for fair trial. In all civil and criminal actions in the superior and criminal courts, in which it shall be suggested on oath, or by affirmation, on behalf of the state, or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial can not be obtained in the county in which the action shall be pending, the judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial, if he shall be of the opinion that a fair trial can not be had in said county, after hearing all the testimony which may be offered on either side by affidavits.

Code, s. 196; 1879, c. 45; 1899, cc. 104, 508; 1806, c. 693, s. 12.

AFFIDAVIT FOR REMOVAL. Purpose of affidavit: Emery v. Hardee, 94-787. **Counsel can consent to let court hear facts as if stated in affidavit:** Ibid. **Contents of affidavit:** Emery v. Hardee, 94-787; State v. Seaborn, 15-305; Smith v. Greenlee, 14-387. **Motion for removal in criminal actions made after issue joined:** State v. Flowers, 109-841; State v. Haywood, 94-847; State v. Swepson, 81-571; State v. Reid, 18-377—**in civil actions before issue joined, see section 425.**

REMOVAL. Need not be made to county within the same judicial district: Lassiter v. R. R., 126-507. **Order conclusive as to the facts upon which founded. The court can only scrutinize sufficiency of order:** Emery v. Hardee, 94-788; Boyden v. Williams, 84-608; State v. Barfield, 30-344; State v. Seaborn, 15-305. **Order stating "the trial of the prosecution shall be removed," is sufficient:** State v. Shepherd, 30-195.

NO APPEAL FROM ORDER. Finding of facts by court conclusive and ruling thereupon not reviewable: Garrett v. Bear, 144-23; State v. Turner, 143-641; Benton v. R. R., 122-1007; State v. Smarr, 121-669; Albertson v. Terry, 109-8; State v. Johnson, 104-780; Phillips v. Lentz, 83-240; State

v. Hall, 73-134; State v. Hill, 72-345; State v. Hildreth, 31-429; State v. Duncan, 28-98—**but where affidavit contains no facts the court will review it,** Phillips v. Lentz, 83-240.

Where court allows state to select the county, so it does not select county objected to by defendant, it can not be complained of by defendant, he having failed to object at the time: State v. Harrison, 145-408.

427. Affidavits and counter affidavits; shall remove, when. No action, whether civil or criminal, shall be so removed, unless the affidavit shall set forth particularly and in detail the ground of the application. And it shall be competent for the other side to controvert the allegations of fact in said application, and to offer counter affidavits to that end. And the judge shall order the removal of any such action, if he shall be satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it.

Code, s. 197; 1879, c. 45; 1899, c. 104, s. 2. **For annotations as to sufficiency of affidavit and order of removal, etc., see section 426.**

428. Transcript on removal; subsequent proceedings. When a cause shall be directed to be removed, the clerk shall transmit to the court to which the same is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of the court.

Code, ss. 195, 198; R. C., c. 31, s. 118; 1806, c. 694, s. 12; 1810, c. 787; C. C. P., s. 69. **Transcript verified:** State v. Lambert, 93-618; State v. Duncan, 28-236. **Where two transcripts sent up what done:** State v. Collins, 14-117. **After order, but before transcript sent, either court can issue subpoenas, etc.,** Commrs. v. Lemly, 85-341; Smith v. Greenlee, 14-387. **Defects in transcript, and amendments thereto:** State v. Swepson, 81-571; State v. Anderson, 92-732; State v. Reid, 18-377. **Docketing of transcript:** Fisher v. Mining Co., 105-123; Cline v. Mnfg. Co., 116-839. **What sent with transcript:** Clark v. Peebles, 100-352.

VIII. Summons.

429. Civil actions commenced by. Civil actions shall be commenced by issuing a summons; but no summons need issue in controversies submitted without action, and in confessions of judgment without action.

Code, s. 199; C. C. P., s. 70. See ss. 580, 803.

Civil actions shall be commenced by issuing a summons except in cases where the defendant is not within reach of the process of the court and can not be personally served, when it shall be commenced by affidavit to be followed by publication: Grocery Co. v.

Bag Co., 142-174; Best v. Mortgage Co., 128-351; **first case overruling McClure v. Fellows, 131-509**; also see Fisher v. Bank, 132-776; Lyon v. Comrs., 120-242; Webster v. Sharpe, 116-466; Fleming v. Patterson, 99-404; Calvert v. Peebles, 82-338; Belmont v. Reilly, 71-260; Steele v. Comrs., 70-140; Thompson v. Berry, 64-79; Patrick v. Joyner, 63-573; Ditmore v. Goins, 128-327. **Special proceedings begun also by summons, the provision as to civil actions being applicable to special proceedings except as otherwise provided:** Railway Co. v. Lumber Co., 132-644; also see section 711. **Office of the summons is to bring the parties into court:** Barneycastle v. Walker, 92-198. **Injunction issued without summons, issuing is irregular:** Fleming v. Patterson, 99-404; Grant v. Edwards, 90-31; Trexler v. Newsome, 88-13; Hirsh v. Whitehead, 65-516; McArthur v. McEachin, 64-72; Patrick v. Joyner, 63-573. **Name of plaintiff in summons:** Heath v. Morgan, 117-504. **Name of defendant in summons:** Plemmons v. Imp. Co., 108-614; Clawson v. Wolf, 77-100. **Summons is issued, when:** Smith v. Lumber Co., 142-26; Houston v. Thornton, 122-366; Currie v. Hawkins, 118-593; Neal v. Nelson, 117-401; Webster v. Sharpe, 116-466; see also section 359. **Appearance waives all defect or irregularity as to summons:** Caldwell v. Wilson, 121-425; Roberts v. Allman, 106-391; Etheridge v. Woodley, 83-11; Wheeler v. Cobb, 75-21; Middleton v. Duffy, 73-72; Duffy v. Averitt, 27-455; Hyatt v. Tomlin, 24-149; also see sections 356 and 447.

430. What to contain; where returnable. The summons shall run in the name of the state, be signed by the clerk of the superior court having jurisdiction to try the action, and shall be directed to the sheriff or other proper officer of the county in which any defendant resides or may be found. It shall be returnable to the regular term of the superior court of the county from which it issued; and shall command the sheriff, or other proper officer, to summon the defendant to appear at the next ensuing term of the superior court and answer the complaint of the plaintiff; and shall contain a notice stating in substance that if the defendant shall fail to answer the complaint within the time specified, the plaintiff will apply to the court for relief demanded in the complaint; and shall be dated on the day of its issue.

Code, ss. 200, 213; C. C. P., 74; 1876-7, cc. 85, 241. **As to summons in special proceedings, see section 106. As to action begun by issuing summons, see section 359.**

FORM OF SUMMONS. Plaintiffs and defendants names: Fisher v. Ins. Co., 136-217; Heath v. Morgan, 117-504; Plemmons v. Improvement Co., 108-614; Clawson v. Wolfe, 77-100; Patterson v. Walton, 119-500; Kerlee v. Corpening, 97-330. **Effect where required number of days not given by summons and where judgment rendered:** Stafford v. Gallops, 123-19. **Summons made returnable to term of court next ensuing:** Sondley v. Asheville, 110-84; also see Roberts v. Allman, 106-391; Jones v. Commrs., 135-218; Martin v. Clark, 135-178; see also sections 434-437; 1507, 1517,

2817, 2819—**but not to another county's superior court,** Moore v. R. R., 67-209; Howerton v. Tate, 66-431.

AMENDING THE SUMMONS: Ewbank v. Turner, 134-81; Piercy v. Watson, 118-978; Elliott v. Tyson, 117-116; Redmond v. Mullenax, 113-505; McLean v. Breece, 113-390; Henderson v. Graham, 84-496; Jackson v. McLean, 90-64; Cheatham v. Crews, 81-343; Phillips v. Holland, 78-31; Thomas v. Womack, 64-657; also see sec. 507.

AS TO WHEN SUMMONS IS ISSUED. See sections 356, 429. **Presumed to issue on date it bears, but this presumption rebuttable:** Houston v. Thornton, 122-365; Currie v. Hawkins, 118-593; Webster v. Sharpe, 116-466.

Case where summons made returnable to judge at chambers instead of to term; duty and power of the judge discussed: Ewbank v. Turner, 134-78.

431. When attested by seal. Every summons addressed to the sheriff or other officer of any county, other than that from which it issued, shall be attested by the seal of the court; but when it shall be addressed to the sheriff or other officer of the county in which it issued, it shall not be attested by the seal of the court.

153-248

Code, s. 203; 1876-7, c. 85, s. 4. **Process without seal addressed to officer of another county is void:** Taylor v. Taylor, 83-116.

432. Issued to several counties. The plaintiff may issue a summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action; and when the said summons is returned, it shall be docketed as if only one had issued; and if any defendant shall not be served with such process, the same proceeding shall be had as in other cases of similar process not executed.

Code, s. 204; R. C., c. 31, s. 44; 1789, c. 314, ss. 1, 2; 1831, c. 14, s. 2.

433. When officer shall execute and return. The officer to whom the summons is addressed shall note on it the day of its delivery to him, and shall execute it at least ten days before the beginning of the term to which it shall be returnable, and shall return it by the first day of the term.

Code, s. 200; 1876-7, c. 85. **The presumption that summons was issued on the day it bears date is not rebutted by the fact that the sheriff's endorsement of its receipt by him is of a later date:** Houston v. Thornton, 122-365. **Failure of sheriff to note day of receipt of summons is irregular but does not make summons void:** Strayhorn v. Blalock, 92-292. **For service of summons see sections 439-444.**

RETURN OF SHERIFF. Defined in Watson v. Mitchell, 108-364; Strayhorn v. Blalock, 92-292; see also sections 1507, 1517, 2817 and 2819. **Amendment of return:** Swain v. Burden, 124-16; Campbell v. Smith, 115-498; Phillips v. Holland, 78-31; Manning v. R. R., 122-824; Steal-

man v. Greenwood, 113-355; Mnfg. Co. v. Buxton, 105-74; Finley v. Hayes, 81-368; Peebles v. Newsom, 74-473; Hassell v. Latham, 52-465; Patton v. Marr, 44-377; Tomlinson v. Long, 53-469; Albright v. Tapscott, 53-473. **Making return nunc pro tunc:** Williams v. Weaver, 101-1; Walters v. Moore, 90-41; Henderson v. Graham, 84-496; Clark v. Hellen, 23-421. **Presumption as to truth of return made:** Strayhorn v. Blalock, 92-292; Miller v. Powers, 117-218; Isley v. Boon, 113-249; Chadbourn v. Johnston, 119-282.

434. When issued within ten days of term. If any summons shall be issued within less than ten days of the beginning of the next term of the superior court for the county in which it is issued, it shall be made returnable to the second term of said court next after the date of its issuing, and shall be executed and returned by the proper officer accordingly.

Code, s. 201; 1876-7, c. 85, s. 2.

435. Issued more than, served within, ten days of term. When the summons shall be issued more than ten days before the next succeeding term of the superior court of the county to which it is returnable, and shall be executed by the proper officer within less than ten days of said term, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the next succeeding term, at which term it shall be treated in all respects as if said next succeeding term had been the return term thereof. But the parties to the action may, by agreement, make up the pleadings at the term to which the summons is returnable. Nothing herein contained shall be construed to release or discharge the sheriff or other officer from any liability he may incur by failing to execute the summons in due time.

'47-437

Code, s. 202; 1876-7, c. 85, s. 3. **"Next term" defined:** Sondley v. Asheville, 110-84. **"Return" defined:** Watson v. Mitchell, 108-364.

436. When summons returned to second term. Whenever it shall be necessary to serve summons, warrant of attachment, or other process by publication, and it shall appear that in order to make publication for the number of weeks required by law sufficient time will not elapse between the order of publication and the term of court next succeeding the order, then, in all such cases, it shall not be necessary to make the summons, warrant of attachment, or other process returnable to the term of court next succeeding, but it shall be lawful for the judge or clerk to direct that the summons, warrant of attachment, or other process shall be returnable to such other term of court, thereafter to be held, as will allow the summons, warrant of attachment, or other process to be published for the number of

weeks required by law so that the publication may be completed before the term of court to which such summons, warrant of attachment, or other process shall be returnable.

1903, c. 169.

437. Alias and pluries. When the defendant in a civil action or special proceeding is not served with summons within the time within which the summons is returnable, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process.

Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71. **Where summons, intended to be an alias but not so ordered, was issued returnable to a future term, at which an amended complaint was filed naming a party as defendant, held sufficient though no connecting summonses:** Battle v. Baird, 118-854.

This section does not apply to cases where party dies before summons served: Rogerson v. Leggett, 145-7.

438. Discontinuance. A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when such summons was issued.

Cases decided before statute passed, but of interest: Koonce v. Pelletier, 115-233; Penniman v. Daniel, 93-332, 91-431; Webster v. Laws, 86-180; Etheridge v. Woodley, 83-11. **No discontinuance because party dies before summons served and no chain of summonses kept up:** Rogerson v. Leggett, 145-7.

439. Served by reading. The summons shall be served in all cases, except as hereinafter provided, by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service.

Code, s. 214; 1876-7, c. 241. **For statute forbidding service on Sunday, see section 2837. Voluntary appearance of defendant equivalent to service of summons. See section 447. Whether summons was duly served is a question of law:** Williamson v. Cocke, 124-585—**and the judge should write his findings of fact for review,** Parker v. Ins. Co., 143-339; see also section 513.

SERVICE OF SUMMONS. Service can be made by a deputy sheriff, though a minor: R. R. v. Fisher, 109-1—**and must be made by reading to defendant,** Williamson v. Cocke, 124-585—**but he can waive the reading,** Williamson v. Cocke, 124-585—**It can not be served on Sunday, section 2837, though in White v. Morris, 107-92, this section seems to have been overlooked in discussing the subject—can not be made on non-resident suitors or witnesses,** Cooper v. Wyman, 122-784—**but can be made on officer of corporation attending judicial sale to which his company is a**

party, Greenleaf v. Bank, 133-292—**and on nonresident attorney attending to case,** Ibid—**can be made on prisoner in jail,** White v. Underwood, 125-25—**but can not be made outside of state,** Hinton v. Ins. Co., 126-18.

ACCEPTANCE OF SERVICE. By parties generally: Battle v. Baird, 118-854; Stancil v. Gay, 92-455; Johnson v. Futrell, 86-122; Nicholson v. Cox, 83-44; Bass v. Bass, 78-374—**though telling officer to mark it "served" will not do:** Godwin v. Monds, 106-448. **Infant can not accept service:** Nicholson v. Cox, 83-44; Bass v. Bass, 78-374—**yet if he does accept service it is cured after guardian ad litem appointed,** Cates v. Pickett, 97-21; Perry v. Adams, 98-167.

IRREGULARITY OF SERVICE WAIVED. By appearance of party: Caldwell v. Wilson, 121-425; Moody v. Moody, 118-926; Cherry v. Lilly, 113-26; Turner v. Douglas, 72-127; see also cases under sections 356, 429 and 447. **By appearance of solvent attorneys, when:** Chadbourn v. Johnston, 118-282; Hackett v. McMillan, 112-513; England v. Garner, 90-197.

As to return of sheriff, see section 433.

440. Served by copy; corporations; infants; persons non compos. The summons shall be served by delivering a copy thereof in the following cases:

1. If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof; Provided, that any person receiving or collecting moneys within this state for, or on behalf of, any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides in the state, or when such service can be made within the state, personally upon the president, treasurer or secretary thereof.

1903-76

For service on foreign corporation by service on local process agent, see section 1243—on insurance commissioner, see section 4750. For service on foreign corporation for forfeiture of charter, see section 1199.

Service on unlicensed insurance company must be made according to this section: Parker v. Ins. Co., 143-339. **Service of summons must be made by leaving copy with one of the persons designated by this section:** Aaron v. Lumber Co., 112-189—**and leaving copy with person's wife is not service,** Bank v. Wilson, 80-200.

Service of summons must be upon general or local agent: Jones v. Ins. Co., 88-499; Katzenstein v. R. R., 78-286. **Local agent in this section does not mean a transient agent:** Moore v. Bank, 92-590. **The term "local agent" not limited to those receiving money for company:** Copeland v. Tel. Co., 136-11. **A manager of agencies in this state is a "managing agent" within this section:** Clinard v. White, 129-250. **One simply acting as a caretaker as a matter of friendship, without compensation, is not such an agent upon whom process can be served:** Kelly v. Lefaiver, 144-4.

Travelling auditor, when company doing no business in this state, not proper party to be served in action against company: Higgs, v. Sperry, 139-299. **Service can not be made upon foreign corporation officers attending the trial of actions against their company,** inferred from Cooper v. Wyman, 122-784—**but can be made upon such officers while attending judicial sale in this state to which their corporation is a party,** Greenleaf v. Bank, 133-292—**and on president while in this state on either private or official business:** Jester v. Steam Packet Co., 131-54. **But service can not be made outside of the state:** Hinton v. Ins. Co., 126-18. **Service of summons upon local agent of the receiver of a corporation is service upon the receiver:** Grady v. R. R., 116-952; Farris v. R. R., 115-600—**and as fully upon the company as if served upon the president and superintendent:** Grady v. R. R., 116-952.

The provisions in section 1491 for an appeal in fifteen days does not apply where summons served by delivering a copy to person designated in this section: King v. R. R., 112-318.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

153-135

Service must be upon infant personally, and, if under fourteen years of age, upon his mother, father or guardian or some one having control of him, also. And when guardian ad litem appointed, upon the said guardian ad litem also: Roseman v. Roseman, 127-494; Ward v. Lowndes, 96-367; Coffin v. Cook, 106-376; Cates v. Pickett, 97-21; Sumner v. Sessoms, 94-371; Hare v. Holloman, 94-14; Fry v. Currie, 91-436; Young v. Young, 91-359; Stancill v. Gay, 92-462; Gulley v. Macy, 81-356; Moore v. Gidney, 75-34. **As to appointment and duties of guardian ad litem, see section 405. As to irregularity of service on infant and its effect, see also section 406.**

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee and to the defendant personally: Provided, that if the superintendent of an insane asylum, or the acting superintendent of such asylum, shall inform the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on any insane person confined in such asylum, that the summons, or process, or notice, can not be served without danger of injury to such insane person, it shall be sufficient for such officer to return said summons, process, or notice, without actual service on the insane person, but with an endorsement that it was not personally served because of such information; and when an insane person shall be confined in a common jail it shall be sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorsement

that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which said jail is situated.

Code, s, 217; 1889, c. 89; C. C. P., s. 82; 1874-5, c. 168. See McAden v. Hooker, 74-24.

441. Irregular service on infants, etc., validated. In any and all civil actions and special proceedings pending on the fourteenth day of March, one thousand eight hundred and seventy-nine, or theretofore determined, in any of the courts, wherein any or all of the defendants were infants, idiots, lunatics or persons non compos mentis, on whom there was no personal service of the summons, the proceedings, actions, decrees, and judgments taken, had and made by such courts in such civil actions, and special proceedings, shall be valid, effectual and binding against and upon such infants, idiots, lunatics and persons non compos mentis, and their rights and estates in like manner, as if they had been personally served with a summons therein: Provided, that this section shall not have the effect, nor be construed, to prevent any of the proceedings, actions, judgments or decrees hereby rendered regular and confirmed, from being impeached and set aside for fraud.

Code, s. 387; 1879, c. 257; 1880, c. 23. **See cases cited under section 406. The real meaning of this section and to what cases it applies:** Carter v. Rountree, 109-29; Harrison v. Harrison, 106-282; Stancill v. Gay, 92-462; Perry v. Adams, 98-167; Cates v. Pickett, 97--21; Hare v. Hollomon, 94-14; Gulley v. Macy, 86-721. **Failure to serve infant personally cured by this section:** White v. Morris, 107-92; see Howerton v. Sexton, 90-581.

153-135

442. Served by publication. Where the person on whom the service of the summons is to be made can not, after due diligence, be found within the state, and that fact appears by affidavit to the satisfaction of the court, or to a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

No summons necessary when defendant is not within reach of process: Grocery Co. v. Bag Co., 142-174; Best v. Mortgage Co., 128-351; the first case overruling on this point McClure v. Fellows, 131-509—**in such case affidavit begins the action:** Grocery Co. v. Bag Co., 142-174. **See generally, as to service of summons:** Hinton v. Ins. Co., 126-18; Graham v. O'Bryan, 120-463; Barnhardt v. Brown, 118-700; Claflin v. Harrison, 108-157. **"Due diligence" construed:** Rose v. Davis, 140-269. **Publication as to nonresident copartners not binding on resident partner:** Pender v. Griffin, 72-270. **Service by publication will not warrant a judgment in**

personam: Goodwin v. Claytor, 137-224; Hinton v. Ins. Co., 126-18; May v. Getty, 140-310; Long v. Ins. Co., 114-465; Winfree v. Bagley, 102-517. **Attachment served by publication, but no service of summons, held void:** Ditmore v. Goins, 128-325; but see Grocery Co. v. Bag Co., 142-174, **which may be construed to overrule it.**

AFFIDAVIT. Contents of: Rose v. Davis, 140-269; Bacon v. Johnson, 110-114; Sheldon v. Kivett, 110-408; Faulk v. Smith, 84-501; Windley v. Broadway, 71-333; Wheeler v. Cobb, 75-21; Spiers v. Halstead, 71-209. **When affidavit made:** Bank v. Blossom, 92-695. **By whom can be made:** Weaver v. Roberts, 84-493. **Amendment of:** Mullen v. Canal Co., 112-109; Weaver v. Roberts, 84-493; Branch v. Frank, 81-180.

1. Where the defendant is a foreign corporation, and has property within the state, or the cause of action arose therein.

Property hereunder embraces choses in action: Boyd v. Ins. Co., 111-378; Winfree v. Bagley, 102-515.

2. Where the defendant, being a resident of this state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein.

See Bernhardt v. Brown, 118-701.

3. Where he is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action.

Affidavit must state not only that he is "nonresident" but that he "has property within the same," Spiers v. Halstead, 71-209. **Word "property" includes choses in action:** Boyd v. Insurance Co., 111-378; Winfrey v. Bagley, 102-515.

4. Where the subject of the action is real or personal property in this state, and the defendant has, or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein.

See Claflin v. Harrison, 108-158; Bernhardt v. Brown, 118-700.

5. Where the action is for divorce, and in all cases where publication is made, the complaint must be filed before the expiration of the time of publication ordered.

King v. King, 84-32.

6. Where the stockholders of any corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate the subject of an action are unknown, if the name of at least one of the parties to the action and interested in the subject matter thereof shall be known, and he be a resident of the state, the court having jurisdiction may, upon affidavit that after due diligence the names or residences of such parties can not be ascertained, authorize service by publication.

See Bernhardt v. Brown, 118-701.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mort-

gaged premises, is unknown to the plaintiff, and the residence of such party can not, with reasonable diligence, be ascertained by him, and such fact shall be made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can be made can, after due diligence, be found within the state, and such facts be made to appear by affidavit. This subsection shall also apply to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners or by individuals.

Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334.

443. Manner of publication. The order must direct the publication in any one or two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for four weeks, of a notice, giving the title of the action, the purpose of the same, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, nor mailing of the summons and complaint, shall be deemed necessary. The cost of publishing in a newspaper shall not exceed one dollar and fifty cents an inch of solid type, and shall in no case exceed six dollars for the notice.

Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3. **What publication must contain:** Guilford County v. The Georgia Co., 109-310; Spillman v. Williams, 91-483. **Where order was made for publication but it was not made, no discontinuance, but judge may order made returnable to future term of court:** Penniman v. Daniel, 93-332. **Where there was publication as to the attachment, but not as to summons, nor was it served, held judgment void:** Ditmore v. Goins, 128-325; but see Grocery Co. v. Bag Co., 142-174, **which apparently destroys its reasoning. When service by publication defective, it can be remedied by new publication, but it is not always necessary:** Penniman v. Daniel 90-154, also 93-332; Bank v. Blossom, 92-695; Price v. Cox, 83-261; Church v. Furniss, 64-659. **Effect of irregular service by publication upon judgments obtained:** Spillman v. Williams, 91-483, and cases there cited.

444. When service complete. In the cases in which service by publication is allowed, the summons shall be deemed served at the expiration of the time prescribed by the order of publication, and the party shall then be in court.

Code, s. 227; C. C. P., s. 88. **Where service not complete it may be remedied:** Penniman v. Daniel, 90-154, also 93-332; Bank v. Blossom, 92-695; Price v. Cox, 83-261; Church v. Furniss, 64-659. **Publication from Aug. 3rd to Aug. 31st where court began on the latter day sufficient for "once a week for four weeks:"** Guilford County v. Georgia Co., 109-310. **An adjudication that summons has been served is necessary before judgment rendered:** Hyman v. Jarnigan, 65-96.

445. Jurisdiction acquired from service. From the time of service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.

Code, s. 229; C. C. P., s. 90. **From time of service of summons defendant is fixed with notice as to all subsequent orders in the cause:** LeDuc v. Slocumb, 124-347; Stith v. Young, 119-428; Ferrell v. Hales, 119-213; Harper v. Sugg, 111-324; Coon v. Smith, 107-430; Wilson v. Pearson, 102-290; Dawkins v. Dawkins, 93-283; Hemphill v. Moore, 104-379; Spencer v. Credle, 102-68; Williams v. Whiting, 94-481; Dempsey v. Rhodes, 93-120; Stancill v. Gay, 92-455; University v. Lassiter, 83-38; Sparrow v. Davidson, 77-35;

446. Proof of service. Proof of the service of the summons or notice must be—

Proof of service made according to this section: Allen v. Strickland, 100-225.

1. By the cerificate of the sheriff or other proper officer.

Presumption that the return states the truth: Strayhorn v. Blalock, 92-292; Miller v. Powers, 117-218; Isley v. Boon, 113-249; Chadbourn v. Johnston, 119-282.

2. In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.

An adjudication that publication is complete and summons served necessary before judgment: Hyman v. Jarnigan, 65-96. **Where record showed affidavit and order, and also affidavit of newspaper as to correct publication, no defect presumed:** Lyle v. Siler, 103-261.

3. The written admission of the defendant.

ACCEPTANCE OF SERVICE. How executed: Middleton v. Duffy, 73-72; Nicholson v. Cox, 83-44; Godwin v. Monds, 106-448. **As to authority to accept:** Edwards v. Moore, 99-1; Stancill v. Gay, 92-455. **Attorney can not accept service of summons:** Star v. Hall, 87-381. **A married woman can accept:** Nicholson v. Cox, 83-44. **Infant can not accept:** Ibid; also Bass v. Bass, 78-374—**yet if he does accept it is cured after guardian appointed:** Cates v. Pickett, 97-21; Perry v. Adams, 98-167.

Code, s. 228; C. C. P., s. 89.

447. Voluntary appearance by defendant. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

Code, s. 229; C. C. P., s. 90. **See section 356. A general appearance waives all defects both as to summons and its service upon defendant:** Lemly v. Ellis, 143-200; Hatcher v. Faison, 142-364; Johnson v. Reformers, 135-385; Caldwell v. Wilson, 121-425; Wheeler v. Cobb, 75-21; White v. Morris, 107-92; Roberts v. Allman, 106-391; Penniman v. Daniel, 95-341; Etheridge v. Woodley, 83-11; Bank v. Wilson, 80-200; Middle v. Duffy, 73-72; Moore v. R. R., 67-209; Duffy v. Averitt, 27-455; Hyatt v. Tomlin, 24-149; Hervey v. Edmunds, 68-243; Heilig v. Stokes, 63-612;

Jones v. Penland, 19-358; see also section 356. **When there is no service of summons an unauthorized appearance by counsel will not put the party in court and bind him:** Hatcher v. Faison, 142-364—**but where service is made and solvent counsel appears without authority it is otherwise,** Ibid. **By treating with opposite party as to time of pleading, etc., one makes a voluntary appearance:** Cook v. Bank, 129-151.

448. Personal service on nonresident. When the place of residence is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it will be sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the papers shall, in making his return, use a form of certificate substantially as follows:

State of .....
County of .....

I, ..., clerk of the ..... court of ..... county, in the state of ....., which court is a court of record having a seal, which is hereto attached, do certify that ....., to me well known as the sheriff of said county of ....., who being by me duly sworn, says that as such sheriff he has full power to serve any and all legal processes issuing from the courts of said state, and that on the.... day of ...., 190.., he served the summons hereto attached by reading and delivering a copy of same to ..... the defendant therein named.

.....sheriff,
.....county,
State of .....

Sworn to and subscribed before me, this ..... day of ..... 190....

....., clerk ..... court,
County of.....
State of .....

[L. S.]

147-210

1891, c. 120. **Service on nonresident does not support a personal judgment:** Hinton v. Ins. Co., 126-18; May v. Getty, 140-310; Long v. Ins. Co., 114-465; Winfree v. Bagley, 102-517. **Service by mailing copy to sheriff of state of defendant is optional and merely alternative with service by publication:** Mullen v. Canal Co., 114-80. **Actual service in another state, without attachment of property in this state, is invalid:** Long v. Ins. Co., 114-465.

449. Defense after judgment on substituted service. The defendant against whom publication is ordered, or who is served under

the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as may be just; and if the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the court may direct; but title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

153-501

Code, s. 220; C. C. P., s. 85. **Summoned after judgment, see section 456. Character of defense necessary to reopen case:** Rhodes v. Rhodes, 125-191. **If defendant guilty of inexcusable neglect, it need not find whether defense meritorious:** Turner v. Machine Co., 133-381. **When application made to defend, judge must find the facts:** Bacon v. Johnson, 110-114; Utley v. Peters, 72-525.

IX. Prosecution Bonds.

450. Plaintiff's, for costs. Before issuing the summons the clerk shall require of the plaintiff either to give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that the same shall be void if the plaintiff shall pay the defendant all such costs as the defendant shall recover of him in the action; or to deposit a like sum with him as a security to the defendant for such costs, and in case of such deposit, he shall give to the plaintiff and to the defendant a certificate to that effect; or to file with him a written authority from some judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper.

Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71. **For bond in surety company, see chapter Bonds, section 272, et seq. For mortgage in lieu of bond, see sections 265-270. Refusal of trial judge to require prosecution bond is not appealable:** Christian v. R. R., 136-321. **Judge may require person suing as pauper to give bond:** Dale v. Presnell, 119-489. **Execution of undertaking is an incidental but not essential condition of the order allowing one to become a party:** Hughes v. Hodges, 94-56. **The giving of prosecution bond is not a condition precedent to the bringing of a suit; the court may permit one to be filed after writ is returned:** Russell v. Saunders, 48-432; Shannonhouse v. Withers, 121-380; Cooper v. Warlick, 109-673; Albertson v. Terry, 109-8; McMillan v. Baker, 92-115; Wall v. Fairly, 66-386; Stancill v. Branch, 61-218. **Sufficiency of undertaking discussed:** Comron v. Standland, 103-207; Holly v. Perry, 94-30. **The dismissal of action for want of bond no estoppel to plaintiff suing on same cause in forma pauperis:** Autry v. Floyd, 127-186. **Objection**

that plaintiff has not filed bond, made when: Albertson v. Terry, 109-8; Hughes v. Hodges, 94-56. **Liability of surety on bond:** Smith v. Arthur, 116-871; Hallman v. Dellinger, 84-1; Swain v. McCullock, 75-495. **Amendment of bond allowed:** Albertson v. Terry, 109-8; Russell v. Saunders, 48-432; Hughes v. Hodges, 94-56; Brittain v. Howell, 19-107.

Officers need not perform their duties as to actions brought unless costs advanced: Ballard v. Gay, 108-545; Long v. Walker, 105-90; West v. Reynolds, 94-333—**but they must make demand for their fees:** West v. Reynolds, 94-333. **Where court orders summons to issue which is to be personally served, clerk need not issue it until demanded by plaintiff; but when service is ordered to be made by publication, after plaintiff has paid expenses, it is his duty to obey the order and make publication:** Penniman v. Daniel, 93-332.

451. Suit as a pauper. Any judge or clerk of the superior court may authorize any person to sue as a pauper in their respective courts when he shall prove, by one or more witnesses, that he has a good cause of action, and shall make affidavit that he is unable to comply with the last section.

Code, s. 210; C. C. P., s. 72; 1868-9, c. 96. For effect on costs, see section 1265. **Affidavit as to inability to give bond or deposit costs:** Maggett v. Roberts, 108-174; Taylor v. Apple, 90-343. **Leave to sue as pauper merely extends to superior court, his appeal being governed by section 597:** Speller v. Speller, 119-356. **A dismissal of action for want of prosecution bond will not estop plaintiff from bringing same action again as a pauper:** Autry v. Floyd, 127-186. **Effect of objection to affidavit after answer filed:** Corn v. Stepp, 84-599. **Order to sue as pauper may be revoked:** Dale v. Presnell, 119-489; McKiel v. Cutler, 45-139.

A judge, clerk, or justice of the peace may grant leave: Brendle v. Heron, 68-496; Sumner v. Candler, 74-266; Rowark v. Gaston, 67-291. **No notice to adverse party necessary:** Deal v. Palmer, 68-215. **Assignment of interests by plaintiff pendente lite, court will dismiss action unless security for costs given:** Davis v. Higgins, 91-382. **Refusal to require prosecution bond not appealable:** Christian v. R. R., 136-321.

The bringing of a pauper suit does not raise a presumption that the attorney took the case for a contingent fee and was therefore a party in interest: Allison v. R. R., 129-336.

WHO CAN SUE AS PAUPER. Any litigant: Christian v. R. R., 136-322. **Infant:** Brendle v. Heron, 68-496. **Administrator, etc.:** Christian v. R. R., 136-321; Allison v. R. R., 129-344; Hamlin v. Neighbors, 75-66; Mason v. Osgood, 71-212. **Guardian:** Brendle v. Heron, 68-496; Christian v. R. R., 136-322. **Nonresident:** Christian v. R. R., 136-322; Porter v. Jones, 68-320.

PROVING THAT HE HAS A GOOD CAUSE. May do so by his own oath: Sumner v. Candler, 74-265; Brendle v. Heron, 68-496;—**or by certificate of counsel or otherwise,** Miazza v. Calloway, 74-31.

452. Court may assign counsel. The court to which such sum-

mons is made returnable may, at its discretion, assign to the person suing as a pauper learned counsel, who shall prosecute his action.

Code, s. 211; 1868-9, c. 96, s. 2.

453. Defendant's, for costs and damages in actions for land. In all actions for the recovery of real property or for the possession thereof, the defendant, before he is permitted to plead, answer or demur, shall execute and file in the office of the clerk of the superior court of the county wherein the suit is pending an undertaking with good and sufficient surety, in an amount to be fixed by the court, not less than two hundred dollars, to be void upon condition that the defendant pay to the plaintiff all such costs and damages as the plaintiff may recover in the action, including damages for the loss of rents and profits.

Code, s. 237; 1869-70, c. 193. Moore v. Byrd, 118-691; Huneycutt v. Brooks, 116-792; Henning v. Warner, 109-408; Cooper v. Warlick, 109-672; Vaughan v. Vincent, 88-116. **Court can extend time for filing the undertaking:** Dunn v. Marks, 141-232; White v. Lokey, 131-72; Taylor v. Pope, 106-271—**and from such order there is no appeal:** Dunn v. Marks, 141-232. **Where separate trial for each defendant each gives bond:** Bryan v. Spivey, 106-99. **Answer not stricken out for want of bond without notice:** Becton v. Dunn, 137-563; McMillan v. Baker, 92-111; Cooper v. Warlick, 109-672; Russell v. Saunders, 48-432; Brittain v. Howell, 19-107. **Court can order additional security and, upon failure to give it, answer stricken out and judgment awarded:** Vaughan v. Vincent, 88-116. **When plaintiff deemed to have waived bond:** Dempsey v. Rhodes, 93-120; McMillan v. Baker, 92-110.

Grantee sued by grantor for possession, grantee having never paid purchase money, grantee must give bond to defend: Allen v. Taylor, 96-37. **Defense bond not required in action to remove cloud from title:** Timber Co. v. Butler, 134-50. **Where undertaking is in form of bond, seal does not defeat its purpose and it will be treated as an undertaking under seal:** Holly v. Perry, 94-30. **Where undertaking written on back of summons, but did not contain names of plaintiff, defendant or surety, held to be sufficient:** Ibid. **Where defense bond not given and no leave to sue as pauper, judgment should be given against defendant for possession without damages:** Junge v. Macknight, 135-107, 137-285; Credle v. Ayers, 126-15; Norton v. McLaurin, 125-185; Vick v. Baker, 122-98; Jones v. Best, 121-154; see Horton v. White, 84-291.

What bond secures: Hughes v. Pritchard, 129-42; White v. Fox, 125-547; Rollins v. Henry, 77-467.

Summary judgment on bond can be entered up against the sureties upon judgment being rendered against defendant: Rollins v. Henry, 84-569—**and where mortgage in lien of bond is given, foreclosure will be decreed on motion after notice,** Ryan v. Martin, 103-282, 104-176. **Landlord and tenant both parties defendant, and when tenant for failure to give bond or leave to defend as a pauper has judgment entered against**

him, execution will not issue until landlord's defense passed upon: Rollins v. Rollins, 76-264; Harkey v. Houston, 65-137.

454. Defense without bond, when. The undertaking prescribed in the preceding section shall not be required if an attorney practicing in the court wherein the action is pending will certify to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant will also file an affidavit stating that he is not worth the amount of said undertaking in any property whatsoever, and is unable to give the same.

Code, s. 237; 1869-70, c. 193. **Certificate of attorney as to meritorious defense:** Wilson v. Fowler, 104-471; Taylor v. Apple, 90-345. **Affidavit of defendant required:** Wilson v. Fowler, 104-471; Taylor v. Apple, 90-345. **No notice to plaintiff of defendant's application necessary:** Deal v. Palmer, 68-215. **Where this section complied with, court must grant leave; has no discretion:** Dempsey v. Rhodes, 93-120; Jones v. Fortune, 69-322.

X. Joint and Several Debtors.

455. When some only of defendants are served; partners. Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

See sections 411, 412 and 413.

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recover judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

Davis v. Sanderlin, 119-84; Hastein v. Johnson, 112-258; Rufty v. Claywell, 93-308; Bain v. Loan Asso., 112-248.

2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in

case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

See sections 411, 414. See Davis v. Sanderlin, 119-84; Hastein v. Johnson, 112-258; Navassa Guano Co. v. Willard, 73-522; Mervin v. Ballard, 65-168.

Code, s. 222; C. C. P., s. 87.

456. Summoned after judgment, when. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding, as provided in the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

Code, s. 223; C. C. P., ss. 87, 318. **Where partner served with notice after three years from time cause of action accrued; held barred by the statute of limitations:** Koonce v. Pelletier, 115-233; Rufty v. Claywell, 93-306—**so also in case of secret partner just discovered,** Navassa Guano Co. v. Willard, 73-521. **It is only when the cause of action is joint and not several that a motion in the cause is proper:** Davis v. Sanderlin, 119-84.

457. Defense by party summoned after judgment. Any party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which may have arisen subsequently to such judgment; and may make any defense which he might have made to the action if the summons had been served on him at the time when the same was originally commenced and such defense had been then interposed to such action.

Code, s. 224; C. C. P., s. 322. **See section 449; also cases under preceding section.**

458. Pleadings and proceedings same as in action. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action and enforced by execution if necessary.

Code, s. 225; C. C. P., s. 323.

459. Pleadings verified as in actions. The answer and reply shall be verified in the like cases and manner and be subject to the same rules as the answer and reply in an action.

Code, s. 226; C. C. P., s. 324.

XI. Lis Pendens.

460. Notice of, filed in county where land lies. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint or at any time afterwards or whenever a warrant of attachment shall be issued, or at any time afterwards, the plaintiff or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief at the time of filing his answer or at any time afterwards, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment and must contain the date of the mortgage, the parties thereto, and the time and place of registering the same.

Code, s. 229; C. C. P., s. 90. **See sections 461-464. Does not need to be filed in county where suit brought:** Harris v. Davenport, 132-701; Arrington v. Arrington, 114-151; Bird v. Gilliam, 125-79; Rollins v. Henry, 78-352; Spencer v. Credle, 102-68; Collingwood v. Brown, 106-362; Morgan v. Bostic, 132-751. **Where case transferred, with all original papers to another county, lis pendens in first county fails:** Arrington v. Arrington, 114-151. **One refused leave to be made party can protect his interest by filing lis pendens and instituting proceedings:** Toms v. Warson, 63-417. **Description of property necessary for lis pendens:** Badger v. Daniel, 77-251; Todd v. Outlaw, 79-235; Arrington v. Arrington, 114-151; Morgan v. Bostic, 132-750; Spencer v. Credle, 102-68. **Effect on property transferred pending suit:** Dancy v. Duncan, 96-111. **Applies to actions concerning alimony, when,** Daniel v. Hodges, 87-95. **Where motion to issue execution pending:** Isler v. Brown, 66-556; Badger v. Daniel, 77-251.

461. Notice ineffectual unless action is prosecuted. The notice of lis pendens shall be of no avail unless it shall be followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after such filing.

Code, s. 229; C. C. P., s. 90. Taylor v. Smith, 121-81.

462. Effect of, on subsequent purchasers. From the filing of the notice of lis pendens only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same

extent as if he were made a party to the action. For the purposes of this section an action shall be deemed to be pending from the time of filing such notice.

Code, s. 229; C. C. P., s. 90. **See sections 460, 461, 463. As to the county wherein suit is brought, if a complaint, with description of property and purpose of action stated, be filed upon issuing of summons, it is a filing of notice:** Morgan v. Bostic, 132-751; Harris v. Davenport, 132-701; Arrington v. Arrington, 114-151; Bird v. Gilliam, 125-79; Collingwood v. Brown, 106-362; Spencer v. Credle, 102-68; Dancy v. Duncan, 96-116; Rollins v. Henry, 78-352; Todd v. Outlaw, 79-240; Badger v. Daniel, 77-251. **Not affected with constructive notice outside of county where suit brought:** Spencer v. Credle, 102-68.

The rule that the pendency of an action affects the purchaser pendent lite of property in controversy with notice in the same manner as if he had had actual notice, and renders him bound by the judgment or decree in the suit, is confined to the property directly in litigation: Badger v. Daniel, 77-251. **A purchaser for value after filing of lis pendens but before filing of complaint is not charged with notice:** Morgan v. Bostic, 132-743. **Complaint to remove cloud from title operates as lis pendens:** Puryear v. Sanford, 124-282. **Purchaser of land under trust sale, after suit brought, with notice, acquires no title:** Overton v. Hinton, 123-6. **One who registers his deed pendente lite is bound by the judgment:** Williams v. Kerr, 113-306.

463. Notice cancelled, when and how. The court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this subchapter to be cancelled of record, by the clerk of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an endorsement to that effect on the margin of the record, which shall refer to the order.

Code, s. 229; C. C. P., s. 90.

464. Lis pendens in Buncombe. Any party to an action desiring to claim the benefit of a notice of lis pendens in Buncombe county, whether given formally under this section or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called "Record of Lis Pendens," which index shall contain the names of the parties to the action, where such notice, whether formal or in the pleadings is filed, the object of the action, the date of indexing and a sufficient description of the land to be affected to enable any person to locate said lands. From the time of cross-indexing only shall the pendency of the action be actual or constructive notice to subsequent purchasers or incumbrancers. The word "filing" in the

preceding sections of this subchapter when referring to actions or proceedings in Buncombe county shall read "cross-indexing." The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action.

1903, c. 472.

XII. Complaint.

465. The first pleading. The first pleading on the part of the plaintiff is the complaint.

Code, s. 232; C. C. P., s. 92. **As to complaints in the various actions, what they should contain, etc., see under subsection 2 of section 467. While pleadings are to be construed liberally, they are to be so construed as to give defendant an opportunity to know the grounds upon which he is charged with liability:** Thomason v. R. R., 142-318; see also section 495. **Complaint must state facts, not evidence:** Crump v. Mims, 64-771. **Complaint can not set up causes of action that did not exist at time of issuance of summons:** Crawford v. Barnes, 118-912; Bynum v. Commrs., 101-412; Clendenin v. Turner, 96-416; Metcalf v. Guthrie, 94-447. **The nature of the action is shown by the complaint:** Barneycastle v. Walker, 92-198. **Where a statute giving the right of action is in the proviso, plaintiff need not negative it, but if the case falls within the proviso, the defendant must set it up in the answer:** Wadsworth v. Stewart, 97-116. **As to variance between summons and complaint:** Burrell v. Hughes, 116-430; Warrenton v. Arrington, 101-112. **As to amendment upon new parties being made:** Richards v. Smith, 98-509; Hughes v. Hodges, 94-56; see sections 505-507. **Motion to amend complaint after answer not allowed as matter of course:** Goodwin v. Fertilizer Works, 121-91; see sections 505-507. **When judgment will cure absence of complaint:** Peebles v. Braswell, 107-68; Robeson v. Hodges, 105-49; McNeill v. Hodges, 105-52; Stancill v. Gay, 92-455; Peoples v. Norwood, 94-167; Little v. McCarter, 89-233; Vick v. Pope, 81-22; Leach v. R. R. 65-486.

466. Time of filing. The plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff.

Code, ss. 206, 238; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3. **Complaint filed after return term stands at the next term to be answered as if it were the return term:** Roberts v. Allman, 106-391; Brown v. Rhinehart, 112-772. **Leave "to file complaint in 30 days and answer in 60 days thereafter" construed:** Mitchell v. Haggard, 105-173; Howard v. Rwy., 122-946. **Time for filing extended:** Brendle v. Heron, 68-495; Gilchrist v. Kitchen, 86-20. **A pleading filed after judge has adjourned court is not filed in contemplation of law:** Foley v. Blank, 92-476. **The exercise of the discretionary power of a court to extend time for filing pleadings is not reviewable:** Gwinn v. Parker, 119-19; Brown v. Hale,

93-188; Gilchrist v. Kitchen, 86-20; see section 512. **The failure to file complaint is ground to dismiss the action, if objection is taken in apt time, but its absence will be cured by acquiescence in the judgment;** McLeod v. Graham, 132-474; McLean v. Breece, 113-390; Peebles v. Braswell, 107-68; McNeill v. Hodges, 105-52; Robeson v. Hodges, 105-49; Little v. McCarter, 89-233; Peoples v. Norwood, 94-167; Stancill v. Gay, 92-455; Leach v. R. R., 65-485; Vick v. Pope, 81-22. **Where pleadings not filed by court nor marked filed, but have been in the papers several terms; effect:** White v. Carroll, 146-.

467. Contents. The complaint shall contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

A general designation of parties as "the heirs of M. C." will not do: Kerlee v. Corpening, 97-330—**nor will "H. M. & Co.," without naming the partners,** Heath v. Morgan, 117-504.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation shall be distinctly numbered.

For demurrer that facts are not sufficient to constitute cause of action, see section 474, subsec. 6. For construction of pleadings see section 495. Facts, not evidence, must be stated: Crump v. Mims, 64-767. **Complaint must set out facts in "plain and concise statement:"** Blackmore v. Winders, 144-216; Lassiter v. Roper, 114-17; Stokes v. Taylor, 104-394; Knowles v. R. R., 102-65; Junge v. MacKnight, 135-110; Pierce v. R. R., 124-98; McElwee v. Blackwell, 94-261; Hussey v. R. R., 98-39; Womble v. Leach, 83-84; Kiff v. Weaver, 94-278; Jones v. Mial, 82-252; Gorman v. Bellamy, 82-496; Moore v. Hobbs, 77-66; Rountree v. Brinson, 98-107—**and must not simply state conclusions of law,** Webb v. Hicks, 116-598. **No cause can be set out that did not exist when summons issued:** Crawford v. Barnes, 118-912; Bynum v. Commrs., 101-412; Cledennin v. Turner, 96-416; Metcalf v. Guthrie, 94-447. **Itemized account need not be set out:** McPhail v. Johnson, 115-298. **Pleading quantum meruit:** Holden v. Warren, 118-326; Moffitt v. Glass, 117-142; Roberts v. Woodworking Co., 111-432; Fulps v. Mock, 108-601; Stokes v. Taylor, 104-394. **Failure to aver a demand made upon defendant not fatal when defense shows it would have been futile:** Moore v. Hurtt, 124-27; Worth v. Wharton, 122-376; Hinson v. Smith, 118-503; McQueen v. Smith, 118-450; Heath v. Morgan, 117-504; Woolen Co. v. McKinnon, 114-661; Buffkins v. Eason, 112-162; Rich v. Hobson, 112-79; Taylor v. Hodges, 105-344. **The rules of pleading are not so stringent as to require a special averment in a complaint of every immediate cause in an action for damages:** Hammond v. Schiff, 100-161. **The plaintiff must allege his cause of action in the complaint and he can not recover on a cause of action set out in the pleadings of his adversary:** Willis v. Branch, 94-142.

COMPLAINTS IN A FEW SPECIFIC CASES. **In action for seduction:** Snider v. Newell, 132-614; Hood v. Sudderth, 111-215—**for recovery of personal property:** Singer Mnfg. Co. v. Barrett, 95-36—**for injury to building by adjacent owner flooding wall with water:** Davis v. Smith, 141-108—**for breach of promise to marry;** Hood v. Sudderth, 111-215—**for penalty against sheriff for false return:** Harrell v. Warren, 100-259; Finley v. Hayes, 81-368; Peebles v. Newsome, 74-473—**for fraud:** Merrimon v. Paving Co., 142-539; Bean v. R. R., 107-731; Worth v. Stewart, 122-263; Riley v. Hall, 119-406; Beaman v. Ward, 132-68—**for cancellation of a deed secured by circumvention:** Harshaw v. Dobson, 64-384—**to require the applicataion of certain special tax funds to purpose for which tax levied:** McCless v. Meekins, 117-34—**for damages for trespass on real property:** Whitaker v. Forbes, 68-228—**to enjoin municipality from making unauthorized use of the public funds:** Merrimon v. Paving Co., 142-539—**to recover on a guaranty:** Hughes v. Warehouse Co., 139-158—**to recover on bonds of indemnity:** Wood v. Kincaid, 144-393; Seaboard Air Line v. Main, 132-445—**for libel:** Osborn v. Leach, 135-628; Williams v. Smith, 134-249—**for recovery of life insurance premiums where agent induced payment through fraud and deceit:** Gwaltney v. Assurance Co., 130-629—**for recovery on constable's bond for false imprisonment:** Warren v. Boyd, 120-56—**for breach of covenant of seizin:** Eames v. Armstrong, 142-506—**for breach of warranty of title to land:** Zimmerman v. Lynch, 130-61; Ravenal v. Ingram, 131-549; Mizzell v. Ruffin, 118-69—**for recovery of damages for right of way of railroad:** Hill v. Mining Co., 113-259—**for damages on contract for the sale of goods of specific quality:** Cox v. Long, 69-7—**for goods sold and delivered:** Smith v. Summerfield, 108-284—**for recovery by husband, who is tenant by courtesy initate, of possession of his wife's land:** Wilson v. Arentz, 70-670—**to recover cotton claimed as rent:** Haywood v. Rogers, 73-320—**for accounting and settlement of guardian:** Adams v. Quinn, 74-359—**to have executor's administrator declared trustee for legatee of executor's testator:** McFarland v. McKay, 74-258—**for malicious abuse of process:** Lockhart v. Bear, 117-299; Sneeden v. Harris, 109-349—**to recover payment of claim against county:** Leach v. Commrs., 84-830; Jones v. Commrs., 73-182; Love v. Commrs., 64-706—**for possession of personal property by officer, the officer having levied thereon:** Penland v. Leatherwood, 101-509—**for slander:** Wozelka v. Hettrick, 93-10; Burns v. Williams, 88-159—**for ponding water on land:** Parker v. R. R., 119-677—**to restrain waste:** Farabow v. Green, 108-339; Jones v. Britton, 102-166; Gordon v. Lowther, 75-193—**for wrongly evicting tenant:** Burwell v. Brodie, 134-540—**to enforce the double liability of bank stockholders:** Smathers v. Bank, 135-410—**to enforce a right of way through neighbor's land:** Boyden v. Achenbach, 79-539—**for maliciously attaching plaintiff's cars in excessive number:** Railroad Co. v. Hardware Co., 143-54, 138-175—**for malicious prosecution:** Davis v. Terry, 114-27; Ely v. Davis, 111-24; Barfield v. Turner, 101-357; Johnson v. Finch, 93-205—**for malicious arrest:** Johnson v. Finch, 93-205—**to impeach a deed from husband to trustee for wife because based upon contemplated separation:** Barnes

v. Barnes, 104-613—**for accounting by administrator within two years:** Allen v. Royster, 107-278—**for trespass in cutting timber trees:** Davis v. Wall, 142-450—**against an administrator for negligence in discharge of duty:** Wood v. Morgan, 118-749—**to recover on a promissory note:** Deloatch v. Vinson, 108-147—**to recover debt on contract:** Burbage v. Windley, 108-357; Lassiter v. Roper, 114-17; Moore v. Hobbs, 79-535—**for penalty for register of deeds issuing marriage license unlawfully:** Maggett v. Roberts, 112-71, also 108-174—**for conspiracy to defraud administrator and others:** Murray v. Southerland, 125-177—**to recover land:** Westfelt v. Adams, 131-379; Stancill v. James, 126-190; Asbury v. Fair, 111-258; Brown v. King, 107-313; Bryan v. Spivey, 106-99; Speight v. Jenkins, 99-143; Richards v. Smith, 98-509; Thames v. Jones, 97-121; Tyson v. Shepherd, 90-314; Johnston v. Pate, 83-110; Falls v. Gamable, 66-455; Garrett v. Trotter, 65-430—**to review and revise a judgment:** Farrar v. Staton, 101-78—**to set aside judgment for fraud:** Moore v. Gulley, 144-81—**to cancel assignment of a public franchise and enjoin use of same:** Atkinson v. Rwy. Co., 113-581—**for conversion:** Parker v. Harden, 121-57; Womble v. Leach, 83-84—**for usury:** Churchill v. Turnage, 122-426; Morgan v. Bank, 93-352—**for recovery of an office:** Kilburn v. Patterson, 98-593; Hancock v. Hubbs, 98-590; Hahn v. Stinson, 98-591—**to recover taxes collected by tax collector or sheriff:** Commrs. v. Candler, 123-682; Bd. of Ed. v. Walls, 117-382; Coffield v. McNeill, 74-535; Commrs. of Pender v. McPherson, 79-524—**against a bank officer personally for deceiving depositor as to solvency of bank:** Solomon v. Bates, 118-311; Townsend v. Williams, 117-330; Tate, Treas., v. Bates, 118-289—**to recover payment for subscribed stock from delinquent stockholder:** Worth v. Wharton, 122-376—**to set aside a deed for fraud or undue influence:** Riley v. Hall, 119-406; Bank v. Harris, 84-206—**against distributees on their refunding bonds given administrator:** Lowery v. Perry, 85-131—**to enforce laborer's lien:** Moore v. R. R., 112-236; Wray v. Harris, 77-77; Cook v. Cobb, 101-68—**against sheriff for refusing to set aside personal property exemption:** Scott v. Kenan, 94-296—**for recovery on life insurance policy:** Britt v. Ins. Co., 105-175; Cheek v. Lodge, 129-179—**for recovery on fire insurance policy:** Hayes v. Ins. Co., 132-702; Wright v. Ins. Co., 138-488—**for negligence** (but for specific actions see further under this paragraph of annotations): Thomason v. R. R., 142-318; Black v. R. R. Co., 115-667; Harris v. Quarry Co., 131-553; Hagins v. R. R., 106-537—**for negligence by express company in failing to deliver whisky intended for sickness:** Thompson v. Exp. Co., 144-389—**for wrongful death:** Lassiter v. R. R., 136-89; Conley v. R. R., 109-692, see section 59—**for injury to house, furniture, etc., and for nuisance caused by vibrations of engine, and from sparks, cinders, etc.:** Thomason v. R. R., 142-318—**for providing machinery not reasonably safe to servant:** Moore v. R. R., 141-111—**for providing for servant unsafe place to work:** Bradley v. R. R., 144-555—**for moving train while employee unloading car:** Smith v. R. R., 129-374—**for burning property by sparks from railroad engines:** Black v. R. R., 115-667—**for injury by negligence of engineer:** Hagins v. R. R., 106-537; Ramsay v. R. R., 91-418; Stanly v. R. R., 89-331—**for physical injury or disease**

resulting from fright and shocks caused by negligence: Watkins v. Mfg. Co., 131-536—**to set aside tax deed as cloud upon title:** Beck v. Meroney, 135-532—**for recovery of penalty for refusal to receive freight:** Currie v. R. R., 135-535—**to enjoin treasurer from paying interest on county bonds:** Commrs v. Williams, 135-660—**for breach of married woman's contract:** Bank v. Howell, 118-274; Witz v. Gray, 116-48; Ulman v. Mace, 115-24; Jones v. Craigmiles, 114-613; Long v. Rankin, 108-333; Farthing v. Shields, 106-289; Flaum v. Wallace, 103-296; Dougherty v. Sprinkle, 88-300—**against railroad company for failing to protect passenger from violence:** Manning v. R. R., 122-824—**to recover from life insurance company money paid for policy when no policy received:** Barnes v. Piedmont Ins. Co., 74-22—**for divorce:** Ladd v. Ladd, 121-118; O'Connor v. O'Connor, 109-139; Jackson v. Jackson, 105-433; White v. White, 84-340—**by administrator, to recover back legacy wrongfully paid:** Bumpass v. Chambers, 77-357—**for negligence in delivery of telegram:** Sherrill v. Tel. Co., 109-527; Mayo v. Tel. Co., 112-343—**to restrain sale of land under mortgage:** Hemmings v. Doss, 125-400.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated.

A formal prayer for relief is not now necessary; party can obtain any relief to which the facts alleged entitle him, or that is not inconsistent with his pleadings: McCulloch v. R. R., 146-; Davis v. Wall, 142-450; Staton v. Webb, 137-35; Voorhees v. Porter, 134-591; Hendon v. R. R., 127-110; Gattis v. Kilgo, 125-135; Gillam v. Ins. Co., 121-369; Simmons v. Allison, 118-763; Sams v. Price, 119-574; Parker v. R. R., 119-677; Scarlett v. Norwood, 115-284; Fowler v. Osborne, 111-409; Gudger v. Penland, 108-593; McEachin v. Stewart, 106-336; McNeill v. Hodges, 105-52; Harris v. Sneeden, 104-369; Barnes v. Barnes, 104-613; Davis v. Ely, 100-283; Moore v. Cameron, 93-51; Lumber Co. v. Wallace, 93-22; Patrick v. R. R., 93-422; Jones v. Mial, 79-168; Dunn v. Barnes, 73-273; Knight v. Houghtalling, 85-17. **Facts alleged not the prayer for relief govern the relief granted:** Adams v. Hayes, 120-383; Reade v. Street, 122-301; Johnson v. Loftin, 111-319; Moore v. Nowell, 94-265. **The sum demanded governs the jurisdiction, provided it is in good faith:** Martin v. Goode, 111-288; Thompson v. Exp. Co., 144-389; Bowers v. R. R., 107-721; Moore v. Nowell, 94-265; Brantley v. Finch, 97-91; Wiseman v. Witherow, 90-140.

Code, s. 233; C. C. P., s. 93.

468. In action to recover purchase money of land. In actions for the recovery of a debt contracted for the purchase of land, it shall be the duty of the plaintiff to set forth in his complaint that the consideration of the debt sued on was the purchase money of certain land, describing said land in an intelligible manner, such as the number of acres, how bounded, and where situated.

Code, s. 234; 1879, c. 217. **Not necessary to allege in complaint on note for purchase money of land that the title to the land is good or**

that plaintiff has tendered a deed: Toms v. Fite, 93-274. **This section does not apply to cases where deed has not been executed to the vendee:** Lewis v. McDowell, 88-261. **A note under seal, reciting that it was given for the balance of the purchase price of certain land, executed and registered, does not attach to the legal title a trust for its payment or constitute a lien thereon:** Carpenter v. Duke, 144-291.

469. What causes of action may be joined. The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of—

The same principle which forbids the improper joinder of causes in civil actions applies to special proceedings: Garrison v. Cox, 99-478. **Cause of action for tort can not be united with cause on contract:** R. R. Co. v. Hardware Co., 135-73; Doughty v. R. R., 78-22; Logan v. Wallis, 76-416;—**unless they come within subsection one below:** Reynolds v. R. R., 136-345, and cases cited. **Complaint can state any number of causes of action coming within any one subsection:** Outland v. Outland, 113-74; Heggie v. Hill, 95-303; Young v. Young, 81-92; Logan v. Wallis, 76-416—**so they are against the same parties,** R. R. Co. v. Hardware Co., 135-75 and cases cited. **Where different causes of action exist between plaintiffs and defendants, all of same character, to prevent multifarious actions, court will permit joinder for convenience:** Hancock v. Wooten, 107-9; Heggie v. Hill, 95-303; also see Williams v. R. R., 144-502 and cases cited. **At common law and under section 469, an action in tort against several defendants is joint or several according to the complaint, and the plaintiff's election determines the character of the tort, whether joint or several:** Hough v. R. R., 144-692. **Where plaintiff seeks relief against a number of defendants all in some way interested in subject of action,** see Oyster v. Mining Co., 140-135; Blackburn v. Ins. Co., 116-824; Pretzfelder v. Ins. Co., 116-491; Springer v. Sheets, 115-370; LeDuc v. Brandt, 110-289; Young v. Young, 81-92; Fisher v. Trust Co., 138-224. **Objection to misjoinder must be taken by demurrer or answer, and if taken by neither, can not be taken by motion upon trial:** Kiger v. Harmon, 113-408; Finley v. Hayes, 81-368; McMillan v. Edwards, 75-83; Burns v. Ashworth, 72-496—**and never in the supreme court:** Wright v. Kinney, 123-618.

1. The same transaction; or transaction connected with the same subject of action.

"Same transaction" discussed: Hawk v. Pine Lumber Co., 145-48; Fisher v. Trust Co., 138-224; Cook v. Smith, 119-350; Benton v. Collins, 118-196; Cheatham v. Bobbitt, 118-346; Young v. Young, 81-92. **"Transactions connected with the same subject of action:"** Sloan v. R. R., 126-490; Benton v. Collins, 118-196; Cook v. Smith, 119-350; Hamlin v. Tucker, 72-502; Solomon v. Bates, 118-316; McGowan v. Ins. Co., 141-368. **Causes of action strictly legal and causes strictly equitable can be united in one action if they arise according to this subsection:** Lumber Co. v. Wallace, 93-22; Gregory v. Hobbs, 93-1.

PROPER JOINDER. Cause of action for damages on contract with cause for tort under this subsection: Reynolds v. R. R., 136-345; Daniels v. Fowler, 120-14; Hodges v. R. R., 105-170; Cook v. Smith, 119-350; Benton v. Collins, 118-196; Railroad Co. v. Hardware Co., 135-75—for debt and to subject property to payment: Outland v. Outland, 113-74—for debt on note with debt on open account: Sutton v. McMillan, 72-102—for tort with cause for false warranty: Ashe v. Gray, 88-190; Long v. Felds, 104-221—for debt with cause for setting aside fraudulent conveyances: Bank v. Harris, 84-206; Benton v. Collins, 118-196—for re-execution of lost deed with cause for possession of land: McMillan v. Edwards, 75-81—against bank directors for loss of deposit by neglect with cause for fraud and deceit: Solomon v. Bates, 118-311; Tate, treas., v. Bates, 118-287—against sheriff on official bond for illegal levy and sale with cause against person directing him and giving indemnifying bond: Cook v. Smith, 119-350—against partner on partnership liability with personal liability, in certain cases: Logan v. Wallis, 76-416—for harboring and maintaining wife with causes for conversion of personalty to which plaintiff entitled jure mariti, for inducing wife to make deed of land by which defendant received rents, for conversion of mules, etc., set out in a marriage settlement executed by plaintiff and wife: Hamlin v. Tucker, 72-502—for recovery of premiums paid on different insurance policies under false representations: McGowan v. Ins. Co., 141-367.

MISJOINDER. Cause of action against maker and endorser of note with cause against guarantor of judgment on the note: Wooten v. Maultsby, 69-462—to remove trustees with cause to set up lost deed and have trust in property declared: Nash v. Sutton, 109-550—to foreclose mortgage on one tract with cause to recover possession of another: Edgerton v. Powell, 72-64—to partition one tract held in common with cause to partition another not held in common by the same tenants: Simpson v. Wallace, 83-477.

2. Contract, express or implied; or,

PROPER JOINDER. Cause of action on official bond for one term of office with cause on bond of succeeding term of office: Syme v. Bunting, 86-175—on one judgment with causes on another against same party: Moore v. Nowell, 94-265—for recovery of one penalty with cause for recovery of another against same party: Burrell v. Hughes, 116-430; Maggett v. Roberts, 108-174—for specific performance of contract with damages for breach of same: Winders v. Hill, 141-694.

MISJOINDER. Cause of action on clerk's bond with cause on administrator's bond: Street v. Tuck, 84-605.

3. Injuries with or without force to person and property, or to either; or,

PROPER JOINDER. Cause of action for illegal levy and sale by sheriff with cause against party who directed sheriff to levy and gave indemnifying bond: Cook v. Smith, 119-350.

MISJOINDER. A cause of action for wrongful attachment and a cause against surety to attachment bond: Railroad v. Hardware Co., 135-73.

4. Injuries to character; or,

Gattis v. Kilgo, 125-135.

5. Claims to recover real property, with or without damages for the withholding thereof; and the rents and profits of the same; or,

PROPER JOINDER. Cause of action by vendor against vendee personally, with cause against him in rem, and also with cause to recover possession of property: Bank v. Pearson, 119-494; Allen v. Taylor, 96-37—**for recovery of possession of land with cause to set up a mistake in a deed:** Ely v. Early, 94-1—**for possession of real property as against several different trespassers:** Bryan v. Spivey, 106-95—**for possession with cause for re-execution of unregistered lost deed:** Jennings v. Reeves, 101-447—**to recover two contiguous tracts of land, where they form part of larger body:** Weeks v. McPhail, 128-134; Bryan v. Spivey, 106-95.

MISJOINDER. Cause of action for foreclosure of mortgage on realty with cause for possession of a different tract: Edgerton v. Powell, 72-64. **Cases where subsection merely cited:** Sherrill v. Connor, 107-637; Jones v. Coffey, 109-519.

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Cause must belong to one class and must affect all the parties, except as to foreclosure of mortgages: Railroad Co. v. Hardware Co., 135-75; Morton v. Tel. Co., 130-303; Gattis v. Kilgo, 125-133; Cromartie v. Parker, 121-204; Hodges v. R. R., 105-170; Doughty v. R. R., 78-22; Street v. Tuck, 84-605; Logan v. Wallis, 76-416; Land Co. v. Beatty, 69-329.

In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases.

Code, s. 267; C. C. P., s. 126.

XIII. Defendant's Pleadings.

470. Demurrer or answer. The only pleading on the part of the defendant is either a demurrer or an answer.

Code, s. 238; C. C. P., s. 94. McClenahan v. Cotten, 83-332. **Demurrer precedes the answer:** Finch v. Baskerville, 85-205—**and can not be put in after it without leave to withdraw answer:** Ibid. **Answering before the hearing on the demurrer waives the demurrer:** Wilson v. Pearson, 102-290; Hyman v. Devereux, 63-624; Moseley v. Johnson, 144-258—**and answering at the same time of demurring waives the demurrer:** Ransom v. McClees, 64-17. **Where defendants jointly liable, one can not answer and the other demur:** Von Glahn v. DeRossett, 76-292. **Motion for nonsuit can not be made a substitute for a demurrer:** Andrews v. Pritchett, 66-387.

471. Demurrer and answer. The defendant may demur to one or more of several causes of action stated in the complaint, and answer to the residue.

Code, s. 246; C. C. P., s. 103. **Where defendants are jointly liable a part can not demur while the remainder answers:** Von Glahn v. DeRossett, 76-292—**but otherwise when not jointly liable:** Conant v. Barnard, 103-320. **The section means a demurrer can be filed, not to a single allegation, but to a single cause of action, and an answer made to the other causes:** Speight v. Jenkins, 99-143; Cowand v. Meyers, 99-198; Sumner v. Young, 65-579. **Defendant can not answer and demur to the same cause of action:** Speight v. Jenkins, 99-143; Finch v. Baskerville, 85-205; Ransom v. McClees, 64-17; Von Glahn v. DeRossett, 76-292. **The same defendants may demur to one and answer as to another of two or more causes, or as to a single cause of action, some may answer and some may demur:** Conant v. Barnard, 103-315. **Refusal to hold answer frivolous and to strike it out is not appealable:** Morgan v. Harris, 141-358; Abbott v. Hancock, 123-89; Walters v. Starnes, 118-842.

SHAM AND IRRELEVANT DEMURRER. Definition: Morgan v. Harris, 141-358; Porter v. Grimsley, 98-550; Johnston v. Pate, 83-110. **Illustrations of sham and irrelevant demurrers:** Porter v. Grimsly, 98-550; Hurst v. Addington, 84-143; Johnston v. Pate, 83-110; Dunn v. Barnes, 73-273. **When demurrer is held frivolous, judgment for plaintiff can be entered:** Cowan v. Baird, 77-201; also see section 560. **Refusal to hold demurrer frivolous is not appealable:** Morgan v. Harris, 141-358; Abbott v. Hancock, 123-89.

472. Sham and irrelevant defenses. Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose.

150-433

Code, s. 247; C. C. P., s. 104. **For judgment on frivolous pleadings, see section 560.**

SHAM AND IRRELEVANT ANSWERS. Sham answer defined: Howell v. Ferguson, 87-113. **Frivolous or irrelevant answer defined:** Vass v. Brewer, 122-226; Weil v. Uzzell, 92-517; Atkinson v. McIntyre, 90-147; Howell v. Ferguson, 87-113; Hurst v. Addington, 84-143; Johnston v. Pate, 83-110. **Cases where answers were contended to be sham or irrelevant, but held good:** Buie v. Brown, 104-335; Bank v. Atkinson, 113-478; Campbell v. Patton, 113-481; Bank v. Charlotte, 75-45; Swepson v.

Harvey, 66-436. **Illustration of sham and irrelevant answers:** Deloatch v. Vinson, 108-147; Rumbough v. Imp. Co., 106-461; Atkinson v. McIntyre, 90-147; Brogden v. Henry, 83-274; Dail v. Harper, 83-4; Commrs. v. Piercy, 72-181; Schehan v. Malone, 71-440; Holmes v. Godwin, 69-470; Flack v. Dawson, 69-42. **An answer raising important issue and disclosing substantial defense is not frivolous even though false:** Whitaker v. Jenkins, 138-476. **Answers should not be stricken out as frivolous unless palpably so:** Womble v. Fraps, 77-98; Hull v. Carter, 83-249; Erwin v. Lowery, 64-321—**and should not be stricken out where matter in any other from, would constitute a defense:** Boone v. Hardie, 83-470; Erwin v. Lowery, 64-322—**and judge's refusal to strike out answer as frivolous is not appealable:** Walters v. Starnes, 118-842—**nor his refusal to hold demurrer frivolous:** Abbott v. Hancock, 123-89.

473. Time for. The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default.

Code, s. 207: 1870-1, c. 42, s. 4. **For enlarging time to file pleadings, see section 512. Extension of time to file pleadings a matter of discretion:** Gilchrist v. Kitchen, 86-20—**and a refusal to allow answer to be filed at trial term is not appealable:** Gwinn v. Parker, 119-19; Reese v. Jones, 84-597. **"Time to demur or answer" entered on docket does not extend time until the trial term:** Boddie v. Woodard, 83-2.

A demurrer to the jurisdiction of the court or that the complaint does not state a cause of action can be interposed at any time: See section 478. A pleading placed in the files after the judge has left court is not filed in contemplation of law: Foley v. Blank, 92-476; but see White v. Carroll, 145-. **Cases merely citing section:** Mecke v. Mineral Co., 122-796; Barnes v. Crawford, 115-80; Fertilizer Co. v. Black, 114-593. **Judgment by default at return term when defendant fails to answer or demur:** Brown v. Rhinehart, 112-772; also see section 556.

XIV. Demurrer.

474. Grounds for. The defendant may demur to the complaint when it shall appear upon the face thereof, either—

Distinction between demurrer to evidence and to complaint stated: McCanless v. Flinchum, 98-358. **Demurrer sustained only when defect appears upon face of complaint:** Davison v. Gregory, 132-389; Von Glahn v. DeRossett, 76-292; Wood v. Kincaid, 144-394; Bank v. Britton, 66-365. **Grounds of demurrer must be specifically pointed out, see section 475. Effect of demurrer:** Wood v. Kincaid, 144-393; Merrimon v. Paving Co., 142-539; Knight v. R. R., 111-80; Bond v. Wool, 107-139; Loughran v. Giles, 110-426. **Waiver of demurrer, deemed:** Teague v. Collins, 134-62; Wilson v. Pearson, 102-290; Hyman v. Devereux, 63-624; Ransom v. McClees, 64-17. **A demurrer can never be aided by separate averments of facts therein, but must be addressed solely to those alleged in the pleading attacked:** Wood v. Kincaid, 144-393. **A "speaking demurrer" never allowable:** Wood v. Kincaid, 144-395; Von Glahn v. De-

Rossett, 76-292. **A complaint cannot be overthrown by a demurrer unless it be wholly insufficient:** Blackmore v. Winders, 144-215.

When the chief ground of demurrer to the complaint in an action for summary ejectment covers only the cause of action upon the stay bond, the demurrer is to that extent severable, though containing objections to other matters of the complaint; and it may be sustained as to the sureties and disallowed as to the principals upon grounds distinctly specified and separately assigned; and, being thus special or severable and denying the plaintiffs' right to recover all, the objection can be raised ore tenus in the supreme court, or the court may notice it ex mero motu: Ibid.

If one allegation is defective it will extend to the whole cause of action: Speight v. Jenkins, 99-143. **There is no law or practice that will permit a tender of judgment of one dollar as an aid to a defective demurrer:** Hall v. Tel. Co., 139-369. **As to frivolous demurrers, see section 472. Joining parties that are unnecessary is not demurrable:** Sullivan v. Field, 118-358; Moore v. Nowell, 94-265; Tuck v. Hunt, 73-24; Righton v. Pruden, 73-64; see also cases under subsection 4. **Statute of limitations can not be taken advantage of by demurrer; only by answer, see section 360—likewise as to the statute of frauds:** Hemmings v. Doss, 125-400; Loughran v. Giles, 110-423. **Where summons has "Mrs. M" as a defendant, but complaint sets out name in full, not demurrable:** Heath v. Morgan, 117-504. **Demurrer can be interposed only for one of the causes herein set out:** Dunn v. Barnes, 73-273.

Demurrer sustained for misjoinder, action divided, see section 476—where overruled, defendant allowed to plead over, when, see section 506—when sustained because no cause of action stated, plaintiff can amend complaint in discretion of court only: Barnes v. Crawford, 115-79; but see Williams v. Smith, 134-249.

As to the sufficiency of demurrer itself, see section 475. If demurrer is overruled the same point can not be presented in a motion to dismiss: Wilson v. Lineberger, 82-412; but see Baker v. Garris, 108-218.

A demurrer can not raise question of contributory negligence: Smith v. So. Rwy. Co., 129-374. **An objection that a complaint is argumentative, hypothetical and in the alternative can not be made by a demurrer:** Daniels v. Fowler, 120-14—**nor that pleading is defective in matter of form:** Fulps v. Mock, 108-605; Stokes v. Taylor, 104-394; Moore v. Edmiston, 70-510—**nor that complaint contains redundant, evidentiary or argumentative matter:** Pender v. Mallett, 123-57; Smith v. Summerfield, 108-284; McGill v. Buie, 106-242; Thames v. Jones, 97-121. **A demurrer does not admit erroneous statement of law:** Pritchard v. Commrs., 126-908.

1. That the court has no jurisdiction of the person of the defendant, or of the subject of the action; or,

A demurrer to the jurisdiction admits the facts for the purposes of the demurrer: Merrimon v. Paving Co., 142-539. **Lack of jurisdiction must appear upon face of complaint:** Bank v. Britton, 66-365. **A plea that court does not exist, is not properly a court, can not be taken advantage of by a plea to the jurisdiction:** State v. Hall, 142-710. **Where issues**

were sent up for jury trial from the probate court and the plaintiffs were permitted to engraft mattters on the petition that were not cognizable in the probate court, demurrer sustained: Capps v. Capps, 85-408.

As to whether demurrer can be sustained under this subsection as to the subject matter of the action, see section defining the jurisdiction of superior court, section 1500—of justices' courts, 1419, 1420—of clerks of superior courts, section 901; and see annotations as to jurisdiction thereunder.

Cases where question of jurisdiction of the person raised by demurrer: Hughes v. Commrs., 107-598; Cain v. Nicholson, 77-411; Oliver v. Wiley, 75-320; McFarland v. McKay, 74-258; Winslow v. Commrs. 64-218.

2. That the plaintiff has not legal capacity to sue; or,

A demurrer addressed to the incapacity of plaintiff admits the facts of the complaint for the purposes of the demurrer: Merrimon v. Paving Co., 142-539. Contingent remainderman allowed to restrain waste: Cowand v. Meyers, 99-198; Gordon v. Lowther, 75-193. Party injured by false return of the sheriff can bring action for penalty, although the action in which such false return was made was brought in name of the state to the use of the party: Peebles v. Newsom, 74-473. Where, in action by infant, defendant plead in bar, he can not afterwards demur or take advantage of plaintiff's infancy, having waived it: Hicks v. Beam, 112-642.

3. That there is another action pending between the same parties for the same cause; or,

Where the pendency of an action between same parties over same cause appears in complaint it must be taken advantage of by demurrer: Alexander v. Norwood, 118-381; Harris v. Johnson, 65-478; Redfearn v. Austin, 88-413. Must be between same parties for same cause: McNeill v. Currie, 117-341; Claywell v. Sudderth, 77-287; Turner v. Rosenthal, 116-437; Probst v. Mathis, 115-526; Curtis v. Piedmont, 109-401; Tobacco Co. v. McElwee, 94-425; Pendleton v. Davis, 92-185; Sloan v. McDowell, 75-29; Woody v. Jordan, 69-189; Harris v. Johnson, 65-478—and must be pending in this state, Ridley v. R. R., 118-996; Sloan v. McDowell, 75-29. Parties can not even by consent give court jurisdiction of second action brought: Alexander v. Norwood, 118-381. Where summons issued by a justice was never served and on its return day another justice issued summons on same cause, first terminated when summons in second was issued: Webster v. Laws, 86-179, 89-224.

4. That there is a defect of parties plaintiff or defendant; or,

Failure to join as plaintiff or defendant one who is a necessary party is ground for demurrer: Winders v. Hill, 141-694; Barrett v. Brown, 86-556; Hunter v. Yarborough, 92-68; Gill v. Young, 82-273—and as to who is "necessary party," see annotations under section 411. When after demurrer filed parties came in and made themselves parties, demurrer untenable: Hill v. Mining Co., 113-259. A demurrer for misjoinder of parties admits the facts for the purposes of the demurrer: Merrimon v. Paving Co., 142-539. When demurrer is sustained, amendment may be allowed provided nature of claim demanded is not substantially changed: Commrs. v. Candler, 123-682. The defect is waived if no objection

interposed properly: Howe v. Harper, 127-356; Kornegay v. Steamboat Co., 107-117; Mining Co. v. Smelting Co., 99-445; Lunn v. Shermer, 93-164. **It is no "defect of parties" to have unnecessary parties:** Abbott v. Hancock, 123-99; Sullivan v. Field, 118-358; McMillan v. Baxley, 112-578; Moore v. Nowell, 94-265; Hoover v. Berryhill, 84-137; Burns v. Ashworth, 72-496; Hargrove v. Hunt, 73-24; Righton v. Pruden, 73-64; Wool v. Edenton, 113-33. **For "defect of parties" objection must be interposed by demurrer, if the complaint shows the defect, and if it does not, then by answer:** Styers v. Alspaugh, 118-631; Kornegay v. Steamboat Co., 107-115; Leak v. Covington, 99-559; Mining Co. v. Smelting Co., 99-445; Lunn v. Shermer, 93-164; Usry v. Suit, 91-406.

Where a complaint alleges that two railroad corporations jointly operating their properties through the agency of a lessee between two points connected by their road beds and tracks, in the discharge of their duty as common carriers, undertook to carry a passenger over their tracks, a demurrer for misjoinder was properly overruled: Carleton v. R. R., 143-43.

5. That several causes of action have been improperly united; or,

For causes of action that can be joined, see section 469. For those causes of action that can not be joined and subject complaint to demurrer, see section 469. Objection waived if misjoinder not demurred to when defect appears in complaint: Teague v. Collins, 134-62; Hocutt v. W. W. R. R. Co., 124-216; McMillan v. Baxley, 112-578; Hall v. Turner, 111-180; Finley v. Hayes, 81-368—**or, when not apparent in complaint, is not objected to by answer:** Kiger v. Harmon, 113-406; Burns Ashworth, 72-496. **A demurrer for misjoinder of causes of action admits the facts for the purposes of the demurrer:** Merrimon v. Paving Co., 142-539. **Complaint setting up separate causes of action against several parties among whom there is no community of interest is demurrable on the ground of misjoinder of causes of action and of parties:** Cromartie v. Parker, 121-198.

6. That the complaint does not state facts sufficient to constitute a cause of action.

When it can be seen by liberal construction that a complaint states a good cause of action, a demurrer will not be sustained: Wood v. Kincaid, 144-393; see also, section 495. **"Facts" and not conclusions of law must be stated:** Moore v. Hobbs, 79-535.

For cases as to whether complaints in specific actions state causes of action, see section 467, subsection 2. The objection that complaint does not state facts sufficient to constitute cause of action can be made at any time, even in the supreme court, and can be by demurrer either in writing or ore tenus: Fagg v. Loan Asso., 113-364; Baker v. Garris, 108-218; Leatherwood v. Fulbright, 109-683; Jackson v. Jackson, 105-433; Knowles v. R. R., 102-59—**but when it appears that the complaint states a cause of action defectively, which could be remedied by amendment, a failure to demur or object in the answer waives the defect:** Johnson v. Finch, 93-205; Wilson v. Sykes, 84-215. **After point raised on demurrer has been overruled, it can be raised again by motion to dismiss at**

any time: Baker v. Garris, 108-218; but see Wilson v. Lineberger, 82-412.

A defective statement of a good cause of action is ground for demurrer, but if sustained, action will not be dismissed but amendment made: Ladd v. Ladd, 121-121; Bowling v. Burton, 101-176; Mizzell v. Ruffin, 118-69—**and if no demurrer, the defect is waived:** Harrison v. Garrett, 132-172; Bennett v. Tel. Co., 128-103; Knowles v. R. R., 102-59; Halstead v. Mullen, 93-252. **Difference between a defective statement of a good cause of action and a statement of a defective cause of action:** Ladd v. Ladd, 121-121; Knowles v. R. R., 102-59; Halstead v. Mullen, 93-252. **Such defect can be cured even after verdict:** Blalock v. Clark, 133-308. **Defective statement aided, how:** Shute v. Austin, 120-440; Whitley v. R. R., 119-724; Mizzell v. Ruffin, 118-69; Wiggins v. Kirkpatrick, 114-298; Bonds v. Smith, 106-554; Harris v. Sneeden, 104-369; Knowles v. R. R., 102-59; Wilson v. Lineberger, 94-641; Willis v. Branch, 94-142; Warner v. R. R., 94-250; Johnson v. Finch, 93-205; Garrett v. Trotter, 65-430. **A defective statement of a good cause of action is cured by failure to demur:** Bennett v. Tel. Co., 128-103.

Complaint against a county for damages because county authorities burned a house infected with contagion, is demurrable: Prichard v. Comrs., 126-908. **Complaint against register of deeds for damages for unlawfully issuing marriage license, demurrable for failure to state cause of action:** Wilkinson v. Dellinger, 126-462.

Code, s. 239; C. C. P., s. 95.

475. Must specify grounds of objection. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

Code, s. 240; C. C. P., s. 96. **A general demurrer will not do. It must specify the ground of objection:** Ball v. Paquin, 140-83; Milliken v. Denny, 135-24; Elam v. Barnes, 110-73; Hunter v. Yarboro, 92-68; Goss v. Waller, 90-149; Bank v. Bogle, 85-203; George v. Hicks, 85-99; Jones v. Commrs, 85-278; Love v. Commrs., 64-706. **A demurrer to the jurisdiction or that complaint does not state facts constituting a cause of action will be treated as a motion to dismiss, and can be interposed ore tenus at any time, even in the supreme court:** Milliken v. Denny, 135-24; Elam v. Barnes, 110-73; Burbank v. Commrs., 92-257; Hunter v. Yarboro, 92-68; Tucker v. Baker, 86-1. **As to answering some causes set forth in complaint and demurring to others, see section 471.**

476. Sustained for misjoinder, action divided. If the demurrer be allowed for the reason that several causes of action have been improperly united, the judge shall, upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

Code, s. 272; C. C. P., s. 131. **See generally:** Railroad Co. v. Hardware Co., 135-73; Weeks v. McPhail, 128-134; Pretzfelder v. Ins. Co., 116-496; 151-133

Hodges v. R. R., 105-170; Finch v. Baskerville, 85-207; Street v. Tuck, 84-605. **Upon demurrer sustained for misjoinder, it becomes the judge's duty to divide the action upon just terms:** Gattis v. Kilgo, 125-133. **Action can not be divided under this section when there is also misjoinder of parties:** Morton v. Tel. Co., 130-299; Cromartie v. Parker, 121-199; Mitchell, 96-14. **Section casually referred to:** Fisher v. Trust Co., 138-242; Cook v. Smith, 119-355; Solomon v. Bates, 118-316.

477. Objection not appearing in complaint. When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer.

Code, s. 241; C. C. P., s. 98. Moore v. Hobbs, 77-65. **Objection as to jurisdiction:** Bank v. Britton, 66-365—**as to defect of parties:** Fisher v. Ins. Co., 136-219; R. R. v. Lumber Co., 114-690; Styers v. Alspaugh, 118-631; Johnson v. Gooch, 114-62; Kornegay v. Steamboat Co., 107-115; State v. Grant, 104-908; Leak v. Covington, 99-559; Mining Co. v. Smelting Co., 99-445; Lunn v. Shermer, 93-164; Usry v. Suit, 91-406; Stanly v. R. R., 89-331; Ramsay v. R. R., 91-418—**as to misjoinder of actions:** Kiger v. Harmon, 113-408; Burns v. Ashworth, 72-496; Durham v. Bostwick, 72-357—**as to defective statements of good causes of action:** Knowles v. R. R., 102-59.

149-264

478. Objection waived. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Code, s. 242; C. C. P., s. 99. **Objection appearing upon face of complaint is waved if no demurrer interposed; also objection not so appearing is waived if not taken advantage of by answer:** Teague v. Collins, 134-62; Hitch v. Commrs., 132-573; Cook v. Bank, 129-149; Ladd v. Ladd, 121-118; Knowles v. R. R., 102-59; Pescud v. Hawkins, 71-299; Hocutt v. R. R., 124-214; Mining Co. v. Smelting Co., 99-462; Burns v. Ashworth, 72-496; Durham v. Bostwick, 72-353; Hawkins v. Hughes, 87-115; Lunn v. Shermer, 93-164; Howe v. Harper, 127-356; Kornegay v. Steamboat Co., 107-117; Styers v. Alspaugh, 118-631; Leak v. Covington, 99-559; Usry v. Suit, 91-406; McMillan v. Baxley, 112-588; Hall v. Turner, 111-180; Finley v. Hayes, 81-368; Kiger v. Harmon, 113-406—**but objection to the jurisdiction of the court and that complaint does not state facts constituting a cause of action are not waived and can be taken advantage of at any time even in the supreme court, in writing or ore tenus:** Blackmore v. Winders, 144-212; Fidelity Co. v. Jordan, 134-236; Parker v. So. Express Co., 132-128; Nichols v. Nichols, 128-108; Hendon v. R. R., 127-110; Fertilizer Co. v. Marshburn, 122-411; Manning v. R. R., 122-824; Ladd v. Ladd, 121-118; Halstead v. Mullen, 93-252; Knowles v. R. R., 102-59; Elam v. Barnes, 110-73; Sutton v. Walters, 118-495; Baker v. Garris, 108-218; Pescud v. Hawkins, 71-299; Rogers v. Jenkins, 98-129; Johnson v. Finch, 93-205; Tucker v. Baker, 86-1; Bryant

v. Fisher, 85-71; Love v. Commrs., 64-706; Jones v. Commrs., 85-280; Jackson v. Jackson, 105-433; Whitehurst v. Pettipher, 105-40; Mnfg. Co. v. Simmons, 97-89; Fagg v. Loan Asso., 113-364; Leatherwood v. Fulbright, 109-683; Hunter v. Yarboro, 92-70—**and court may ex mero motu dismiss when lack of jurisdiction or when complaint fails to state a cause of action:** Blackmore v. Winders, 144-212; Cressler v. Asheville, 138-482; Short v. Gill, 126-803; Cary v. Allegood, 121-54; Nash v. Ferrabow, 115-303; Hagins v. R. R., 106-537; Bank v. Bobbitt, 108-525; Norris v. McLam, 104-159; State v. Miller, 100-545; Rogers v. Jenkins, 98-129; Noville v. Dew, 94-43; Peacock v. Stott, 104-154; Smaw v. Cohen, 95-85; Tucker v. Baker, 86-1; Jones v. Commrs., 85-278; State v. Benthall, 82-664.

XV. Answer.

479. Contains what. The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

Directly supporting this subsection: Cobb v. Clegg, 137-153. **For frivolous answers, see section 472. An answer adopting each and every section of another answer filed in the case is sufficient if the adopted answer is sufficient:** Hooker v. Worthington, 134-283. **Answer need not state why defendant has not sufficient knowledge or information to form a belief:** Morgan v. Roper, 119-367.

SUFFICIENT DENIALS. **''He denies the truth of the averments contained in the first, second, third, fourth, fifth, and sixth paragraphs of complaint and insists that plaintiff be held to strict proof thereof:''** Brown v. Cooper, 89-237. **Denial ''on information and belief'' that plaintiff ever had possession of certain lands is sufficient:** Kitchen v. Wilson, 80-192; but see Harrill v. R. R., 135-606. **Defendant in action to recover land may deny possession of part and disclaim title, and admit possession of part, denying that it is wrongful, and claim title:** Graybeal v. Powers, 83-561. **''They have not sufficient information to admit or deny the same:''** Person v. Leary, 127-116. **Defendant ''is advised, informed and believes that the first article of the complaint is not true, and therefore denies the same:''** Gordner v. Lumber Co., 144-110.

INSUFFICIENT DENIALS. **''No allegation of the complaint is true:''** Flack v. Dawson, 69-42; Heyer v. Beatty, 76-28. **''They deny the said complaint and each and every allegation contained therein:''** Schehan v. Malone, 71-441. **A general denial of plaintiff's ownership of land is not sufficient where a judgment working an estoppel upon defendant is pleaded:** Johnson v. Pate, 90-334. **''The allegations of sixth paragraph of complaint are untrue in manner and form as therein stated:''** Rumbough v. Imp. Co., 106-461. **Where complaint alleges matters as within the personal knowledge of defendant it is not sufficient denial ''that defendant has no knowledge or information sufficient to form a belief:''** Streator v. Streator, 145-; Gas Mchne Co. v. Neuse Mnfg. Co., 91-74—**nor sufficient to answer ''he is informed and believes that the allegations of the third**

article are not true, and denies the same:'' Avery v. Stewart, 134-299. In action to recover land defendant denying title of plaintiff but not denying unlawful possession by him (defendant), plaintiff gets judgment: Tyson v. Shepherd, 90-314. ''He has no knowledge of the facts alleged in paragraph two:'' Woodcock v. Bostick, 128-246. ''He has no information as to the truth of the allegation of paragraph seven:'' Ibid. The denial that defendant has knowledge, which does not also deny that he has information sufficient to form a belief, is insufficient: Fagg v. Loan Asso., 113-364; Durden v. Simmons, 84-557; Bank v. Charlotte, 75-45. ''It denies on information and belief the statement of facts in the fifth paragraph of the complaint: Harrill v. R. R. Co., 135-606; but see Kitchen v. Wilson, 80-192.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

As to counterclaims: Smith v. French, 141-7; and cases cited; also see section 481. Relying upon a counterclaim is optional with defendant; he can bring his own independent action on it: Asher v. Reizenstein, 105-216; Tob. Co. v. McElwee, 94-425; Gregory v. Hobbs, 93-1; McClennahan v. Cotten, 83-332; Francis v. Edwards, 77-271; Woody v. Jordan, 69-189. A defense which cannot be obtained by a denial of the allegations must be set up as new matter: Raynor v. R. R., 129-195.

NEW MATTER IN ANSWER. Must be set up or else no advantage of it can be taken: Johnson v. Bell, 74-356. Should be set up with the same precision as that required in complaint: Lassiter v. Roper, 114-17; Anderson v. Logan, 105-269; Montague v. Brown, 104-165; Buie v. Brown, 104-335; Rountree v. Brinson, 98-107; Talbert v. Becton, 111-543; Cotton Mills v. Cotton Mills, 116-647; Deloatch v. Vinson, 108-147—and must not state evidential facts: Farrior v. Houston, 95-578—and may contain both legal and equitable defenses: Bean v. R. R., 107-731. The plea of payment: Banking Co. v. Walker, 121-115; Threadgill v. Commrs., 116-627; Pemberton v. Simmons, 100-316. Pleading the statute of limitations, see section 360—pleading usury: Rountree v. Brinson, 98-107; Oldham v. Bank, 85-241; Moore v. Woodward, 83-531—pleading fraud, Cotton Mills v. Cotton Mills, 116-647—pleading equitable defenses in action for the recovery of real property: Wilson v. Wilson, 117-351; Talbert v. Becton, 111-543; Anderson v. Logan, 105-266; Hinton v. Pritchard, 102-94; Dempsey v. Rhodes, 93-120; Bodenhamer v. Welch, 89-78; Johnson v. McArthur, 64-675—counterclaim: Smith v. French, 141-7 and cases cited; Brown v. Carter, 111-183; Davis v. Terry, 114-28; Milling Co. v. Finlay, 110-411; Anderson v. Logan, 105-266; Smith v. McGregor, 96-101; Byerly v. Humphreys, 95-151; Hurst v. Everett, 91-399; Garrett v. Love, 89-205—pleading want of consideration in deed sued on: Ivey v. Granberry, 66-223—accord and satisfaction: Hayes v. R. R., 143-125—sheriff's defense against penalty for failing to execute process that fees were not paid: Johnson v. Kennedy, 70-435—former judgment: Blackwell v. Dibbrell, 103-270; Harrison v. Hoff, 102-126—matter in avoidance: Eames v. Armstrong, 142-507; Smith v. Newberry, 140-385; Threadgill v. Commrs., 116-628; Reed v. Reed, 93-462; Knott v. Burwell, 96-272; see also section 483—another action pending for same cause; Curtis v. Piedmont, 109-401; Hawkins

v. Hughes, 104-161—**contributory negligence:** DeBerry v. R. R., 100-310; also see section 483. **New matter treated as a plea "since last continuance:"** Puffer v. Lucas, 101-281.

Code, s. 243; C. C. P., s. 100.

480. Debt for purchase money of land denied. If the defendant shall deny in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury.

Code, s. 235; 1879, c. 217; Davis v. Evans, 142-464; Durham v. Wilson, 104-595; Toms v. Fite, 93-275.

481. Counterclaim. The counterclaim mentioned in section four hundred and seventy-nine must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

COUNTERCLAIM DEFINED. Subject to the limitations expressed in this statute, a counterclaim includes well nigh every kind of cross demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off recoupment or cross-action and includes them all, and secures to defendant the full relief which a separate action at law or a bill in chancery or a cross bill would have secured to him on the same state of facts: Smith v. French, 141-7; Electric Co. v. Williams, 123-51; Wilson v. Hughes, 94-182; Lee v. Eure, 93-5; Hurst v. Everett, 91-399; Bitting v. Thaxton, 72-541. **Other definitions of "counterclaim:"** Askew v. Koonce, 118-526; Guano Co. v. Tilley, 110-29; Raisin v. Thomas, 88-148. **It is a creature of the Code of Civil Procedure and must conform to it provisions:** Bank v. Wilson, 124-562; Electric Co. v. Williams, 123-51. 148-471

Counterclaim in its relation to set-off and recoupment: Electric Co. v. Williams, 123-51; Mnfg. Co. v. Gray, 126-108; Davis v. Mnfg. Co., 114-321; Adams v. Bank, 113-332; Neal v. Lea, 64-678.

PLEADING COUNTERCLAIM. Plaintiff can not plead a counterclaim to defendant's counterclaim: Boyett v. Vaughan, 85-363, overruling Boyett v. Vaughn, 79-528; but see Scott v. Bryan, 96-289.

Pleading a counterclaim is optional with defendant; he can bring his own independent action on it: Mauney v. Hamilton, 132-306; Shankle v. Whitley, 131-168; Asher v. Reizenstein, 105-216; Tobacco Co. v. McElwee, 94-425; Gregory v. Hobbs, 93-1; McClennahan v. Cotten, 83-332; Francis v. Edwards, 77-271; Woody v. Jordan, 69-189. Must be set up by answer: Reynolds v. Smathers, 87-24; Johnson v. Bell, 74-356. **In actions on separate notes for purchase price of machinery, counterclaim for damages for defects, etc., can not be set up but once:** Mnfg. Co. v. Moore, 144-527. **A covenant not to sue available as counterclaim:** Harshaw v. Woodfin, 64-568. **Where counterclaim pleaded under first subsection, plaintiff can not take a nonsuit and thereby debar defendant**

from prosecuting his counterclaim or from having tried any other right set out in answer: Well Co. v. Ice Co., 125-80; Rumbough v. Young, 119-567; Bank v. Commrs., 116-380; Wilkins v. Suttles, 114-551; Pass v. Pass, 109-484; Mnfg. Co. v. Buxton, 105-74; Gatewood v. Leak, 99-363; Bynum v. Powe, 97-374; McNeill v. Lawton, 97-16; Whedbee v. Leggett, 92-469; Purnell v. Vaughan, 80-46—**but where counterclaim pleaded under second subsection plaintiff can take a nonsuit:** Olmstead v Smith, 133-584; Pass v. Pass, 109-484; McNeill v. Lawton, 97-16; Whedbee v. Leggett, 92-469. **Where counterclaim pleaded is the subject of another action pending:** Davis v. Terry, 114-27. **Justice of the peace can not entertain counterclaim beyond his jurisdiction:** Electric Co. v. Williams, 123-51; Hurst v. Everett, 91-399; Raisin v. Thomas, 88-148; Boyette v. Vaughan, 85-363; Meneely v. Craven, 86-364; Derr v. Stubbs, 83-559; McClenahan v. Cotton, 83-332; but see Heyser v. Gunter, 118-964. **Superior court may allow counterclaim to be entered in cases appealed from justice, but not of a size beyond justice's jurisdiction:** Moore v. Garner, 109-157; Hurst v. Everett, 91-399; Raisin v. Thomas, 88-148; Meneely v. Craven, 86-364; Thomas v. Simpson, 80-4; Johnson v. Rowland, 80-1. **Failure to plead counterclaim in former suit no estoppel:** Shankle v. Whitley, 131-168. **As to pleading benefit derived by plaintiff from defendant's improvements, etc.:** McGee v. Fox, 107-766. **When counterclaim ruled out on demurrer, defendant must not appeal, but simply except and go ahead:** Knott v. Burwell, 96-272. **Defendant can not set up as counterclaim any and every cause of action he may have against plaintiff:** Byerly v. Humphrey, 95-151. **Too late to object that counterclaim improperly pleaded after submission to arbitration:** Robbins v. Killebrew, 95-19. **Where no cause of action stated in counterclaim:** Ayers v. Makely, 131-63. **The fact that plaintiff is not worth his personal property exemption does not preclude defendant from setting up counterclaim:** Lynn v. Cotton Mills, 130-621. **Where plaintiff alleged a contract of sale and a breach thereof, and the answer denied that it was an absolute sale and alleged that it was a consignment, a judgment by default on the counterclaim was improper:** Tillinghast v. Cotton Mills, 143-268.

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

And it must exist at the commencement of the action: Griffin v. Thomas, 128-310; Kramer v. Electric Light Co., 95-277. **Counterclaim under this subsection defined:** Gibson v. Barbour, 100-192. **It may arise out of either contract or tort:** Phipps v. Wilson, 125-106; Branch v. Chappell, 119-81; Puffer v. Lucas, 112-377; McKinnon v. Morrison, 104-354; Kramer v. Electric Light Co., 95-277; Lee v. Eure, 93-5; Trotter v. Connor, 90-455; Bitting v. Thaxton, 72-541. **Instances of counterclaim attempted to be interposed arising out of tort:** Street v. Andrews, 115-417; Gaskins v. Davis, 115-86; Smith v. Young, 109-224. **As to claims sounding in damages as counterclaims:** Wilson v. Charlotte, 108-121; Bush v. Hall, 95-82; Raisin v. Thomas. 88-148.

SPECIFIC COUNTERCLAIMS. **Improvements on land (betterments) in action to recover land:** Scott v. Battle, 85-184; Reed v. Exum, 84-430; Daniel v. Crumpler, 75-184. **In action for goods sold and delivered, defendant can not set up latent defects:** Max v. Harris, 125-345. **In action by vendor for possession of land sold under bond for title, vendee may set up and demand money paid:** Wellborn v. Simonton, 88-266; Pearsall v. Mayers, 64-549; Daniel v. Crumpler, 75-184—**but where vendee repudiates contract he can not recover as a counterclaim money paid thereon,** Davison v. Land Co., 121-146. **Usury may be pleaded as counterclaim:** Bank v. Ireland, 122-571—**but not if paid,** Meares v. Butler, 123-206. **In action for trespass for cutting timber defendant can not set up damage for ponding water:** Street v. Andrews, 115-417; Bazemore v. Bridgers, 105-191. **Owner of land charged with owelty may set up as counterclaim that he has been evicted by superior title:** Huntley v. Cline, 93-458. **Defective title is a defense in an action for purchase money of land and not a counterclaim; and it seems defective acreage is also:** Bank v. Loughran, 122-668; Hutchinson v. Smith, 68-351. **In action for cutting timber defendant may claim title and ask for accounting of timber cut:** Lumber Co. v. Wallace, 93-22. **Where defendant received a different machine from the one ordered, and converted it to his own use, he is liable for its value and his counterclaim for the difference in price of the two machines must fail:** Machine Co. v. Chalkley, 143-181. **Fraud as counterclaim:** Hobbs v. Bland, 124-284; Wilson v. Hughes, 94-182; Garrett v. Love, 89-205; Hall v. Commrs., 74-130; Walsh v. Hall, 66-233; Cotton Mills v. Cotton Mills, 116-647. **False warranty as defense to action for purchase of horse:** Hobbs v. Bland, 124-284; Wilson v. Hughes, 94-182. **Where bank is being liquidated, a stockholder sued on a note due bank secured by pledge of stock can not set up as counterclaim his supposed share in the assets:** Bank v. Riggins, 124-534. **Where bank in hands of receiver, assigned claims against bank can not be used as setoff, when,** Davis v. Mnfg. Co., 114-321. **In action against bank to recover individual deposit the indebtedness of the partnership is a counterclaim:** Adams v. Bank, 113-332. **In claim and delivery by administrator to recover a horse belonging to estate, bailee can not set up account for feeding:** Mauney v. Ingram, 78-96. **In action to recover wife's property no debt owing by husband can be counterclaim;** Houck v. Somers, 118-607; Halliday v. McMillan, 83-270. **In action for damages to land a proceeding for the condemnation of an easement can not be set up as counterclaim:** Leigh v. Garysburg Mnfg. Co., 132-167. **In action for possession of mortgaged chatttels damaged for wrongful seizure of same is no counterclaim:** Satterthwaite v. Ellis, 129-67. **In action for purchase price, defendant may set up deficiency in articles contracted for:** Guano Co. v. Tillery, 110-29; Hurst v. Everett, 91-399; Howie v. Rea, 70-559; Cox v. Long, 69-7. **In action for rent, lessees may plead lessors have no title:** McKesson v. Mendenhall, 64-286. **In action for purchase money of life estate, plaintiff and defendant being tenants in common of reversion, defendant can not set up waste for plaintiff cutting timber before the sale:** Devries v. Warren, 82-356. **An equitable counterclaim to a purely legal cause of action is good:** Dempsey v. Rhodes, 93-120.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

This section directly supported: Bank v. Wilson, 124-562. **The counterclaim is available if arising upon contract express or implied:** Davidson v. Land Co., 126-704. **Counterclaim must exist when action brought:** Phipps v. Wilson, 125-106; Puffer v. Lucas, 112-377; Reynolds v. Smathers, 87-24; Hogan v. Kirkland, 64-253. **Question as to counterclaim being set up as against the state:** Battle v. Thompson, 65-406—**as against a county,** Gatling v. Commrs., 92-536—**as against a city,** Cobb v. Elizabeth City, 75-1.

INSTANCES OF PROPER COUNTERCLAIMS SET UP. In actions by personal representative: Carr v. Askew, 94-194; Barbee v. Green, 86-158; Whedbee v. Reddick, 79-521; McLean v. Leach, 68-98; Ransom v. McLees, 64-17—**in action by endorsee of negotiable note after maturity:** Causey v. Snow, 122-326; Martin v. Richardson, 68-255; Harris v. Burwell, 65-584—**in action by insolvent plaintiff against one who is his surety in another matter:** Baker v. Brem, 103-80; Scott v. Timberlake, 83-382; Walker v. Dicks, 80-263—**in action by and against receiver of insolvent railroad company:** Railroad v. Railroad, 118-1078—**in action by partnership against creditor of one or more partners:** Sloan v. McDowell, 71-356—**in action to recover wages of minor children against cotton mill to whose store father owed an account:** Lynn v. Cotton Mills, 130-621.

INSTANCES OF IMPROPER COUNTERCLAIMS SET UP. In action against personal representative of deceased: Mull v. Walker, 100-46; McClenahan v. Cotten, 83-332—**in action by personal representative:** Pate v. Oliver, 104-458; Rountree v. Britt, 94-104—**in action by endorsee before maturity against maker of a negotiatble note:** Bank v. McNair, 116-550; Farthing v. Dark, 111-243; Bank v. Burgwyn, 108-62; Tredwell v. Blount, 86-33—**in action by trustee in deed for benefit of creditors against creditor for debt due by him to assignor:** Davis v. Mnfg. Co., 114-321; Brown v. Brittain, 84-552.

Code, s. 244; C. C. P., s. 101.

482. Several defenses. The defendant may set forth by answer as many defenses and conterclaims as he may have, whether they be such as have been theretofore denominated legal, equitable, or both. They must each be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished.

Code, s. 245; C. C. P., s. 102. **Where several defenses, they may all be pleaded, but each is a separate defense:** Keathley v. Branch, 88-379; Sumner v. Shipman, 65-623. **And the defenses may be legal or equitable:** Bean v. R. R., 107-731; Melvin v. Stephens, 82-283; Clark v. Clark, 65-655. **Answer failing to state the several defenses separately will be rejected if excepted to in apt time:** Keathley v. Branch, 88-379.

Contradictory defenses are admissable under this section if properly set out: Upton v. R. R., 128-173; McLamb v. McPhail, 126-218; Threadgill v. Commrs., 116-628; Reed v. Reed, 93-462; Ten Broeck v. Orchard, 79-518.

Cases merely referring to the section: Gossler v. Wood, 120-73; McLaurin v. Conly, 90-53.

483. Contributory negligence pleaded and proved. In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial.

1887, c. 33.

This section requires the defendant to both plead and to prove contributory negligence, and the court can not adjudge that a defense is fully proved nor can it hold that there is no evidence of negligence when proof of a collision raises a presumption of negligence, which presumption is evidence: Stewart v. R. R. Co., 137-687. **This section applies to actions brought by an employee against employer:** Hudson v. R. R., 104-491.

PLEADING CONTRIBUTORY NEGLIGENCE. Davis v. R. R. Co., 136-115. **"That plaintiff was injured by his own negligence" is not a sufficient plea:** Cogdell v. R. R., 132-852, overruling, Cogdell v. R. R., 130-313. **Contributory negligence is an affirmative defense:** Powell v. R. R., 125-370; Bolden v. R. R., 123-614. **Question of contributory negligence can never be raised by demurrer:** Smith v. R. R., 129-374. **The acts and defaults of the plaintiff constituting contributory negligence must be set out:** Watson v. Farmer, 141-452.

PROVING CONTRIBUTORY NEGLIGENCE. Brewster v. Elizabeth City, 137-392. **The burden is upon defendant:** Goforth v. R. R., 144-572; House v. R. R., 131-103; Frazier v. R. R., 130-355; Cogdell v. R. R., 130-313; Thomas v. R. R., 129-392; Halton v. R. R., 127-255; Cogdell v. R. R., 124-302; Bolden v. R. R., 123-614; Cox v. R. R., 123-604; Bank v. School Commrs., 121-109; Hardison v. R. R., 120-492; Mnfg. Co. v. R. R., 122-881; Wood v. Bartholomew, 122-177. **A matter or proof, not of conjecture:** Morrison v. R. R., 123-414.

The presumption is against contributory negligence: Norton v. R. R., 122-910. **Under the age prohibited by statute, the presumption is that the child injured while working in a factory or manufacturing establishment is incapable of contributory negligence, subject to be overcome by evidence in rebuttal under proper instructions from the court:** Leathers v. Tob. Co., 144-330.

XVI. Reply.

484. When filed; cause at issue. The plaintiff shall join issue on the demurrer or reply to the answer at the same term to which such demurrer or answer may be filed; and the issues, whether of law or of fact, shall stand for trial at the next term succeeding the term at which the pleadings are completed: Provided, that where an action is instituted upon a bill, note, bill of exchange, liquidated and settled account, or for divorce, and summons in such action shall be served on the defendant at least thirty days before the term of court to which such summons shall be returnable, and a copy of the

complaint filed in the clerk's office at least thirty days before such term of court, if civil cases can be tried at such, then and in such case such action shall stand for trial at such first term of court.

Code, s. 208; 1870-1, c. 42, s. 5; 1901, c. 626.

Reply should not be stricken out because not formally filed, nor marked "filed," if it has been in the papers several terms without objection by defendant: White v. Carroll, 146-.

485. What to contain; demurrer to answer. When the answer contains new matter constituting a counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and the plaintiff may demur to one or more of such defenses or counterclaims, and reply to the residue of the counterclaim. And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counterclaim.

Code, s. 248; C. C. P., s. 105.

DEMURRER TO ANSWER. The question arises, will the facts admitted by the demurrer determine the rights of parties: Blackwell v. Willard, 65-555. **Failure to demur waives defects in answer:** Printing Co. v McAden, 131-178. **Instances of demurrers to answers:** Lee v. Beaman, 73-410. **Demurrer sustained, judgment will be entered for plaintiff, unless defect can be cured by amendment:** Foy v. Haughton, 83-467.

REPLY TO NEW MATTER IN ANSWER. Reply can only be made to new matter: Olmstead v. Raleigh, 130-243. **Judge can permit it even after verdict:** Strause v. Ins. Co., 128-66, see sections 512 and 515. **Every allegation of new matter deemed to be denied except where counterclaim set up:** Fishblate v. Fidelity Co., 140-594; Wilson v. Brown, 134-408; Askew v. Koonce, 118-526; Vance v. Vance, 118-864; Buffkin v. Eason, 110-266; Walker v. Scott, 106-61; Stanton v. Hughes, 97-321; Fitzgerald v. Shelton, 95-519; Barnhardt v. Smith, 86-483; Jones v. Cohen, 82-80; Price v. Eccles, 73-162. **Sufficient reply to counterclaim:** Gregg v. Mallett, 111-74. **Court may order reply when defense is by way of avoidance,** Fishblate v. Fidelity Co., 140-594; James v. R. R., 121-530; Fitzgerald v. Shelton, 95-519; Stanton v. Hughes, 97-321; Price v. Eccles, 73-162. **Replication necessary when seeking to avoid the plea of the statute of limitations:** Stubbs v. Motz, 113-458—**but otherwise no reply is necessary when statute of limitations pleaded,** Oldham v. Reiger, 145-.

SETTING UP NEW MATTER IN REPLY. Can be done, so it is not

inconsistent with complaint: Boyett v. Vaughan, 85-363; also see same case in 79-528. **A counterclaim can not be pleaded to a counterclaim unless in such a way as to be treated as part of complaint:** Boyett v. Vaughan, 85-363; Scott v. Bryan, 96-289. **Equitable matter may be set up against equitable defense in answer, when:** Houston v. Sledge, 101-640; Hardin v. Ray, 94-456; Bean v. R. R., 107-731.

486. Demurrer to reply. If a reply of the plaintiff to any defense set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

Code, s. 250; C. C. P., s. 107. **See** Walker v. Scott, 106-61; Houston v. Sledge, 98-414; Culver v. Eggers, 63-631.

XVII. Pleading, General Provisions.

487. Forms of. The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter.

Code, s. 231; C. C. P., s. 91. **For forms of pleading and effect of the adoption of the Code of Civil Procedure upon the forms of actions and pleadings as well as upon the rules of pleading, see annotations under section 354.**

All forms of pleading previous to the adoption of the C. C. P. are abolished and now we have only the forms of pleading and the rules by which their sufficiency is to be determined as prescribed in this section: Jones v. Mial, 82-257; Turner v. McKee, 137-259; Sneeden v. Harris, 109-358; also see section 354.

488. Subscribed; verified, when. Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Code, s. 257; C. C. P., s. 116. **The object in verifying pleadings:** Griffin v. Light Co., 111-434. **Where pleading is verified every subsequent pleading, except a demurrer, must be verified:** Alford v. McCormac, 90-151. **The effect of filing complaint unverified is to dispense with the necessity of subsequent pleadings being verified:** Reynolds v. Smathers, 87-24. **When pleading amended after verification it stands as unverified and no subsequent pleading need be verified:** Rankin v. Allison, 64-673.

When verified complaint filed and no answer is filed plaintiff is entitled to judgment: Kruger v. Bank, 123-16; Curran v. Kerchner, 117-264; Griffin v. Light Co., 111-434—**also entitled when answer not verified is filed,** Alford v. McCormac, 90-151; Alspaugh v. Winstead, 79-526—**but where a properly verified complaint would entitle a plaintiff to final judgment for want of answer, if complaint is not properly verified, judgment should be by default and inquiry,** Cole v. Boyd, 125-496. **Effect of landlord verifying pleading in action of ejectment and tenant failing to verify:** Harkey v. Houston, 65-137.

Under this section it is not required that any pleading be verified, but simply that when verified all subsequent pleadings except a demurrer must be: Lindsay v. Beaman, 128-191. **Not necessary that petition in special proceedings be verified,** Ibid.

489. Verification. The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit.

Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7. **In action for divorce another form of verification is prescribed, see section 1563, and a verification under this section will not do:** Hopkins v. Hopkins, 132-22. **It is not necessary for affiant to subscribe to affidavit:** Alford v. McCormac, 90-151. **A verified complaint, amended by unverified amendment, renders amended complaint unverified:** Brown v. Rhinehart, 112-772. **Court may grant amendment to verification:** Cantwell v. Herring, 127-81; Best v. Dunn, 126-560; Payne v. Boyd, 125-499.

SUFFICIENT VERIFICATIONS. **"The facts set forth in the foregoing complaint of his own knowledge are true, except as to those matters stated upon information and belief, and, as to those matters, he believes it to be true:"** Alspaugh v. Winstead, 79-526; but see Phifer v. Ins. Co., 123-414. **"Foregoing answer of defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true:"** McLamb v. McPhail, 126-218.

INSUFFICIENT VERIFICATIONS. **"The facts herein stated are true to the best of his knowledge, information and belief:"** Cowles v. Hardin, 79-577; Benedict v. Hall, 76-114. **"The facts stated in this complaint of his own knowledge are true, and those stated on information and belief he believes to be true:"** Carroll v. McMillan, 133-140; Phifer v. Ins. Co., 123-410; Payne v. Boyd, 125-499; Cole v. Boyd, 125-496. **"Sworn and subscribed to:"** Martin v. Martin, 130-28.

490. Verification by agent or attorney. The affidavit may also be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.

Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7. **Made by agent or attorney when founded upon written instrument for payment of money**

only which is in his possession: Griffin v. Light Co., 111-434; Johnson v. Maxwell, 87-18—**or when the material allegations are within his personal knowledge:** Griffin v. Light Co., 111-434; Hammerslaugh v. Farrior, 95-135.

Requirement that agent shall set forth his knowledge and grounds for belief and why it is not made by party: Griffin v. Light Co., 111-434; Hammerslaugh v. Farrior, 95-135; Banks v. Mnfg. Co., 108-282. **Possession itself averred amounts to an averment of knowledge or grounds of belief:** Griffin v. Light Co., 111-434.

491. Verification by corporation; when state is party. When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts.

Code, s. 258; 1901, c. 610; C. C. P., s. 117; 1868-9, c. 159, s. 7. **The verification by an officer is the verification of the corporation:** Bank v. Hutchinson, 87-22. **The officer of corporation need not state the ground of his knowledge, etc.:** Ibid. **Since the amendment of 1901, c. 610, decisions holding that agents can not verify are of no effect; a managing or local agent can now verify:** Godwin v. Tel. Co., 136-258—**also a managing director,** Best v. Mortgage Co., 131-71.

492. Verification before what officer. Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the state, or justice of the peace, shall be competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes.

Code, s. 258; 1891, c. 140; C. C. P., s. 117; 1868-9, c. 159, s. 7. **May be made before clerk of court of record in another state:** Hinton v. Ins. Co., 116-22; Barcello v. Hapgood, 118-712. **Courts take judicial notice of the seals of courts of another state to determine validity of verification:** Hinton v. Ins. Co., 116-22. **Notary not affixing seal, verification invalid:** Tucker v. Life Asso., 112-796.

493. Verification omitted, when; pleadings incompetent in criminal prosecutions. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.

Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

494. Items of account; particulars furnished, when. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party,

within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or the judge thereof may order a further account when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

Code, s. 259; C. C. P., s. 118. **It is not requisite that the items should be set out in the pleadings; a bill of particulars can be ordered by the court if demanded:** McPhail v. Johnson, 115-302.

BILLS OF PARTICULARS. When court will order: Lumber Co. v. R. R., 141-179; Turner v. McKee, 137-254; Allen v. Rwy., 120-548; Lucas v. R. R., 121-509; State v. Pickett, 118-1231; Townsend v. Williams, 117-330; State v. Shade, 115-757; State v. Dunn, 109-839; State v. Gates, 107-835; State v. Bryant, 111-693; Bryan v. Spivey, 106-95. **Object of the bill:** Wiggins v. Guthrie, 101-661. **Where solicitor files a bill, state is confined in its proof to items set out:** State v. Van Pelt, 136-633. **Person insisting upon rejecting testimony, because bill of particulars not furnished, must have question settled before trial:** State v. Brady, 107-822; Wiggins v. Guthrie, 101-661. **Bills of particulars in contested election cases:** Boyer v. Teague, 106-576. **A bill does not supply defects in indictment:** State v. Van Pelt, 136-633. **For bills of particulars in criminal actions, see section 3244.**

495. Pleadings construed. In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties.

147-120

Code, s. 260; C. C. P., s. 119. **For effect of the adoption of the C. C. P. upon pleading, see section 354. The section construed:** White v. Carroll, 146-239; Blackmore v. Winders, 144-214; Turner v. McKee, 137-259; Davis v. R. R., 136-121; R. R. Co. v. Main, 132-452; Adams v. Hayes, 120-388; Stubbs v. Motz, 113-459; Stokes v. Taylor, 104-394; Buie v. Brown, 104-335. **Every reasonable intendment and presumption must now be indulged in favor of the pleader, and pleadings inartificially drawn are sufficient if from any portion or to any extent it can be gathered that facts which constitute a cause of action have been alleged:** Blackmore v. Winders, 144-212. **While pleadings are to be construed liberally they are to be so construed as to give the defendant an opportunity to know the grounds upon which he is charged with liability:** Thomason v. R. R., 142-318.

The common law rule that every pleading should be construed against the pleader is modified by this section: Wright v. Ins. Co., 138-488; Wood v. Kincaid, 144-393. **Cases merely referring to section:** Knott v. R. R., 142-241; Oyster v. Mining Co., 140-138; Staton v. Webb, 137-38; Ravenal v. Ingram, 131-551; Watkins v. Mnfg. Co., 131-540; Sloan v. R. R., 126-489; Smith v. Building & Loan, 119-254.

496. Irrelevant, redundant; indefinite, uncertain. If irrelevant

or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

Code, s. 261; C. C. P., s. 120. **Judge acts upon motion:** Blackmore v. Winders, 144-216; Wood v. Kincaid, 144-396; Oyster v. Mining Co., 140-138; Wright v. Ins. Co., 138-493; Rwy. Co. v. Main, 132-445; Skittletharpe v. Skittletharpe, 130-75; Allen v. R. R., 120-548; Buie v. Brown, 104-335; Fulps v. Mock, 108-605; Smith v. Summerfield, 108-284; Stokes v. Taylor, 104-394; Speight v. Jones, 99-145; Johnston v. Pate, 83-110—**or ex mero motu:** Allen v. R. R., 120-548; Buie v. Brown, 104-335; McKinnon v. McIntosh, 98-89; Turner v. Cuthrell, 94-239. **Motion must be made before answer or demurrer:** Pender v. Mallett, 123-57; Lucas v. R. R., 121-506; Daniels v. Fowler, 120-14; Fulps v. Mock, 108-605; Smith v. Summerfield, 108-284; Stokes v. Taylor, 104-394; Irvin v. Clark, 98-437; Morgan v. Bank, 93-352; Best v. Clyde, 86-4; but see as to appeals from justice's court, Smith v. Newberry, 140-387. **Motion addressed entirely to discretion of trial judge:** Allen v. R. R., 120-550; Conley v. R. R., 109-692. **Pleadings containing offensive matter should be removed from the files:** Mitchell v. Brown, 88-156. **If there is any formal defect which renders the pleading unintelligible, or the precise nature of the charge or defense be not apparent by reason thereof, it can be corrected on motion:** Blackmore v. Winders, 144-216. 147-120

497. Judgments pleaded; burden of proof. In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

Code, s. 262; C. C. P., s. 121. **In order to avail one's self of the defense of a former judgment, it must be pleaded, and this is so even if judgment was rendered by the same court:** Smith v. Lumber Co., 140-375; Blackwell v. Dibbrell, 103-270; Daniel v. Bellamy, 91-78.

498. Conditions precedent pleaded; burden of proof. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance.

Code, s. 263; C. C. P., s. 122. **Allegation that plaintiff "duly performed" sufficient:** Britt v. Ins. Co., 105-175.

499. Instrument for payment of money pleaded. In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

Code, s. 263; C. C. P., s. 122.

500. Private statutes pleaded. In pleading a private statute or right derived therefrom it shall be sufficient to refer to such statute by its title or the day of its ratification, and the court shall thereupon take judicial notice thereof.

Code, s. 264; C. C. P., s. 123. **Necessity of pleading the statute:** Corporation Com. v. R. R., 127-283; Durham v. R. R., 108-399; Hughes v. Commrs., 107-598. **How to plead it:** Trustee v. Satchwell, 77-111. **When set out according to this section, it is to be regarded as having been set out according to this section, it is to be regarded as having been private laws of 1897, is a public statute and need not be pleaded:** Hancock v. Rwy. Co., 124-222.

501. Libel and slander, complaint; onus. In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

Code, s. 265; C. C. P., s. 124. See section 2012 et seq. **Refined and subtle distinctions of the common law pleading done away with:** Carson v. Mills, 69-124. **Only necessary now to state that the words were published or spoken concerning the plaintiff:** Ibid; also Wozelka v. Hettrick, 93-10. **Complaint need not negative the idea that the words were privileged:** Gudger v. Penland, 108-593.

502. Libel and slander, answer. In the actions mentioned in the preceding section, the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Code, s. 266; C. C. P., s. 125. **See section 2012 et seq. Plea of justification:** Logan v. Hodges, 146-; Moore v. Edmiston, 70-510. **Mitigating circumstances pleaded and given in evidence:** Logan v. Hodges, 145-; Upchurch v. Robertson, 127-128. Gudger v. Penland, 108-593; State v. Hinson, 103-375; Knott v. Burwell, 96-272; McDougald v. Coward, 95-368; Sowers v. Sowers, 87-303; McCurry v. McCurry, 82-296. **When defendant**

pleads the general issue in a suit for slander, evidence in justification or mitigation is incompetent: Upchurch v. Robertson, 127-127.

503. Allegations not denied, deemed true. Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply shall for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

Code, s. 268; C. C. P., s. 127. **Not necessary to put pleadings in evidence to show that allegation not denied:** West v. Grocery Co., 138-168. **Allegations in complaint, not denied, deemed true:** Hauser v. Harding, 126-295; Cook v. Guirkin, 119-13; McMillan v. Gambill, 115-352; Stephenson v. Felton, 106-114; Grant v. Gooch, 105-281; Tucker v. Wilkins, 105-272; Harris v. Sneeden, 104-369; Bonham v. Craig, 80-224; Oates v. Gray, 66-442; Jenkins v. Ore Co., 65-563—**except in divorce, when failure to deny has no effect,** Toole v. Toole, 112-152; Steel v. Steel, 104-631—**and except when legal proposition stated in complaint:** Tiddy v. Graves, 126-624; Gatlin v. Tarboro, 78-119; Kelly v. McCallum, 83-563.

Allegations in answer constituting counterclaim, not denied, deemed true: Rountree v. Britt, 94-104; Green v. R. R., 77-95; McKesson v. Mendenhall, 64-287—**but new matter in answer not constituting a counterclaim is deemed denied:** White v. Carroll, 146-; Fishblate v. Fidelity Co., 140-594; Smith v. Bruton, 137-79; Jeffreys v. R. R., 127-381; McLamb v. McPhail, 126-221; Bank v. Loughran, 122-674; James v. R. R., 121-530; Wagon Co. v. Byrd, 119-461; Morgan v. Roper, 119-368; Askew v. Koonce, 118-526; Vance v. Vance, 118-864; McQueen v. Bank, 111-515; Buffkins v. Eason, 110-264; Grant v. Gooch, 105-278; Stanton v. Hughes, 97-318; Fitzgerald v. Shelton, 95-519; Dempsey v. Rhodes, 93-120; Skinner v. Wood, 76-110; Price v. Eccles, 73-162. **Admission by failure to deny is as available as if found by a jury:** Grant v. Gooch, 105-281; Kelly v. McCallum, 83-563; Bonham v. Craig, 80-224; Jenkins v. Ore Co., 65-563.

Section merely referred to in Junge v. MacKnight, 135-110; dissenting opinion of Walker, J. in Wilson v. Brown, 134-408; Page v. Ins. Co., 131-116; Gattis v. Kilgo, 128-423; Gregg v. Mallett, 111-78.

504. Pleading lost, copy used. If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

Code, s. 600; C. C. P., s. 357. **Copy should always be supplied before case argued before supreme court:** Blackmore v. Winders, 144-219. **An order permitting pleadings to be substituted for those lost is not reviewable:** Bray v. Creekmore, 109-49.

XVIII. Amendments.

505. As of course, when. Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appear to the court or judge that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court or judge may seem just.

Code, s. 272; C. C. P., s. 131. **Any pleading may be once amended as of course without cost:** Barnes v. Crawford, 115-80. **As to amendments to pleadings, process and other proceedings, see section 507 et seq.**

506. Upon demurrer overruled. After the decision of a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just.

152-316

Code, s. 272; C. C. P., s. 131; 1871-2, c. 173. **This section gives a right to answer over at the same term of court, if demurrer interposed in good faith:** Morgan v. Harris, 141-358; Perry v. Commrs., 130-558; Sloan v. R. R., 126-487; Turner v. McKee, 137-255; Gore v. Davis, 124-234; Gorrell v. Water Supply Co., 124-337; Barnes v. Crawford, 115-76; Hornthal v. Burwell, 109-18; Bronson v. Ins. Co., 85-415; Moore v. Hobbs, 77-66—**but if demurrer is frivolous, defendant may answer over only in the discretion of the court,** Morgan v. Harris, 141-358; Cowan v. Baird, 77-201—**and refusal to hold demurrer frivolous is not appealable,** Morgan v. Harris, 141-358; Abbott v. Hancock, 123-89; Walters v. Starnes, 118-842.

Where demurrer sustained, plaintiff allowed to amend in discretion of court only, Fidelity Co. v. Jordan, 134-236; Woodcock v. Bostic, 128-243; Barnes v. Crawford, 115-76 Netherton v. Candler, 78-88; but see Williams v. Smith, 134-249.

507. To pleading, process or proceeding, when. The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved.

146-316

Code, s. 273; C. C. P., s. 132. **See sections 505, 506, 508-511, 515-517.**

149-437

POLICY OF CODE PROCEDURE AS TO AMENDMENTS. Is to have actions tried upon their merits and avert a failure of justice; and in order

to do this the courts pursue a liberal policy as to amendments of pleadings, process, or other proceedings: Blalock v. Clark, 133-309; Simpson v. Lumber Co., 133-99; Railway Co. v. King, 125-455; North v. Dunn, 122-766; Bank v. Cotton Mills, 115-524; Cox v. Grisham, 113-279; Kron v. Smith, 96-389; Halstead v. Mullen, 93-252; Comrs. v. Blair, 76-136; Wilson v. Moore, 72-558; Garrett v. Trotter, 65-430—**and such amendments may be made ex mero motu,** Allen v. R. R., 120-548—**and made in courts of justices also:** McPhail v. Johnson, 115-298; Cox v. Grisham, 113-279—**and also in clerk's court,** Cushing v. Styron, 104-338; Maxwell v. Blair, 95-317. **Supreme court will not amend when it will destroy an exception duly taken below:** West v. R. R., 140-620.

This liberal policy is pursued in cases appealed from justice to superior court: Laney v. Mackey, 144-630; McBride v. Welborn, 119-508; Starke v. Cotten, 115-81; McPhail v. Johnson, 115-298; Sheldon v. Kivett, 110-408; Moore v. Garner, 109-157; Leathers v. Morris, 101-184; Allen v. Jackson, 86-321; Bank v. McArthur, 82-107; Beville v. Cox, 109-265; Thomas v. Simpson, 80-4; Johnson v. Rowland, 80-1; Lane v. Morton, 78-7; Hinton v. Deans, 75-18; State v. Cauble, 70-62; Bullard v. Johnson, 65-436—**and in cases appealed from clerk,** Faison v. Williams, 121-152; Elliott v. Tyson, 117-114; McLean v. Breece, 113-390; Lictie v. Chappell, 111-347; Robeson v. Hodges, 105-49; Finch v. Baskerville, 85-205; Capps v. Capps, 85-408; Sudderth v. McCombs, 67-353.

The allowance or disallowance of amendments is discretionary with court, and court's discretion not reviewable: Streator v. Streator, 145-; Aiken v. Mfg. Co., 141-339; Balk v. Harris, 130-383; Goodwin v. Fertilizer Co., 121-91; Brendle v. Reese, 115-552; Donnelly v. Wilcox, 113-410; Maxwell v. McIver, 113-288; Allen v. McLendon, 113-321; Sinclair v. R. R., 111-507; Moore v. Garner, 109-157; Bray v. Creedmore, 109-49; Jarrett v. Gibbs, 107-303; Bank v. McElwee, 104-305; Blackwell v. Dibbrell, 103-270; Warden v. McKinnon, 99-251; Knott v. Taylor, 96-553; Brooks v. Brooks, 90-142; Grant v. Burgwyn, 88-95; Wiggins v. McCoy, 87-499; Carpenter v. Huffsteller, 87-273; Reynolds v. Smathers, 87-24; Poston v. Rose, 87-279; Henry v. Cannon, 86-24; Gill v. Young, 88-61; Gilchrist v. Kitchen, 86-20; Boddie v. Woodard, 83-2; Reese v. Jones, 84-597; Dobson v. Chambers, 78-334; Hinton v. Deans, 75-18—**except in the cases specified in annotations under heading "Amendment of pleadings" in which it is stated that "amendments not allowed." The discretion of the court is inherent as well as statutory:** Gilchrist v. Kitchen, 86-20; Knott v. Taylor, 96-553. **Too late to object after amendment made:** Wilson v. Pearson, 102-290.

But where court refuses amendment for want of power, it is reviewable: Balk v. Harris, 130-381; Martin v. Bank, 131-123; State v. Fuller, 114-885. **An appeal from an order refusing amendment to pleadings is premature;** Streator v. Streator, 145-; Ayers v. Makely, 131-60—**as is also appeal from order making an additional party,** Bennett v. Shelton, 117-103.

Where amendment not allowed it will be presumed that it was within the exercise of the court's discretion: Balk v. Harris, 130-381—**but may be rebutted by statement of the trial judge to the contrary,** Ayers v. Makely,

131-60. **Clerk can allow amendment:** Simmons v. Jones, 118-472; Maxwell v. Blair, 95-317. **An amended pleading does not exclude a party from the benefit of allegations in the original pleading:** Threadgill v. Commrs., 116-616. **Where complaint in action begun before clerk states matters properly triable in that court, amendment can not be allowed in superior court engrafting matters of which latter court alone has jurisdiction:** Robeson v. Hodges, 105-49. **Court has no power, with or without amendment, to convert an action brought to obtain an injunction into one for a mandamus:** McNair v. Commrs., 93-364.

TERMS OF AMENDMENT. Are entirely in court's discretion: Robinson v. Willoughby, 67-84—**and must be strictly complied with,** Hinton v. Ins. Co., 116-25; Crump v. Thomas, 89-241.

AMENDMENT OF PLEADINGS. See section 515. **Amendments liberally allowed upon proper terms and where necessary to avert failure of justice, see cases cited in paragraph of annotations headed "Policy of Code Procedure as to Amendments."**

Amendment to make necessary parties, when: Belding v. Archer, 131-287; Proctor v. Ins. Co., 124-265; Walker v. Miller, 139-448; Comrs. v. Candler, 123-682; Reynolds v. Smathers, 87-24—**to make additional parties, when:** Aiken v. Mfg. Co., 141-339; Bernard v. Shemwell, 139-447; Mills v. Callahan, 126-756; Tillery v. Candler, 118-888; Bullard v. Johnson, 65-436; Bruce v. Nicholson, 109-202; Plemmons v. Imp. Co., 108-614; Tucker v. Markland, 101-422; Clendenin v. Turner, 96-416; Merrill v. Merrill, 92-657; Isler v. Koonce, 83-55; Glenn v. Bank, 80-97; Bank v. Creditors, 80-9—**to strike out name of party,** Bullard v. Johnson, 65-436; Forte v. Boone, 114-176; Maggett v. Roberts, 108-174; Brown v. Mitchell, 102-347; Gatewood v. Leake, 99-363; Jarrett v. Gibbs, 107-303—**to show jurisdiction:** Elliott v. Tyson, 117-114; Planing Mills v. McNinch, 99-517; Singer Mfg. Co. v. Barrett, 95-36, but see Gilliam v. Life Ins. Co., 121-369; Boyd v. R. R., 132-184—**to make proper relator,** Comrs. v. Candler, 123-682; Forte v. Boone, 114-176—**to substitute parties,** R. R. v. Tel. Co., 113-220; Hodge v. R. R., 108-24; Wilson v. Pearson, 102-290; Bray v. Creekmore, 109-49—**to perfect complaint that does not wholly state a cause of action:** Stone v. R. R., 144-220; Williams v. Smith, 134-252; Blalock v. Clark, 133-306; Lassiter v. R. R., 136-92; Parker v. Harden, 122-111; Woodbury v. Evans, 122-179; Simpson v. Lumber Co., 133-95; Mizzell v. Ruffin, 118-69; Jackson v. Jackson, 105-433; Moore v. Nowell, 94-265; Halstead v. Mullen, 93-255; Pearce v. Mason, 78-37; Garrett v. Trotter, 65-435; Johnson v. Finch, 93-205—**to make pleading plain, definite and certain,** McKinnon v. McIntosh, 98-89—**to add to defense in action of ejectment,** Taylor v. Gooch, 110-387—**to set up mistake in a deed in action concerning land,** Ely v. Early, 94-1—**to make answer responsive to amended complaint,** Sams v. Price, 121-392; Brooks v. Brooks, 90-142; Gill v. Young, 88-58—**to enable plaintiff to recover for tort instead of on contract by changing mode of stating same facts,** Reynolds v. R. R., 136-345—**to conform pleading to proof, when does not change cause of action,** Woodbury v. Evans, 122-780; Dickens v. Perkins, 134-223; Nims Mfg. Co. v. Blythe, 127-325; Hendon v. R. R., 127-114; Abernathy v. Seagle, 98-553; Kiger v. Harmon, 113-407; Spivey v. Grant, 96-214; Barnes v. Barnes, 104-613;

Gibbs v. Fuller, 66-116—**to cure affidavit in divorce,** Moore v. Moore, 130-333; Holloman v. Holloman, 127-15—**to set up statute of limitations,** Smith v. Smith, 123-229—**to conform to agreed facts,** Dalby v. Hancock, 125-327—**to include right of attachment as against intervenor,** Finch v. Gregg, 126-179—**to perfect lost pleadings on appeal from justice's court:** Faison v. Johnson, 78-78—**to allow counterclaim on appeal, not set up before justice:** Thomas v. Simpson, 80-4; Johnson v. Rowland, 80-1—**to enable recovery of expenses instead of commissions by trustee under deed of trust,** Fry v. Graham, 122-773—**to conform to decision of supreme court,** in the case of McCulloch v. R. R., 145-; Banking Co. v. Morehead, 126-279; Vick v. Vick, 126-127; Faison v. Williams, 121-153; Holley v. Holley, 96-229—**to change amount demanded,** Boyd v. R. R., 132-184—**to correct date of release pleaded,** R. R. v. Main, 132-445—**to show better profile in action to condemn land,** R. R. v. Newton, 133-132—**to set up estoppel in proceeding to drain land,** Porter v. Armstrong, 134-455—**to conform complaint to verdict,** Gillis v. Arringdale, 135-295—**to permit recovery on quantum meruit,** Roberts v. Woodworking Co., 111-432—**to permit widow to claim crops on dower land instead of as agent for minor child,** King v. Dudley, 113-167—**to perfect cause of action for deceit and false warranty,** Joyner v. Earley, 139-49.

No amendment allowed where amendment changes nature of action or defense: Bonner v. Stotesbury, 139-3; Finch v. Strickland, 132-103; Simpson v. Lumber Co., 133-99; Shell v. West, 130-171; Smith v. Smith, 123-229; Goodwin v. Fertilizer Works, 123-162; Gillam v. Life Ins. Co., 121-369; Craven v. Russell, 118-564; Martin v. Bank, 131-121; Mizzell v. Ruffin, 118-69; Friedenwald Co. v. Tobacco Works, 117-544; Hester v. Mullen, 107-724; Richards v. Smith, 98-509; Knott v. Taylor, 96-553; Kron v. Smith, 96-389; Clendenin v. Turner, 96-416; Robbins v. Harris, 96-557; Ely v. Early, 94-1; McNair v. Commrs., 93-364; Grant v. Burgwyn, 88-95; Carpenter v. Huffsteller, 87-273; Gilchrist v. Kitchen, 86-20; March v. Verble, 79-19; but see Reynolds v. R. R. Co., 136-348; Simpson v. Lumber Co., 133-95; Pender v. Mallett, 123-61; King v. Dudley, 113-167—**or where defendant not allowed also to amend to meet added allegations of complaint,** Dobson v. R. R., 129-289; Brooks v. Brooks, 90-142—**or where defendant is deprived of a defense,** Gillam v. Ins. Co., 121-369; Goodwin v. Fertilizer Works, 123-162; Parker v. Harden, 122-111; Pender v. Mallett, 123-57; Gill v. Young, 88-58 Henderson v. Graham, 84-496; Cogdell v. Exum, 69-464; Christmas v. Mitchell, 38-535—**or where it will defeat a statutory provision,** Patterson v. Wadsworth, 94-538; Cogdell v. Exum, 69-464—**or to confer jurisdiction,** Gillam v. Ins. Co., 121-369—**or to set up cause of action accruing subsequently,** Powell v. Allen, 103-46; Jackson v. McLean, 96-474; Clendenin v. Turner, 96-416—**or to disturb a vested right,** Brown v. Mitchell, 102-374—**or to add a party that necessarily changes the cause of action,** Shell v. West, 130-171. **If amendment changing the nature of the action is allowed, the statute of limitations runs up to the time of the amendment:** Ely v. Early, 94-1; Sams v. Price, 121-392. **Amendment to verification,** Cantwell v. Herring, 127-81; Best v. Dunn, 126-560.

AMENDMENT OF PROCESS. Power of amendment is broad, both by

statute and on account of the inherent powers of the court, and is entirely discretionary: Swain v. Burden, 124-16; Jackson v. McLean, 90-64; Henderson v. Graham, 84-496; see section 1467. **Amendment of summons:** State v. Wells, 142-590; Ewbank v. Turner, 134-80; Burwell v. Hughes, 116-430; McBride v. Welborn, 119-508; Piercy v. Watson, 118-976; Forte v. Boone, 114-176; McPhail v. Johnson, 115-298; Cox v. Grisham, 113-279; Redmond v. Mullenax, 113-505; Jackson v. McLean, 90-64; Capps v. Capps, 85-408; Henderson v. Graham, 84-496; Chatham v. Crews, 81-343; Thomas v. Womack, 64-657—**of return of summons,** Grady v. R. R., 116-952; Campbell v. Smith, 115-498; Luttrell v. Martin, 112-593—**of affidavit for publication of summons,** Mullen v. Canal Co., 112-109—**of return of execution,** Dysart v. Brandreth, 118-968; Williams v. Weaver, 101-1; Walters v. Moore, 90-41—**of warrant issued by justice,** State v. Cauble, 70-62; Bullard v. Johnson, 65-436—**of pleadings in justice's court,** Moore v. Garner, 109-157.

AMENDMENT OF PROCEEDINGS OTHER THAN PLEADINGS AND PROCESS. Of affidavit in attachment: Cook v. Mining Co., 114-617; Sheldon v. Kivett, 110-408; Cushing v. Styron, 104-338; Pope v. Frank, 81-180; Bank v. Blossom, 92-695; Penniman v. Daniel, 93-332; Brown v. Hawkins, 65-645; Clark v. Clark, 64-150—**and such affidavit can be amended even though original affidavit totally insufficient,** Brown v. Hawkins, 65-645. **Of nature of attorney's appearance for client:** Suiter v. Brittle, 90-19. **Of affidavit in proceedings supplementary to execution:** Weiller v. Lawrence, 81-69. Of judgment: Banking Co. v. Duke, 121-110; Rosenthal v. Roberson, 114-594; Beam v. Bridgers, 111-269; Brooks v. Stephens, 100-297; Cook v. Moore, 100-294; Wall v. Covington, 83-144; Farmer v. Willard, 75-401. **Amendment of judgment must be made in court that rendered it,** Adams v. Reeves, 76-412; Morton v. Rippy, 84-611—**but magistrate's judgment docketed in superior court may be amended, when,** Patterson v. Walton, 119-500. **Of the record:** Kerr v. Hicks, 131-90; Pipkin v. McArtan, 122-194; State v. Jenkins, 121-637; Woodworking Co. v. Southwick, 119-611; State v. Gillikin, 114-832; State v. Pool, 106-698; Walton v. McKesson, 101-428; Wynne v. Small, 102-132; Brooks v. Stephens, 100-297; State v. Warren, 95-674; McDowell v. McDowell, 92-227; Walton v. Pearson, 85-34; State v. Swepson, 83-584; Perry v. Adams, 83-266; Bank v. McArthur, 82-107; State v. Davis, 80-384; Murrill v. Humphrey, 76-414; State v. King, 27-203; State v. Roberts, 19-540; State v. Calhoon, 18-374. **Of magistrate's record when case appealed to superior court:** Bank v. McArthur, 82-107. **Of the verification of pleadings:** Cantwell v. Herring, 127-81; Best v. Dunn, 122-560. **Courts will not allow amendment of its records, particularly after long lapse of time, without strong and convincing proof:** Walton v. McKesson, 101-428.

TIME OF AMENDING. Record may be amended at chambers: Falkner v. Hunt, 68-475. **Pleadings may be amended during trial, when:** Woodbury v. Evans, 122-780; Sams v. Price, 119-574; Craven v. Russell, 118-564; King v. Dudley, 113-167; Allen v. McLendon, 113-322; Lilly v. Baker, 88-151; Garrett v. Trotter, 65-430—**after judgment, when,** Waters v. Waters, 125-593; Knott v. Taylor, 96-553—**after verdict,** Boyd v. R. R., 132-184; Blalock v. Clark, 133-308; Roberts v. Woodworking Co., 111-

433; Brown v. Mitchell, 102-347; Robeson v. Hodges, 105-49; Morgan v. Smith, 95-396; Pearce v. Mason, 78-37; Dobson v. Chambers, 78-334; Righton v. Pruden, 73-61; Penny v. Smith, 65-35—**after referee's report,** Mfg. Co. v. Blythe, 127-325—**after supreme court orders new trial:** Martin v. Martin, 130-27; Comrs. v. Kenan, 127-181; but see Cook v. Bank, 130, 183. **Presumption that amendment regularly made:** Monger v. Kelly, 115-294; Patterson v. Wadsworth, 94-538.

508. Effect of substantial. When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered shall not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of such amendment.

1901, c. 486. **See section 507.**

509. Unsubstantial defects disregarded. The court or judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Code, s. 276; R. C., c. 3, ss. 5, 6; C. C. P., s. 135. **As to immaterial variance between pleading and proof, see section 515. Cases directly supporting section:** Wright v. Ins. Co., 138-488; Halstead v. Mullen, 93-255. **Exceptions to pleadings that are reasonably certain and understood will be disregarded:** Moore v. Edmiston, 70-510; Watkins v. Mfg. Co., 131-539; Gorman v. Bellamy, 82-499. **Such defects in pleadings as would be remediable by amendment that does not change substantially the claim or defense will not sustain a dismissal of the action:** Halstead v. Mullen, 93-255. **Certain defects in procedure and process held not material:** Barneycastle v. Walker, 92-198; Wilson v. Moore, 72-558; Best v. Mortgage Co., 128-351; Patterson v. Walton, 119-500; White v. Morris, 107-98.

510. When plaintiff ignorant of defendant's name; true name inserted when known. When the plaintiff shall be ignorant of the name of a defendant such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Code, s. 275; C. C. P., s. 134. **A defect in name cured by judgment by default or by appeal by defendant without having moved to dismiss:** Clawson v. Wolfe, 77-100; Patterson v. Walton, 119-500; Ryan v. Martin, 91-464.

511. Supplemental pleadings. The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made, and either party

may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of such action, determining the matter in controversy in said action, or any part thereof, and if said judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in said action on his behalf.

Code, s. 277; C. C. P., s. 136. **See for amendment of pleadings, process, etc., sections 505-507, 515-517. Plea puis darrein continuance is a supplemental pleading:** Balk v. Harris, 130-381—**and, if a bar to the action, can be allowed in court's discretion; but as to whether it is a bar the court's ruling is reviewable,** Ibid; also Warden v. McKinnon, 99-251. **Allowed when case comes back from appellate court:** Holley v. Holley, 96-229; Faison v. Williams, 121-153; Vick v. Vick, 126-127; Banking Co. v. Morehead, 126-279—**when new parties made and their connection with controversy not appearing,** Hughes v. Hodges, 94-56; Coggins v. Flythe, 114-277; Moore v. R. R., 74-528; Baggarly v. Calvert, 70-688—**when one of two plaintiffs enters a retraxit,** Sinclair v. R. R., 111-507—**where defects in plaintiff's title or matters validating defendant's title have accrued since action begun,** Taylor v. Gooch, 110-387—**when defendant has been discharged in bankruptcy,** Balk v. Harris, 130-381.

Not allowed when party dies and relationship of new parties to him are ascertained from record: Hughes v. Hodges, 94-56—**nor for purpose of injecting cause of action accrued since suit instituted:** Metcalf v Guthrie, 94-447—**nor for purpose of setting up counterclaim after nonsuit has been entered:** Well Co. v. Ice Co., 125-80.

512. Time for pleading enlarged; porceedings made conformable to law. The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge such time; and whenever any proceeding taken by a party fails to conform to law in any respect, the judge may, in like manner and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

Code, s. 274; C. C. P., s. 133. **As to amendments of pleadings, process, etc., see sections 505-511. Time allowed to plead, upon request, is an appearance,** Cook v. Bank, 129-149. **The extension of time hereunder can not be beyond the next term without consent:** Sheek v. Sain, 127-271. **An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove:** Garrett v. Bear, 144-23. **The trial court may permit an answer to be filed after the supreme court has decided that judgment by default should have been entered for the plaintiff,** Cook v. Bank, 131-96; **overruling** Cook v. Bank, 131-83; see also Griffin v. Light Co., 111-434; Bank v. Ireland, 122-576. **Extension of time to file pleadings should not be encouraged:** Dempsey v. Rhodes, 93-120; Griffin v. Light Co., 111-438. **Extensions of time and amendments hereunder entirely within court's discretion and**

not reviewable: Wilmington v. McDonald, 133-548; White v. Lokey, 131-72; Best v. Mortgage Co., 131-70; Woodcock v. Merrimon, 122-731; Gwinn v. Parker, 119-19; Armour Packing Co. v. Williams, 122-408; Bailey v. Comrs., 120-388; Mallard v. Patterson, 108-255; McMillan v. Baxley, 112-578; Gore v. Davis, 124-234; Kruger v. Bank, 123-17; Gilchrist v. Kitchen, 86-20; Reese v. Jones, 84-597; Austin v. Clarke, 70-458. **Dismissing action for failure to file complaint in time not reviewable:** Armour Packing Co. v. Williams, 122-408. **Order at request of one party allowing to both parties time to file pleadings with no exception by adverse party is binding on both:** Mecke v. Mineral Co., 122-790. **As to extension of time to file answer:** Morgan v. Harris, 141-360; Wilmington v. McDonald, 133-548; Mauney v. Hamilton, 132-295; White v. Lokey, 131-72; Cook v. Bank, 131-96; Gore v. Davis, 124-234; Bailey v. Comrs., 120-388; Woodcock v. Merrimon, 122-731; Gwinn v. Parker, 119-19; Mallard v. Patterson, 108-255; Reese v. Jones, 84-597; Best v. Mortgage Co., 131-70; Griffin v. Light Co., 111-434; Banks v. Mfg. Co., 108-282—**reply,** Strause v. Ins. Co., 128-64; McMillan v. Baxley, 112-578; Bank v. Ireland, 122-576—**defense bond,** Dunn v. Marks, 141-232; Becton v. Dunn, 137-563; Timber Co. v. Butler, 130-50. **Filing of answer after supreme court reverses ruling of lower court in sustaining demurrer and dismissing action:** Sloan v. R. R., 126-487. **Cases merely referring to section:** Stockton v. Mining Co., 144-599; Laney v. Mackey, 144-632.

513. Mistake, surprise, excusable neglect. The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding.

Code, s. 274; 1893, c. 81; C. C. P., s. 133. **For procedure generally** see Norton v. McLaurin, 125-185. **Mistake of fact, not of law, referred to herein:** Phifer v. Ins. Co., 123-405; Skinner v. Terry, 107-103. **"Surprise" does not mean sudden astonishment at action of court,** Ibid. **The judge and not the clerk, has jurisdiction hereunder:** Maxwell v. Blair, 95-317; Griel v. Vernon, 65-76. 147-17

Judgment set aside hereunder only on motion and not by an independent action: Ins. Co. v. Scott, 136-157. **Judgment by default can not be set aside simply because defendant has meritorious defense if his neglect to assert it was not excusable:** Osborn v. Leach, 133-427; Pepper v. Clegg, 132-313. **Where judge finds the neglect inexcusable, he need not inquire if defense meritorious:** Turner v. Machine Co., 133-381—**but where neglect excusable he can not set aside judgment unless defendant has a meritorious defense,** Norton v. McLaurin, 125-185; Stockton v. Mining Co., 144-595. **A judgment entered by consent of attorney is a matter within the scope of his authority will not be set aside on the ground of excusable neglect:** Hairston v. Garwood, 123-345. **A judgment rendered conformable to a verdict prior to the passage of the act (chap. 81, 1893), can not be set aside hereunder:** Morrison v. McDonald, 113-327; Brown v. Rhinehart, 112-772. **Where motion was made in term time and by inadvertence or**

mistake a party fails to take notice, the court may allow party opportunity to be heard: Hemphill v. Moore, 104-380. The clerk can not set aside a judgment in a special proceeding for excusable negligence, but he can allow amendments: Maxwell v. Blair, 95-317.

There is no rule that affidavits should be filed before the motion hereunder is heard: Jones v. Swepson, 94-700. Where supreme court reverses decision of lower court upon the motion to set aside judgment and sends it back for a rehearing it is to be heard de novo and any competent evidence, whether introduced on former hearing or not, can be offered: Ibid.

In order to set aside a consent decree hereunder, what necessary to show: Kerchner v. McEachern, 93-447; Vaughan v. Gooch, 92-524. As to rules of evidence in hearing motions to set aside judgments: Stancill v. Gay, 92-455. Motion to set aside for causes mentioned must be made within one year from rendition where summons personally served: Ins. Co. v. Scott, 136-157; Clement v. Ireland, 129-220; Banking Co. v. Duke, 121-111; Roberts v. Allman, 106-391; Ruffin v. Harrison, 91-398; Young v. Greenlee, 85-593; McLean v. McLean, 84-366; Moore v. Hinnant, 90-163; Askew v. Capehart, 79-17; McDaniel v. Watkins, 76-399—but if not personally served, within one year from actual notice of judgment, McLean v. McLean, 84-366; DePriest v. Patterson, 85-378. The burden of showing mistake, surprise or excusable neglect is on the applicant for relief: Jeffries v. Aaron, 120-167; Mauney v. Gidney, 88-200; Grant v. Edwards, 88-246; Kerchner v. Baker, 82-169; Sluder v. Rollins, 76-271; Weaver v. Jones, 82-440; Clayton v. Johnston, 82-423.

Notice of motion to set aside must be given adverse party: Johnson v. Marcom, 121-83; Harper v. Sugg, 111-324; Coor v. Smith, 107-430; Allison v. Whittier, 101-490;—and may be served upon attorney of record, Branch v. Walker, 92-87.

This section only applies to judgments taken at former terms: McCulloch v. Doak, 68-267; Clemmons v. Field, 99-400; Beck v. Bellamy, 93-129; State v. Bennett, 93-503; see Johnson v. Marcom, 121-83—for the reason that an order or decree made during a term of court is in fieri and can be vacated or modified during such term: Gwinn v. Parker, 119-19; Harper v. Sugg, 111-324. An application to set aside an irregular judgment does not come under this section: Becton v. Dunn, 137-559; Cowles v. Hayes, 69-406; Vick v. Pope, 81-22; Monroe v. Whitted, 79-508; Mabry v. Erwin, 78-45.

FINDINGS AND ORDERS OF JUDGE. The facts should be found by the judge and his findings are not reviewable: Stockton v. Mining Co., 144-595; Osborn v. Leach, 133-427; Pepper v. Clegg, 132-313; Morris v. Ins. Co., 131-212; Koch v. Porter, 129-132; Norton v. McLaurin, 125-185; Marsh v. Griffin, 123-660; Marion v. Tilley, 119-473; Sikes v. Weatherly, 110-131; Albertson v. Terry, 108-75; Taylor v. Pope, 106-267; Weil v. Woodard, 104-94; Winborne v. Johnson, 95-46; Branch v. Walker, 92-87; Jones v. Swepson, 79-510; Johnson v. Duckworth, 72-244; Powell v. Weith, 66-423; Clegg v. Soapstone Co., 66-391; Oldham v. Sneed, 80-15; Smith v. Hahn, 80-240; Bryant v. Fisher, 85-69—and if either mistake, inadvertence, surprise or excusable neglect exists, then the court's discretion in relieving

a party is not reviewable unless such discretion is abused: Pepper v. Clegg, 132-313; Morris v. Ins. Co., 131-212; Norton v. McLaurin, 125-185; Wyche v. Ross, 119-174; Marsh v. Griffin, 123-660; Manning v. R. R., 122-824; Cowles v. Cowles, 121-272; Stith v. Jones, 119-428; Wyche v. Ross, 119-174; Sikes v. Weatherly, 110-131; Albertson v. Terry, 108-75; Weil v. Woodard, 104-94; Foley v. Blank, 92-476; Winborne v. Johnson, 95-47; Brown v. Hale, 93-188; Williams v. R. R., 110-471; Beck v. Bellamy, 93-129; Nicholson v. Cox, 83-48; Bank v. Foote, 77-131; Simonton v. Lanier, 71-498—**but as to whether the facts found show that either mistake, inadvertence, surprise or excusable neglect exists is a question of law and is reviewable:** Stockton v. Mining Co., 144-595; Williams v. R. R., 110-471; Norton v. McLaurin, 125-185; Pepper v. Clegg, 132-313; Weil v. Woodard, 104-94; Winborne v. Johnson, 95-46; Foley v. Blank, 92-476—**also where judge refuses to set aside judgment on the ground that he has no power, it is reviewable,** Gilchrist v. Kitchen, 86-21; Hudgins v. White, 65-393; State v. Locust, 63-574; Winslow v. Anderson, 20-1.

Relief under this section will be granted by the supreme court: Bernhardt v. Brown, 118-710; Summerlin v. Cowles, 107-459; State v. Willis, 106-804; Cook v. Moore, 100-294; Wiley v. Logan, 94-564; Scott v. Queen, 95-340; Williamson v. Boykin, 104-100; Farrar v. Staton, 101-78; Wade v. Newbern, 73-318.

NEGLECT EXCUSABLE. On the part of party when: Stith v. Jones, 119-428; Sikes v. Weatherly, 110-131; Weil v. Woodard, 104-94; Holden v. Purefoy, 108-163; Warren v. Harvey, 92-137; Branch v. Walker, 92-87; Pickens v. Fox, 90-369; Geer v. Reams, 88-197; Francks v. Sutton, 86-78; Wynne v. Prairie, 86-73; Mebane v. Mebane, 80-34; Blue v. Blue, 79-69; Long v. Cole, 74-267; Griel v. Vernon, 65-76. **On the part of an attorney, surprising his client when:** Taylor v. Pope, 106-267; Gwathney v. Savage, 101-103; Wiley v. Logan, 94-564; Winborn v. Byrd, 92-7; Boing v. R. R., 88-62; English v. English, 87-497; Ellington v. Wicker, 87-14; Wynne v. Prairie, 86-73; Molyneux v. Huey, 81-106; Moore v. Gidney, 75-34; Griel v. Vernon, 65-76; Francks v. Sutton, 86-78; Geer v. Reams, 88-197.

NEGLECT NOT EXCUSABLE. On the part of party, when: Stockton v. Mining Co., 144-595; Williamson v. Cocke, 124-585; Vick v. Baker, 122-98; Manning v. R. R., 122-824; Cowles v. Cowles, 121-272; Stith v. Jones, 119-428; Sluder v. Graham, 118-835; Simpson v. Brown, 117-482; Finlayson v. Accident Co., 109-196; Roberts v. Allman, 106-391; Smith v. Smith, 101-461; Brown v. Hale, 93-188; Abrams v. Ins. Co., 93-60; Kivett v. Wynne, 89-39; Churchill v. Ins. Co., 88-205; Norwood v. King, 86-80; DePriest v. Patterson, 85-376; Henry v. Clayton, 85-371; McLean v. McLean, 84-366; Hutchinson v. Rumfelt, 83-441; University v. Lassiter, 83-38; Kerchner v. Baker, 82-169; Hodgin v. Matthews, 81-289; Cobb v. O'Hagan, 81-293; Hyman v. Capehart, 79-511; Bradfort v. Coit, 77-72; Sluder v. Rollins, 76-271; Skinner v. Bryce, 75-287; White v. Snow, 71-232; Clegg v. Soapstone Co., 67-302; Burke v. Stokely, 65-569; Waddell v. Wood, 64-624. **On the part of attorney, when:** Vivian v. Mitchell, 144-472; Hairston v. Garwood, 123-345; Neal v. Land Co., 112-841; Edwards v. Henderson, 109-83; Norton v. McLaurin, 125-185; Manning v. R. R.,

122-824; Vick v. Baker, 122-98; Cowles v. Cowles, 121-272; Chadbourn v. Johnston, 119-282; Boyer v. Garner, 116-125-; Finlayson v. Accident Co., 103-196; Griffin v. Nelson, 106-235; Roberts v. Allman, 106-391; Whitson v. R. R., 95-385; Churchill v. Ins. Co., 92-485; Boing v. R. R., 88-62; University v. Lassiter, 83-38; Sluder v. Rollins, 76-271; Hyman v. Capehart, 79-511; Burke v. Stokely, 65-569. **On the part of party's agent, when:** Morris v. Ins. Co., 131-212.

Cases merely referring to section: Turner v. Davis, 132-188; Hardy v. Hardy, 128-179; Black v. Black, 111-302; Bost v. Lassiter, 105-497; Strickland v. Strickland, 95-471.

514. Orders without notice vacated. An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Code, s. 546; C. C. P., s. 297. State v. Johnson, 109-855; Clayton v. Jones, 68-497; Blue v. Blue, 79-69; Sledge v. Blum, 63-374. **Where orders made by consent:** Henry v. Hilliard, 120-479. **A judge of superior court has the power to vacate or modify orders made in a cause at any time before final judgment:** Welch v. Kingsland, 89-179.

XIX. Variance Between Pleading and Proof.

515. Material; amendment when. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he had been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

Code, s. 269; C. C. P., s. 128. **For amendments to pleadings, see section 507. Variance immaterial unless adverse party misled:** Bank v. Burgwyn, 116-122; Morgan v. Bank, 93-352; Patrick v. R. R., 93-422; Lawrence v. Hester, 93-79; Usry v. Suit, 91-406; Lilly v. Baker, 88-151.

The court has no more power than under the old system to hear proofs without allegations: McKee v. Lineberger, 69-217. **A variance arises when proof does not sustain allegation, and if immaterial it will be disregarded; but if material and misleading, the court may, in its discretion allow amendments; but where evidence relates to cause of action different from that stated in complaint, it is no variance and this section does not apply:** Willis v. Branch, 94-142. **The court has power to conform the pleadings to the proof, when: See section 507. Cases where variance held immaterial:** Asbury v. R. R., 125-573; Bank v. Burgwyn, 116-122; Knowles v. R. R., 102-66; Morgan v. Bank, 93-352; Mode v. Penland, 93-292. **Where party misled, amendment allowed:** Willis v. Branch, 94-143; Webb v. Tay-

lor, 80-305; Houghton v. Newberry, 69-459; Shelton v. Davis, 59-324; Pegram v. Stoltz, 67-144; see also section 507. **Proof without allegation is as unavailing as allegation without proof:** McCoy v. R. R., 142-383; Abernathy v. Seagle, 98-553. **Where an amendment to pleading is such as to cause surprise it is cause for continuance only:** Martin v. Bank, 131-121. **A recovery can not be had on the allegation of one cause of action and the proof of another, for the reason that the defendant, however diligent, can not prepare his defense to meet surprises:** Smith v. B. and L. Asso., 116-102. **Cases merely referring to section:** Faulk v. Thornton, 108-320.

516. Immaterial. Where the variance is not material as provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

Code, s. 270; C. C. P., s. 129. **See sections 507 and 515,** Hendon v. R. R., 127-114; Gibbs v. Fuller, 66-116. **Section merely referred to** in Faulk v. Thornton, 108-320; Knowles v. R. R., 102-66.

517. Failure of proof. Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.

Code, s. 271; C. C. P., s. 130. **See** Smith v. Loan Asso., 116-102; Hunt v. Vanderbilt, 115-559; Smith v. McGregor, 96-101; Grant v. Burgwyn, 88-95; Carpenter v. Huffsteller, 87-273; Pendleton v. Dalton, 96-507.

XX. Reference.

518. By consent. All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation.

Code, s. 420; C. C. P., s. 244. **It is proper that the agreement to refer should specify the issues of law and fact:** Morisey v. Swinson, 104-555; see also Barrett v. Henry, 85-325. **Consent once given to a reference can not be recalled:** McDaniel v. Scurlock, 115-295; Morisey v. Swinson, 104-555; White v. Utley, 86-415; Fleming v. Roberts, 77-415—**and a waiver of a jury trial can not be withdrawn; such waiver can be made by counsel without special authority,** Stevenson v. Felton, 99-58. **Order entered of record is sufficient "written consent:"** White v. Utley, 86-415. **Where no written consent, yet both parties appear and examine witnesses and report is made and confirmed and judgment rendered, from which there is appeal too late to object to order of reference:** Johnston v. Haynes, 68-509.

A reference not excepted to is a reference by consent: Roughton v. Sawyer, 144-766; Kerr v. Hicks, 129-141; Blalock v. Mfg. Co., 110-107;

Smith v. Hicks, 108-248; Rogers v. Bank, 108-574; Nissen v. Mining Co., 104-309; Grant v. Hughes, 96-177; Harris v. Shaffer, 92-30; Belvin v. Paper Co., 123-138; White v. Utley, 86-417; Atkinson v. Whitehead, 77-418; Armfield v. Brown, 70-27—**and a reference by consent is a waiver of a jury trial,** Roughton v. Sawyer, 144-766; Driller Co. v. Worth, 117-515; Collins v. Young, 118-265; Nissen v. Mining Co., 104-309; Grant v. Hughes, 96-177; Fertilizer Co. v. Reams, 105-291; Battle v. Mayo, 102-413; Grant v. Reese, 82-72; Overby v. Fayetteville, 81-56; Britt v. Benton, 79-177; Atkinson v. Whitehead, 77-418; Perry v. Tupper, 77-413; Lippard v. Roseman, 72-427; Armfield v. Brown, 70-27; Green v. Castlebury, 70-20; Kluttz v. McKenzie, 65-102; Stevenson v. Felton, 99-58; Carr v. Askew, 94-412.

The court can not discontinue a reference by consent; it may be discontinued by the death of the referee or his removal for good cause, Perry v. Tupper, 77-413; Smith v. Hicks, 108-248; Patrick v. R. R., 101-602. **Difference between reference hereunder and an arbitration:** Lusk v. Clayton, 70-185. **The court retains jurisdiction, with power to review and reverse the conclusions of law of the referee, and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused:** Brackett v. Gilliam, 125-380; Cummings v. Swepson, 124-579—**also has power to make all necessary orders pending the trial,** McNeill v. Lawton, 97-16; Credle v. Ayers, 126-11. **A consent order may be changed to a compulsory order only by consent:** Kerr v. Hicks, 129-141—**and it will date as a compulsory order from the first,** Ibid. **Cases citing section:** Lumber Co. v. Lumber Co., 137-439.

519. Compulsory. Where the parties do not consent, the court may upon the application of either, or of its own motion, direct a reference in the following cases:

Reference should not be ordered while there are pleas in bar not yet determined: Oldham v. Rieger, 145-254; Duckworth v. Duckworth, 144-620; Kerr v. Hicks, 129-141; Austin v. Stewart, 126-525; Bank v. Fid. Co., 126-320; Comrs. v. White, 123-534; Smith v. Goldsboro, 121-351; Roysters v. Wright, 118-152; Jones v. Beaman, 117-259; McMillan v. Baxley, 112-578; Bridgers v. Bridgers, 101-71; Grant v. Hughes, 96-177; Humble v. Mebane, 89-410; Price v. Eccles, 73-162; Neal v. Blackwell, 85-299; Sloan v. McMahon, 85-296; Cox v. Cox, 84-138; Clements v. Rogers, 95-248; Quarles v. Jenkins, 98-258; Comrs. v. Raleigh, 88-120; R. R. v. Morrison, 82-141; Douglas v. Caldwell, 64-372.

Cases upon the question as to whether cause is a proper one to be referred; Pinchback v. Mining Co., 137-171; Bond v. Wilson, 137-145; Jones v. Sugg, 136-143. **The refusal to refer is appealable:** Jones v. Sugg, 136-143; Lee v. Baird, 134-410. **Reference ought not to be made before issues are raised:** Syme v. Bunting, 86-175; Lumber Co. v. McPherson, 133-287; Kerr v. Hicks, 131-90. **The judge retains control of case under reference and may find facts himself from the evidence reported without a re-reference:** Credle v. Ayers, 126-11; Brackett v. Gilliam, 125-380. **Not error**

to refuse a compulsory reference when the motion to refer is not made until after the close of the evidence: Hughes v. Boone, 102-137.

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or,

Albright v. Albright, 91-220; Chalk v. Bank, 87-200; Commrs. v. Magnin, 85-114; Leak v. Covington, 87-501; Grant v. Hughes, 94-755; Little v. Duncan, 89-416; Heilig v. Foard, 64-710. **No reference ordered after final decree to ascertain facts taking place after judgment:** White v. Butcher, 97-7; Pearson v. Carr, 97-194; McCall v. Webb, 126-762, and cases cited. **Where an order of reference is made after the right to an account is established by the verdict of a jury appeal can only be taken from final judgment after report:** Jones v. Wooten, 137-421; Shankle v. Whitley, 131-168.

3. When the case involves a complicated question of boundary, or one which requires a personal view of the premises; or,

4. Where a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action; or,

5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars.

The compulsory reference under this section shall not deprive either party of his constitutional right to a trial of the issues of fact arising on the pleadings, by a jury, but such trial shall be had only upon the written evidence taken before the referee.

Either party is entitled to a jury trial, where the reference is compulsory, if demanded in apt time, and he should, by exceptions, distinctly designate the controverted facts that he demands shall be determined: Ogden v. Land & Lumber Co., 146-; Kerr v. Hicks, 131-90; Wilson v. Featherstone, 120-446; Taylor v. Smith, 118-127; Driller Co. v. Worth, 117-515; Yelverton v. Coley, 101-248; McDaniel v. Scurlock, 115-295; Blalock v. Mnfg. Co., 110-99; Smith v. Hicks, 108-248; Grant v. Hughes, 96-177; Carr v. Askew, 94-194; Harris v. Shaffer, 92-30; Gold Co. v. Ore Co., 79-48; Atkinson v. Whitehead, 77-419; Keener v. Finger, 70-35; Green v. Castleberry, 70-20; Armfield v. Brown, 70-27; see also annotations under section 525.

Code, s. 421; 1897, c. 237, ss. 1, 2; C. C. P., s. 245.

520. Referees, how chosen; qualifications. In all cases of reference the parties as to whom issues are joined in the action (ex-

cept when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object. And no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate.

Code, s. 423; C. C. P., s. 247. **See annotations under section 518.**

521. Referees may administer oaths. Every referee shall have power to administer oaths in any proceeding before him, and shall have generally the power vested in a referee by law.

Code, s. 599; C. C. P., s. 356. **Referee has power to enforce obedience to his rulings:** La Fontaine v. Underwriters, 83-132. **For general powers, see section 522.**

522. Conduct of trial; amendments; contempt punished. The trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for nonattendance or refusal to be sworn or to testify, as is possessed by the court.

Code, s. 422; C. C. P., s. 246. **For report, exceptions, trial by jury of issues, etc., see under section 525.**

POWERS OF REFEREE. Has no inherent powers, but simply those granted in the Revisal and those authorized by the court: Cummings v. Swepson, 124-584; Jones v. Beaman, 117-259. **Has power to enforce obedience to his rulings just as the court would have at trial:** La Fontaine v. Underwriters, 83-132—**to make new parties,** Koonce v. Pelletier, 115-235; Perkins v. Berry, 103-131—**to allow amendments to pleadings,** Blanton v. Bostic, 126-418; Jones v. Beaman, 117-259; Gillam v. Ins. Co., 121-373—**to direct a nonsuit,** Stith v. Jones, 119-428; McNeill v. Lawton, 97-16—**to tax costs of reference,** Wharton v. Gattis, 91-53. **Has no power to dismiss action for want of jurisdiction in the superior court:** Austin v. Stewart, 126-525. **Credibility of a witness is for the referee to determine,** Harris v. Smith, 144-439.

THE TRIAL BY REFEREE. Rules for trial: Green v. Castlebury, 70-20; Battle v. Mayo, 102-413. **Method of noting exceptions to referee's ruling in apt time:** Armfield v. Colvert, 103-147. **What referee should find in action against guardian for renting ward's land privately:** Duffy v.

Williams, 133-195. **In a reference in an action involving the validity of a deed, referee must find as to bona fides of conveyance:** Blalock v. Mnfg. Co., 110-99. **Referee is justified in not considering evidence when it is not competent for jury to consider:** Stephenson v. Felton, 106-114. **A referee is not bound to the findings of fact of the trial court when such findings were, by agreement of parties, only for the purpose of construing the will:** Lee v. Baird, 134-410. **Nonsuit can be taken before referee:** McNeill v. Lawton, 97-16; Stith v. Jones, 119-428.

523. Testimony reduced to writing. The testimony of all the witnesses on both sides shall be reduced to writing by the referee, or under his direction, and signed by the witnesses, and the evidence so taken and signed shall be filed in the cause, and constitute a part of the record.

1897, c. 237, s. 3. **All the testimony must be reported as taken and copies of all documents considered by referee must be filed with the papers:** Tharington v. Tharington, 99-118; Perkins v. Berry, 103-131; Comrs. v. Magnin, 85-114; Cain v. Nicholson, 77-411—**and if all the evidence is not sent up, the court can order the remainder to be sent up,** Perkins v. Berry, 103-131; Williams v. Whiting, 92-683—**but the fact that evidence is not sent up is no ground for exception,** Perkins v. Berry, 103-131; Mnfg. Co. v. Williamson, 100-83.

524. Report, when and to whom made; review of; judgment on. The referee shall make and deliver a report within such time as may be ordered by the court. The report of the referee shall be made to the clerk of the court in which the action is pending; either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review such report, and set aside, modify or confirm the same in whole or in part, and no judgment shall be entered on any reference except by order of the judge.

Code, s. 423; C. C. P., s. 247. **For annotations on contents of report, exceptions, confirmation, trial by jury, appeal, see section 525. The judge, in his discretion, may set aside a reference after the report is filed and proceed and try the case:** Cummings v. Swepson, 124-579; Bushee v. Surles, 79-51—**and his ruling in this respect is not reviewable:** Cummings v. Swepson, 124-579; Bushee v. Surles, 79-51. **When and to whom report made and where motions with reference thereto heard:** McNeill v. Hodges, 99-248. **Judge can not exercise his authority "out of term" except in county where action pending:** McNeill v. Hodges, 99-248; Ledbetter v. Pinner, 120-457; Skinner v. Terry, 107-103; Godwin v. Monds, 101-354.

525. Report, what to contain; exceptions; effect of special verdict, when. The referee must state the facts found and the conclusions of law separately; and his decision must be given, and may be excepted to and reviewed in like manner, and with like effect

in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report shall have the effect of a special verdict.

Code, s. 422; C. C. P., s. 246.

DUTY OF JUDGE AS TO REPORT. In passing upon the report, the judge must review the findings of the referee: Holt v. Johnson, 128-67. The court must review and pass upon all the exceptions to the report of the referee, whether to the conclusions of law or findings of fact and set aside, modify or confirm them according to his judgment; his conclusions upon the executions to matters of law are reviewable, but those upon the facts are not: Miller v. Groome, 109-148; see cases under "Findings of Fact" and "Exceptions to Report." Refusal of court to pass upon report under a consent reference is reviewable: Stevenson v. Felton, 99-58.

THE REPORT. It should not be argumentative: Weisel v. Cobb, 118-11. The report should state distinctly and separately the conclusions as to law and fact: Barcroft v. Roberts, 91-363; Cooper v. Middleton, 94-86; Earp v. Richardson, 75-84; Klutts v. McKenzie, 65-102—must state all facts constituting the defense and not leave to inference what is the fact to be found, Cooper v. Middleton, 94-93—must state all the items of account in detail between the parties, Sharpe v. Eliason, 116-665; Gore v. Lewis, 109-539; Cain v. Nicholson, 77-411; McCampbell v. McClung, 75-393—must state the account according to method pointed out by order, Burke v. Turner, 89-246—must be accompanied by the testimony, Perkins v. Berry, 103-131; Barbee v. Green, 92-471; Comrs. v. Magnin, 85-114; Cain v. Nicholson, 77-411; see also section 523—and if not so accompanied, court may order sent up, Perkins v. Berry, 103-131. Cases where question of designation of parties to whom accounts due arises: Perkins v. Berry, 103-131.

FINDINGS OF FACT. Must be stated distinctly and separate from the conclusions of law: Earp v. Richardson, 75-84; Klutts v. McKenzie, 65-102. Are presumed to be right, but presumption rebuttable, when: Green v. Jones, 78-265. Referee's findings of fact are conclusive when not excepted to, and if they are adopted by the court, by being affirmed, such findings are conclusive unless found without evidence or upon improper evidence: Henderson v. McLain, 146-; Frey v. Lumber Co., 144-759; Thornton v. McNeely, 144-622; Harris v. Smith, 144-439; Ramsey v. Browder, 136-251; Lambertson v. Vann, 134-109; Malloy v. Cotton Mills, 132-432; Lewis v. Covington, 130-541; Holt v. Johnson, 129-138; Dunn v. Beaman, 126-764; Bank v. Loughran, 126-814; Lenoir v. Linville Imp. Co., 126-922; Lewis v. Overby, 126-347; Cochran v. Imp. Co., 127-386; Holt v. Couch, 125-456; Boyle v. Stallings, 140-527; Wadesboro v. Atkinson, 107-317; Jordan v. Bryan, 103-59; Kitchen v. Grandy, 101-86; Strauss v. Frederick, 98-60; Battle v. Mayo, 102-435; and cases cited; Vaughan v. Lewellyn, 94-472; Cooper v. Middleton, 94-86; Depriest v. Patterson, 92-399; Usry v. Suit, 91-406; see also Dunavant v. R. R., 122-999; Collins v. Young,

118-265. **If the judge below makes no findings of facts, it will be presumed he adopted the referee's findings:** McEwen v. Loucheim, 115-348; Battle v. Mayo, 102-413; Barbee v. Green, 92-471.

Where reference was by consent, the findings of fact will not be reviewed when approved by the superior court, except upon the ground, if taken in apt time, that there is no testimony to support them or that testimony is incompetent: Cotton Mills v. Cotton Mills, 115-475; McEwen v. Loucheim, 115-348; Turner v. Shuffler, 108-642; Whitehead v. Whitehurst, 108-458; Joyner v. Stancill, 108-153; Roper v. Burton, 107-526; Battle v. Mayo, 102-413; Smith v. Smith, 101-461; Grant v. Reese, 94-720; Vaughan v. Lewellyn, 94-472; Hanner v. McAdoo, 86-370; Hunter v. Kelly, 92-285. **Where exception is made that referee failed to pass upon certain evidence, it is competent for the judge to pass thereon and find the facts:** Credle v. Ayers, 126-11; Wallace v. Douglas, 103-19.

Reference not required to refer to evidence in his findings of fact. He should transmit the evidence along with the report: Barbee v. Green, 92-471. **Proper method of stating account in foreclosure of mortgage:** Knight v. Houghtalling, 91-246. **Findings of fact as a special verdict:** Morisey v. Swinson, 104-555; see Lawrence v. Hyman, 79-209. **A motion to exclude certain items in a final report will be treated as an exception thereto:** Rogers v. Bank, 108-574.

EXCEPTIONS TO REPORT. Report is reviewed, not by appeal, but by exceptions taken to the report: Green v. Castlebury, 70-20. **Exception must specifically designate, in case of taking an account, the charge or credit objected to, for a general allegation of error will not be considered:** Currie v. McNeill, 83-176; Green v. Castleberry, 77-164; Brumble v. Brown, 71-513; Whitford v. Foy, 71-527—**and should, in all cases, point out specifically the fault complained of:** Ogden v. Land & Lumber Co., 146-; Battle v. Mayo, 102-413; Wilson v. Featherstone, 120-446; Perkins v. Berry, 103-131; Mnfg. Co. v. Brooks, 106-113; Tilley v. Bivens, 110-343; Wiley v. Logan, 95-358; Cooper v. Middleton, 94-86; Worthy v. Brower, 93-344; Morrison v. Baker, 81-76; Suit v. Suit, 78-272—**for the court will not examine into every item of every line of record to ascertain its meaning,** Whitford v. Foy, 71-527; Battle v. Mayo, 102-413; Young v. Kennedy, 95-265; Mfg. Co. v. Brooks, 106-113.

An exception as to a finding of fact will not be heard where claim not presented, nor evidence introduced before the referee in apt time: Overby v. Fayetteville, 81-56; Nash v. Taylor, 3-174. **Exception must be filed at the term to which the report is made though court can extend time,** Kerr v. Hicks, 131-90; R. R. v. King, 125-454; Johnson v. Loftin, 111-323; McNeill v. Hodges, 105-52; Long v. Logan, 86-535; Comrs. v. Magnin, 85-117; University v. Lassiter, 83-38; State v. Peebles, 67-97—**but judge can refuse to consider them when not filed in time,** Shields v. McNeill, 118-590.

Where exception because referee failed to find as to a particular fact, and report recommitted, he will not be allowed to except to second report on ground that it is a mixed question of law and fact: Tyson v. Tyson, 92-288. **An exception to referee's conclusion that plaintiff can not recover opens up both findings of law and fact for review by the judge:** Brackett

v. Gilliam, 125-382. **When facts stated as ground for exceptions conflict with the findings of the referee, the exception should be overruled:** Smith v. Smith, 101-461. **It is error for judge to pass upon exceptions to unfinished report:** White v. Utley, 86-415. **Except by consent, exceptions can not be heard or orders made outside of county where action pending:** McNeill v. Hodges, 99-248.

The court can, in its discretion, set aside a reference to state an account, after report made and exceptions filed, and proceed to try the case: Bushee v. Surles, 79-51; Cummings v. Swepson, 124-579.

Exceptions to ruling of referee as to competency of evidence: Vestal v. Sloan, 83-555; Shehan v. Malone, 71-440.

RECOMMITTED TO REFEREE, WHEN. The fact that a referee has not found the facts upon which the report is based must be taken advantage of by a motion to recommit: Blalock v. Mfg. Co., 110-99; Scroggs v. Stevenson, 100-354; Tilley v. Bivens, 110-343. **Where referee fails to find the facts upon which the plea of the statute of limitations can be determined:** Lanning v. Comrs., 106-505—**see, also** Foushee v. Beckwith, 119-178—**where fails to state fully the findings of fact so the conclusions of law thereon may be reviewed:** Tilley v. Bivens, 110-343; Norment v. Brown, 79-363—**where no facts are found by either referee or judge,** Foushee v. Beckwith, 119-178; Lanning v. Comrs., 106-505—**where report is imperfect or unsatisfactory,** Grant v. Bell, 90-558; but see Grant v. Edwards, 92-442. **No appeal from order of reference:** Chemical Co. v. Lackey, 140-32. **Where report recommitted to referee to have report reformed so as to conform to jury's verdict upon the issues based upon exceptions not reviewable:** Kerr v. Hicks, 122-409.

Supreme court may order account restated: Gore v. Lewis, 109-539. **Where case is remanded by supreme court with orders that referee modify his report to conform to rulings of the court, the referee need not give notice to the parties:** Gay v. Grant, 116-93.

When superior court recommits without objection, complaining party can not except to report reformed in the manner directed: Cowles v. Curry, 96-331. **A report will not be re-referred where the same, though informal, furnishes the information required:** Gulley v. Macy, 89-343.

TRIAL BY JURY. Where a reference is by consent, the parties waive the right to have any of the issues of fact passed upon by a jury. Where the reference is compulsory the excepting party has the right to have all issues of fact which arise on the pleadings submitted to a jury, if objection made to order of reference, but not the questions of fact which arise on exceptions to the findings of fact by the referee: Grant v. Hughes, 96-177; Carr v. Askew, 94-194; Belvin v. Paper Co., 123-150; see also cases under last paragraph of section 519. **No right of trial by jury when consent reference:** Smith v. Hicks, 108-248; see section 518. **Evidence before jury is not restricted to the evidence heard by the referee:** Kerr v. Hicks, 131-90. **A party may waive right of trial by jury by failing to set forth in his exception to the referee's report a specific demand for the trial of the precise issue passed upon by the referee** Ogden v. Land and Lumber Co., 146-; Driller Co. v. Worth, 118-746; Yelverton v. Coley, 101-248; Taylor v. Smith, 118-127; McDaniel v. Scurlock, 115-295.

JUDGMENT UPON REPORT. The findings of the referee, when reviewed and corrected, becomes the judgment of the court: Armfield v. Brown, 70-29—and such reviewing and correcting is res judicata and can not be passed upon by another judge: Alexander v. Alexander, 120-472; Scroggs v. Stevenson, 100-354. If no exception filed, the referee's finding as to a particular fact should be confirmed: Chard v. Warren, 122-75. In cases purely equitable in their nature, if an account has been taken and report made the plaintiff will not be allowed to suffer judgment of nonsuit: Boyle v. Stallings, 140-524.

APPEALS TO SUPREME COURT. Where report recommitted to be conformed to a ruling by the superior court upon an exception, the appeal must be from the judgment on final report and not from decision on exception: Wallace v. Douglas, 105-42; McLean v. Breece, 113-390; Leak v. Covington, 95-193; Torrence v. Davidson, 90-2; Grant v. Reese, 90-3; Lutz v. Cline, 89-186; Jones v. Call, 89-188. The supreme court will only consider exceptions to the rulings of the court below in confirming or disaffirming the report: Perry v. Hardison, 99-21; see also Scroggs v. Stevenson, 100-354; and Tyson v. Tyson, 100-360. Where the findings of fact are approved by the court below, and there is some evidence to support them, the supreme court can only correct the errors of law: Rhyne v. Love, 98-486; Thornton v. McNeely, 144-622; Wiley v. Logan, 95-358; Wadesboro v. Atkinson, 107-317; Morrisey v. Swinson, 104-555; Nissen v. Mining Co., 104-309; Howerton v. Sexton, 104-75; Kitchin v. Grandy, 101-86; Abernathy v. Withers, 99-520; Reaves v. Davis, 99-425. The supreme court will not entertain an objection made for the first time that the findings of fact were not supported by evidence: Joyner v. Stancill, 108-153; Hawkins v. Cedar Works, 122-87. After supreme court has rendered final judgment, the superior court can not order a further reference: Pearson v. Carr, 97-194. Supreme court may order account restated: Gore v. Lewis, 109-539. "Plaintiff excepts to such rulings adverse to it and appeals" too general to be considered: Comrs. v. Erwin, 140-193; see also Wiley v. Logan, 95-358. How appeals taken on the ground that there is no evidence to support the findings of fact made or adopted by the judge below: Battle v. Mayo, 102-413. A ruling by referee, confirmed by judge, will not be disturbed when no exception appears in record: Bank v. Bank, 138-467. When exceptions to referee's report are overruled and this court affirms judgment, such exceptions can not be reviewed: Burwell v. Burgwyn, 105-507. Sending case up to the supreme court, how exceptions, etc., set out: Bank v. Mfg. Co., 96-298. The supreme court does not try to ascertain what facts the evidence warranted: Battle v. Mayo, 102-413; Patterson v. Wadsworth, 89-407. Refusal of superior court to set aside referee's report for newly discovered evidence not reviewable: Henderson v. McLain, 146-.

XXI. Trial.

526. Defined. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Code, s. 397; C. C. P., s. 223. All the issues that are material must be

tried unless waived: Gordon v. Collett, 102-532; Davidson v. Gifford, 100-18; Porter v. R. R., 97-66.

527. How issue tried. An issue of law must be tried by the judge or court, unless it be referred . An issue of fact must be tried by a jury, unless a trial by jury be waived, or a reference be ordered. Every other issue is triable by the court, or the judge thereof, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. And when a compulsory reference is ordered either party has the right to have the issues of fact tried by a jury.

Code, ss. 398, 399; C. C. P., ss. 224, 225. **For compulsory reference, see section 519. So much of the pleadings ought to be read to the jury as may be necessary to explain and to present the issues:** Smith v. Nimocks, 94-243. **The consent to waive a jury trial may be made by counsel without special authority:** Stevenson v. Felton, 99-58. **Where parties agree to a particular mode of trial they are bound by it:** Runnion v. Ramsay, 93-410. **Error for judge to decide the issues unless both sides consent:** Wilson v. Bynum, 92-717.

TRIAL BY JURY. A matter of right, when: Driller Co. v. Worth, 117-515; Gwaltney v. Timber Co., 111-547; McQueen v. Bank, 111-509; McCanless v. Flinchum, 98-358; Jones v. Call, 93-170; Yelverton v. Coley, 101-248; Hull v. Carter, 83-249; Womble v. Fraps, 77-198; Lippard v. Roseman, 72-427; Stith v. Lookabill, 71-25; Isler v. Murphy, 71-436; Armfield v. Brown, 70-27; Andrews v. Pritchett, 66-387; Erwin v. Lowery, 64-322—**but party can waive it,** Armfield v. Brown, 70-27; see also State v. Mitchell, 119-786 and cases cited. **A reference made by consent waives the right:** Battle v. Mayo, 102-413; see also section 525. **This right to trial of issues of fact by a jury applies to equitable as well as legal actions:** Ely v. Early, 94-1; Worthy v. Shields, 90-192;

Party not entitled to trial by jury in civil matters except in cases where, under the common law, the demand that the facts should be so found could not be refused: Railroad v. Parker, 105-246; R. R. v. Ely, 101-8; State v. Lyle, 100-497; R. R. v. Davis, 19-451. **A person charged with contempt is not entitled:** Baker v. Cordon, 86-116; In re Deaton, 105-59; consider Moye v. Cogdell, 66-403. **It is error to leave to the jury a material fact upon which there is no evidence,** Fortescue v. Makeley, 92-56.

SECTION CASUALLY REFERRED TO. Lumber Co. v. Lumber Co., 137-439; Stancill v. Spain, 133-79; Wilson v. Markley, 133-616; Carr v. Askew, 94-212.

528. Of issues of fact. Every issue of fact joined on the pleadings, and inquiry of damages required to be tried by a jury, shall be tried at the term of the court next ensuing such joinder of issue or order for inquiry: Provided, such issue shall have been joined or order for inquiry made, more than thirty days before such term, but if not, they shall be tried at the second term after such joinder or order.

Code, s. 400; C. C. P., s. 226. **Where at trial term an amended answer to an amended complaint raises additional issues, defendant entitled to continuance:** Dobson v. R. R., 129-289. **Section referred to:** State v. Spivey, 132-990; State v. Smarr, 121-670; Denmark v. R. R., 107-188.

529. Issues of fact before the clerk; bond for cost. All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term of such court, and in case of such transfer neither party shall be required to give an undertaking for costs.

Rev. 1905. **See section 717.**

530. Continuance before term; affidavit for. Any party to an action may apply to the court in which it is pending, or to the judge thereof, after three days' notice in writing to the adverse party, to have the trial deferred to a term subsequent to that in which it is regularly triable; such application must be made thirty days before the trial term, and must be on affidavit. The court or judge may defer the trial as asked for, on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial; and,

2. That by reason of circumstances beyond his control, which he shall set forth, he can not have a fair trial at the reguar trial term; if the application is made by reason of the expected absence of a witness, it shall state the name and residence of the witness, the facts expected to be proved by him, and the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant shall in all cases pay the costs of the application.

Continuances are not favored by the law: Wagon Co. v. Bostic, 118-759. **Where, pending action for divorce, defendant becomes insane, the cause will be continued as long as there is a hope of the defendant's regaining reason:** Stratford v. Stratford, 92-297—**but when all hope gone, semble that plaintiff allowed to proceed,** Ibid.

Code, s. 401; C. C. P., s. 227.

531. Continuance in term. The judge at any time during the term at which an action is triable, may postpone the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.

2. That he can not have a fair trial at that term, by reason of circumstances stated, and if the ground of application be the nonattendance of a witness, the affidavit shall contain the particulars

required by subdivision two of the preceding section. Unless the applicant shall also set forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in the preceding section, and that his application is made as soon as it reasonably could be after the knowledge of such facts, the postponement shall not be granted, except on the terms of the payment of the costs in the action for the term.

Code, s. 402; C. C. P., s. 228; R. C., c. 31, s. 57.

The matter of continuing causes is within the discretion of the presiding judge and his discretion is not reviewable unless it is grossly abused: Lanier v. Ins. Co., 142-14; State v. Sultan, 142-569; State v. Dewey, 139-560; Slingluff v. Hall, 124-397; Wagon Co. v. Bostic, 118-758; Banks v. Mfg. Co., 108-282; Dupree v. Ins. Co., 92-417; McCurry v. McCurry, 82-296; Gay v. Brookshire, 82-411; State v. Vann, 84-722; State v. Scott, 80-365; State v. Lindsey, 78-499; Moore v. Dickson, 74-423; Austin v. Clarke, 70-458; State v. Duncan, 28-98; Armstrong v. Wright, 8-93— **or unless it affects a substantial right,** Stratford v. Stratford, 92-297— **though an appeal is useless, it working a continuance of itself,** Jaffray v. Bear, 98-58; Isler v. Dewey, 79-1.

GROUNDS OF CONTINUANCE. Insanity of party since action brought: Stratford v. Stratford, 92-297. **Amendment of pleadings causing surprise;** Martin v. Bank, 131-121. **Amendment of pleading producing other issues,** Dobson v. R. R., 129-289. **New evidence discovered:** Herndon v. R. R., 121-498.

NOT GROUND OF CONTINUANCE. The fact that attorney in case is son of trial judge: Allison v. R. R., 129-336. **Where witnesses absent but it appeared they had not been subpoenaed while party had ample opportunity to subpoena them:** McQueen v. Bank, 111-509. **Where absent witness would only be competent after verdict in mitigation of sentence:** State v. Sheppard, 1-51.

An admission of fact made to prevent a continuance for absence of witness can not be used in a subsequent trial, the witness being present: Cutler v. Cutler, 130-1. **It is error to order defendant's affidavit for continuance in a crminal case read to jury, he objecting:** State v. Twiggs, 60-142.

532. Counter affidavits as to continuance. It shall be competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. And the judge shall not allow such continuance unless he shall be satisfied, after thorough examination of the evidence as aforesaid, that the ends of justice demand it.

1885, c. 394.

533. Order of business. The criminal calendar shall be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The

issues on the civil calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

Code, s. 403; C. C. P., s. 229.

534. Separate trials, when. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

Code, s. 407; C. C. P., s. 230. **Severance is not a matter of right, but is discretionary with judge and his decision is not reviewable, except when discretion abused; it is like dividing the action into several suits with the usual provisions for costs, etc.;** State v. Carraway, 142-575; Bryan v. Spivey, 106-95; State v. Moore, 120-570; State v. Finley, 118-1161; State v. Jackson, 112-851; State v. Oxendine, 107-783; State v. Gooch, 94-1006; State v. Smith, 24-402; State v. Dixon, 78-558; State v. Duncan, 28-98; State v. Lindsey, 78-499; State v. Scott, 80-365. **Where there is misjoinder of parties the court in its discretion can divide the action:** Pretzfelder v. Ins. Co., 116-496; see also section 476.

535. Judge to explain law; express no opinion on facts. No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.

Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452.

JUDGE TO EXPRESS NO OPINION. Judge must not at any time during trial express an opinion on the weight of the evidence, nor make any remark from which an inference can be drawn as to his opinion of the facts: State v. Rwy., 145-269; Smith v. Moore, 145-570; Universal Metal Co. v. Railroad, 145-293; Withers v. Lane, 144-184; Dobbins v. Dobbins, 141-213; Kearns v. R. R., 139-483; Earnhart v. Clement, 137-95; Harper v. Anderson, 130-358; State v. McDowell, 129-523; Neal v. R. R., 126-653; Davis v. Blevins, 125-433; Bank v. Gilmer, 116-684; Young v. Construction Co., 109-618; Albertson v. Terry, 109-10; State v. Hardee, 83-619; Fickey v. Merrimon, 79-585; March v. Verble, 79-19; State v. Browning, 78-555; State v. Dancy, 78-437; State v. Locke, 77-481; State v. Dixon, 75-275; State v. Dick, 60-440; State v. Allen, 48-257; Nash v. Morton, 48-3; Powell v. R. R., 68-395; State v. Cardwell, 44-245; State v. Presley, 35-494; State v. Angel, 29-27; State v. Johnson, 23-358; Reel v. Reel, 9-63; Orbison v. Morrison, 7-551; Tate v. Greenlee, 7-556. **The "facts" referred to are those in dispute:** State v. Angel, 29-27.

The judge may violate the rule as to expressing opinion by his manner and emphasis: Withers v. Lane, 144-184, and cases cited; Reiger v. Davis,

67-185; State v. Dancy, 78-437; State v. Brown, 67-435—**but such manner and emphasis must be so set out that the supreme court can judge of it,** Davis v. Blevins, 125-433; Reiger v. Davis, 67-185; State v. Jones, 67-285; **Remarks by the court of doubtful propriety are not ground of exception where it appears they did no harm to party excepting:** State v. Brabham, 108-793. **Remarks by judge before trial:** State v. Jacobs, 106-695; State v. Howard, 129-584—**by bystander,** State v. Jackson, 112-851. **It must appear to the supreme court with ordinary certainty that the remarks or actions of the judge were likely to have had an unfair influence or to have conveyed to the jury his opinion on the weight of the testimony:** State v. Jones, 67-285; State v. Lipsey, 14-485. **It is only when the law gives to testimony an artificial weight that the judge is at liberty to express an opinion as to its weight:** Bonner v. Hodges, 111-66.

Instances of expression of opinion, and of conduct likely to influence the jury: State v. Seaboard Air Line, 145-570; Universal Metal Co. v. Railroad, 145-293; Perry v. Perry, 144-328; State v. Simmons, 143-613; State v. Davis, 136-568; Faulkner v. King, 130-494; State v. McDowell, 129-523; Marcom v. Adams, 122-223; Kinney v. R. R., 122-961; Threadgill v. Comrs., 116-616; Sherrill v. Tel. Co., 116-655; Fleming v. R. R., 115-699; Bonner v. Hodges, 111-66; State v. Jenkins, 85-544; State v. Dancy, 78-437; State v. Sykes, 79-618; Powell v. R. R., 68-395; State v. Parker, 66-624; State v. Simmons, 51-21; Melvin v. Easley, 46-386; State v. Thomas, 29-381.

Instances where court held did not amount to an expression of opinion or an invasion of jury's prerogative: Lewis v. Rwy., 132-382; State v. Edwards, 126-1053; Means v. R. R., 126-424; State v. Chastain, 104-904; Davis v. Blevins, 125-433; State v. Robertson, 121-551; State v. Dewey, 139-566; Garrett v. Pegram, 120-288; State v. Journigan, 120-568; Little v. R. R., 119-771; Williams v. Lumber Co., 118-928; Bank v. Gilmer, 116-684; Osborne v. Wilkes, 108-651; Berry v. Hall, 105-164; DeBerry v. Nicholson, 102-465; State v. Brown, 100-519; State v. Freeman, 100-429; DeBerry v. R. R., 100-310; State v. Debnan, 98-712; Ferrall v. Broadway, 95-551; State v. Gardner, 94-953; Greenlee v. Greenlee, 93-278; State v. McNeill, 93-553; Buxly v. Buxton, 92-479; Comrs. v. Lash, 89-159; Stilley v. McCox, 88-18; State v. Robertson, 86-628; Flynt v. Bodenhamer, 80-205; State v. Laxton, 78-564; State v. Neville, 51-423; State v. Butner, 76-118; State v. Jones, 67-288; State v. Davis, 15-612—**but held so here because corrected later by the court,** State v. May, 15-328.

THE CHARGE. The manner in which the judge is to state the law and assist the jury in applying the law to the facts must be left to a great extent to the good sense and sound judgment of the judge: State v. Beard, 124-811; **overruling** State v. Boyle, 104-800 on the same point; see also Holly v. Holly, 94-96. **The judge must charge on all the different aspects presented by the evidence; should give the law applicable to every state of facts which may be reasonably assumed:** State v. Rippy, 104-756; State v. Brewer, 98-607; State v. Gilmer, 97-429; Spence v. Clapp, 95-545; State v. Dunlop, 65-288; State v. Matthews, 78-523; State v. Gaskins, 93-547—**must divest the issues, so far as practicable, of all irrelevant matter and submit only those aspects presented by the evidence,** State v.

Wilson, 104-868; State v. Haney, 19-390; State v. Moses, 13-452; State v. Lipsey, 14-485—**should array on both sides the evidence bearing upon the material issues and apply the principles of law thereto; must not charge on the contentions of one side:** Jarrett v. Trunk Co., 144-299, and cases cited; Boon v. Murphy, 108-187; State v. Brady, 107-822; State v. Pritchett, 106-667; Bank v. Sumner, 119-591; State v. Jones, 97-469; Phifer v. Alexander, 97-335; State v. Jones, 87-547; Wilson v. Taylor, 98-275; State v. Rogers, 93-523—**must plainly and correctly state the evidence and declare and explain the law arising thereon:** Withers v. Lane, 144-184; State v. Green, 134-661; State v. Fulford, 124-798; State v. Brady, 107-822; State v. Pritchett, 106-667; State v. Lawson, 98-759; State v. Jones, 97-473; State v. Chavis, 80-353; State v. Cain, 47-201; State v. Peace, 46-251; State v. Rash, 34-382; State v. Martin, 24-101; State v. Dunlap, 65-288; State v. Moses, 13-452—**should use the words "if you find from the evidence such to be the facts" and not "if you believe such fact or facts,"** Sossamon v. Cruse, 133-470; Merrill v. Dudley, 139-57; State v. Barrett, 123-753; State v. Green, 134-658; see also State v. Horton, 100-443—**may instruct jury, where no conflict of evidence, that if they believe the witnesses they should find accordingly:** McQuay v. R. R., 109-585; State v. Dixon, 104-704; Nelson v. Ins. Co., 120-302; State v. Neal, 120-613; State v. Journigan, 120-568; State v. Woolard, 119-779; Love v. Gregg, 117-467; Harmon v. Hunt, 116-678; Purifoy v. R. R., 108-100; State v. McLain, 104-894; Chemical Co. v. Johnson, 101-223; State v. Jones, 98-651; State v. Crane, 95-619; Hannon v. Grizzard, 89-115; State v. Burke, 82-551; Gaither v. Ferebee, 60-303; Sneed v. Creath, 8-309—**may say to the jury that the testimony of a man of good character is entitled to more weight than that of a man who has proven a bad character:** State v. Gay, 94-814—**may charge that there is no evidence to support contention of defendant, when such is the case,** State v. Allen, 48-257; State v. Sowls, 61-151—**may recapitulate fairly the contentions of counsel as to the bearing of the evidence upon the issues,** Clark v. R. R., 109-430—**should charge as to interest party entitled to:** Brem v. Covington, 104-589; Jolly v. Bryan, 86-458; Barlow v. Norfleet, 72-535—**should charge "If jury believe from the testimony" not, "if jury believe the testimony",** State v. Horton, 100-443; State v. Barrett, 123-753; see State v. Green, 134-658; Sossamon v. Cruse, 133-470; Merrill v. Dudley, 139-57—**may, when he hands the written charge to the jury, at their request send written memoranda of certain dates necessary for them to have to arrive at conclusions,** State v. Cagle, 114-835—**can state that evidence of defendant, if believed, should be given same weight as any other witness,** State v. Gilmer, 97-429—**should, where there is no evidence which in any aspect will warrant the jury in drawing an inference or conclusion as to an issue, so state to the jury,** Harper v. Anderson, 130-538; Royster v. Stallings, 124-55; State v. Byrd, 121-684; Barber v. Roseboro, 97-192; Willis v. Branch, 94-142; State v. McKinsey, 80-458; Witkowsky v. Wasson, 71-451; State v. Dunlop, 65-288; State v. Allen, 48-257; Wells v. Clements, 48-168; Reed v. Shenck, 13-415—**must, if requested in apt time, caution jury as to the credibility of suspicious testimony of accomplices, near relatives, etc.;** Bonner v. Hodges, 111-66; Berry v. Hall, 105-164; Ferrall v. Broadway, 95-551; State v. Nash, 30-35—**must, in a**

criminal action, give such instructions as will enable jury to understand nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of accused: State v. Godwin, 145-; State v. Fulford, 124-801; State v. Kale, 124-818—may recall jury for further instructions, Lafoon v. Shearin, 95-391; Scott v. Green, 89-278—may recapitulate confessions illegally obtained in order to caution jury not to consider them, State v. Gregory, 50-315—may state to jury that there is no contradiction between witness, if so, State v. Horan, 61-571—can say that evidence as to guilt of white man need not be any stronger than to convict a negro, State v. Norwood, 74-247—may lay down any proposition that is universally admitted, State v. Gay, 94-814—may comment upon deportment of witness, when, State v. Nat, 51-114—may tell jury it is their province to judge of the credibility of a witness, State v. Spencer, 64-316—may tell jury they are not concluded by the testimony of an expert, one having testified, State v. Owen, 72-605—may charge that if they believe the evidence of defendant he is guilty, State v. Riley, 113-648; State v. Woolard, 119-779—may inform the jury of the punishment prescribed if prisoner found guilty, State v. Garner, 129-536.

The judge should not encumber the case by an instruction upon hypothetical state of facts; State v. Wilson, 104-868; State v. Craine, 120-601; State v. Hicks, 125-636; Stewart v. Carpet Co., 138-60; Burton v. Rosemary Mfg. Co., 132-17; Morrison v. Rwy., 123-414; Leak v. Covington, 99-559; State v. Lambert, 93-618; State v. Anderson, 92-732; State v. Harrison, 50-115; State v. Collins, 30-407—must not weigh the evidence and declare the result to the jury as a matter of law; Miller v. R. R., 143-115; State v. Green, 134-658; Harper v. Anderson, 130-538; Vanderbilt v. Brown, 128-498; Benton v. Toler, 109-238; McCanless v. Flinchum, 98-358—must not give conflicting or inconsistent instructions: Mott v. Tel. Co., 142-532; Pegram v. R. R., 139-303; Drum v. Miller, 135-218; Edwards v. R. R., 132-101; State v. Clark, 134-712; Edwards v. R. R., 129-78; Bragaw v. Supreme Lodge, 124-154; Wright v. R. R., 123-282; Tillett v. R. R., 115-662—must not simply call attention to the issues without further instruction, Phifer v. Alexander, 97-335—need not recapitulate all the evidence to the jury, State v. Ussery, 118-1177; Bank v. Sumner, 119-591; Boon v. Murphy, 108-187; State v. Jones, 97-469; State v. Jones, 87-547; Wiseman v. Penland, 79-197; State v. Sykes, 79-618; State v. Caviness, 78-484; State v. O'Neal, 29-251; State v. Morris, 10-388; State v. Haney, 19-390; State v. Lipsey, 14-485; State v. Moses, 13-457—must not give to the jury an abstract proposition of law without any evidence to support it, Williams v. Harris, 137-460; Leach v. Linde, 108-547—should not direct a verdict when evidence conflicting, Davis v. Traction Co., 141-134; Corporation Com. v. R. R., 137-1; Gordon v. Rwy., 132-565; House v. R. R., 131-103; Harper v. Anderson, 130-538; Parks v. Rwy. Co., 124-136; Rickert v. Rwy., 123-255; Thompson v. Winston, 118-662; Burrus v. Ins. Co., 121-62; Everett v. Receivers, 121-519; Hardison v. R. R., 120-492; Harris v. Carrington, 115-187; Curtis v. Lumber Co., 113-417; Haynes v. Rogers, 111-228; Asbury v. Fair, 111-251; Buffkin v. Eason, 110-264; Farthing v. Dark, 109-291; Machine Co. v. Lumber Co., 109-576; State v. Weathers, 98-685; Long v. Hall, 97-286; Laffoon v. Shearin, 95-391; Morgan v. Lewis,

95-296; State v. Rollins, 113-723; Weisenfield v. McLean, 96-248; State v. Rogers, 93-523; Brazil v. R. R., 93-313; see also Harris v. Murphy, 119-34—**should not direct a verdict at all in criminal cases even though evidence not conflicting,** State v. Godwin, 145-461; and cases cited; State v. Hill, 141-769; State v. Riley, 113-648; State v. Winchester, 113-641; but see State v. Dixon, 104-704—**must not state a fact as to which the evidence is conflicting,** Davis v. Summerfield, 133-325; Fleming v. R. R., 115-676; Emery v. R. R., 102-209; Bumgardner v. R. R., 132-438—**must not charge on a selected fact but charge the law on the whole case,** Dobson v. Wisenhunt, 101-645; Michael v. Foil, 100-178—**must not omit essential ingredient in undertaking to state the law applicable to a material fact,** Rumbough v. Sackett, 141-495; Pierce v. Alspaugh, 83-258; State v. Austin, 79-624; Bynum v. Bynum, 33-632; State v. O'Neal, 29-251; State v. Johnson, 23-354—**need not repeat instructions already given, even when specially asked to do so by prayer,** Sprinkle v. Wellborn, 140-163—**must not direct verdict in favor of one upon whom the burden of proof rests,** House v. R. R., 131-103; Boutten v. R. R., 128-337; Mfg. Co. v. R. R., 128-280; Crews v. Cantwell, 125-516; Gates v. Max, 125-143; Cox v. R. R., 123-604; Collins v. Swanson, 121-67; Eller v. Church, 121-269; Bank v. School Com., 121-107; White v. R. R., 121-484—**should not give confusing instructions,** Alexander v. Gibbon, 118-796—**must not single out issues and charge specially as to them and give only general instructions as to other,** Knight v. R. R., 110-58; State v. Ellick, 60-450—**should not merely deal in generalities such as just reading headnotes of cases without making any application of them to the facts,** State v. Groves, 121-563; State v. Jones, 87-547—**must not charge upon an aspect of the case not presented by the evidence,** State v. McKinney, 111-683; Stewart v. Carpet Co., 138-60; Griffin v. R. R., 137-247; Stewart v. R. R., 136-385; Bryan v. R. R., 134-538; Joines v. Johnson, 133-487; Trust Co. v. Benbow, 131-413; Carson v. R. R., 128-95; Felmet v. Exp. Co., 123-499; Greer v. Herren, 99-492; Carpenter v. Tucker, 98-316; Burwell v. R. R., 94-451; State v. Gooch, 94-987; State v. Hunter, 94-829; State v. Speaks, 94-865; State v. Smith, 100-550; but see Penniman v. Alexander, 115-555—**must not submit to jury evidence that was merely conjectural and speculative,** Lewis v. Steamship Co., 132-904—**must not use broad statement calculated to mislead and which may mislead,** Fleming v. Rwy. Co., 131-476—**should not have referred, in an action for negligence in delivering a telegram, to the "proverbial slowness of the messenger boy,"** Meadows v. Tel. Co., 131-73—**should not direct a verdict, after plaintiff rests, and refuse to allow defendant to introduce competent evidence,** Porter v. White, 127-73—**should not single out the testimony of one witness and charge the jury that if they believe the testimony of that witness they would find in accordance therewith, when there are several witnesses who testify in regard to the same matter,** Weisenfield v. McLean, 96-248; State v. Baker, 69-147; State v. Weathers, 98-685—**need not charge on a particular point when no special instructions asked:** Patterson v. Mills, 121-259, and cases therein cited; also see section 538—**should not charge that "if the jury believe a certain state of facts the plaintiff is not entitled to recover,"** Farrell v. R. R., 102-390—**should not charge on matters not pertinent to the issues,** Gaines v. McAllister, 122-340—**must**

not say which of two conflicting statements of witness is correct, Ward v. Mfg. Co., 123-248—must not tell jury to "adopt most plausible theory" in a criminal case, State v. Dewey, 139-556—must not say that evidence of character is of little weight when facts are postively sworn to, State v. Lipsey, 14-485—must not state a hypothesis in a criminal action without evidence to support it, State v. Lizemore, 52-206—must not, in his charge on homicide, make a hypothesis omitting the leading fact which goes to acquit the accused, State v. Floyd, 51-392—must not charge jury to take the testimony of a certain witness as true, State v. Parker, 66-624—must not charge that swearing falsely on trial is an additional evidence of guilt, State v. Byers, 80-426—must not charge that where one juror doubts guilt of prisoner other jurors should yield to him, State v. Bowman, 80-432—must not instruct that defendant be convicted of murder in first degree when no evidence introduced for him, State v. Gadbury, 117-811—must not charge that there is a presumption that men testify truly and not falsely, State v. Jones, 77-520.

In reviewing the testimony to the jury, it is sufficient if the judge gives the substance: State v. Gould, 90-658. If defendant wants any special portion of evidence recapitulated he must request it in apt time: State v. Ussery, 118-1177. Where counsel and judge disagree as to the testimony the judge may submit his notes to the jury and tell them they are to say what the testimony is and they could refresh their memories by his notes: State v. Keath, 83-626; Glover v. Flowers, 101-134; Spence v. Baxter, 95-170. Although the trial judge lays down the law correctly, unless it is applicable to the facts of the case and warranted by the evidence, a new trial will be granted: King v. Wells, 94-344. Judge may correct errors previously made in conduct of trial: Trust Co. v. Forbes, 120-355; Wilson v. Mfg. Co., 120-94; Toole v. Toole, 112-152; State v. Keen, 95-646; Lewis v. R. R., 95-179; State v. McNair, 93-628; Gilbert v. James, 86-244; State v. Robbins, 48-250; State v. May, 15-328—but in some cases of conflicting and confusing instructions it is held that judge can not sufficiently correct his error, Williams v. Haid, 118-481; Tillett v. R. R., 115-662; State v. Fuller, 114-885; Taylor v. Taylor, 112-27; Bragaw v. Supreme Lodge, 124-154; Alexander v. Gibbon, 118-796. Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict: Davis v. Keen, 142-496.

Relative rights and powers of court and jury in actions involving questions of negligence and contributory negligence: Russell v. R. R., 118-1098; Parks v. Rwy., 124-136; White v. R. R., 121-484; McCracken v. Smathers, 119-617; Chesson v. Lumber Co., 118-59; Knight v. R. R., 110-58; Bolden v. R. R., 123-614; Ellerbe v. R. R., 118-1024; Thompson v. Winston, 118-662; McQuay v. R. R., 109-585; Wright v. R. R., 127-225.

Where a charge covers the entire case and submits it fairly and correctly to the jury under all circumstances, parties have no just ground of complaint: Marable v. R. R., 142-557; Gilliland v. Bd. of Ed., 141-482; State v. Parker, 61-473; State v. Shaw, 49-440; State v. Exum, 138-599.

Charging quantum of proof in actions which were formerly suits in equity: Perry v. Ins. Co., 137-402; Lehew v. Hewett, 138-6; 130-22; Gaskins v. Allen, 137-426; Earnhart v. Clement, 137-91; Chaffin v. Mfg. Co.,

135-95; Jones v. Warren, 134-390; Wilson v. Brown, 134-400; Warehouse Co. v. Ozment, 132-839; Ray v. Long, 132-891; Sallenger v. Perry, 130-134; Porter v. White, 128-45; Watkins v. Williams, 123-174; Benedict v. Jones, 129-470; Hemmings v. Doss, 125-400; Nimocks v. McIntyre, 120-325; Kelly v. McNeill, 118-354; Cobb v. Edwards, 117-244; Summers v. Moore, 113-394; Faison v. Hardy, 114-58; McMillan v. Baxley, 112-578; Hamilton v. Buchanan, 112-463; Haynes v. Rogers, 111-228; Bergeron v. Ins. Co., 111-45; Bonner v. Hodges, 111-66; Cornelius v. Brawley, 109-542; Berry v. Hall, 105-154; Harding v. Long, 103-1; Brown v. Mitchell, 102-347; Kornegay v. Everett, 99-30; Loftin v. Loftin, 96-94; Ely v. Early, 94-1—**in other actions,** Hodges v. R. R., 122-992; Blackburn v. Ins. Co., 116-821; Bergeron v. Ins. Co., 111-45; Perry v. Ins. Co., 137-402; State v. Jaynes, 78-504; State v. Carson, 115-743; State v. Starnes, 94-973; State v. Gee, 92-756; State v. Josey, 64-56, see also under "charging as to reasonable doubt" infra.

Withdrawing case from the jury and directing verdict where not more than scintilla of evidence: Cable v. R. R., 122-892; Spruill v. Ins. Co., 120-141; and cases therein cited; Royster v. Stallings, 124-55; Oakley v. Tate, 118-361; State v. Green, 117-695; Covington v. Newberger, 99-523, and cases therein cited; Smith v. McGregor, 96-101; State v. Powell, 94-965. **See cases under paragraph "the charge" where evidence not conflicting; also cases under section 539. An excerpt from a charge to the jury is to be construed with the context and in connection with the whole charge:** State v. Lilliston, 141-857; Liles v. Lumber Co., 142-39; Gilliland v. Bd. of Education, 141-482; State v. Tilley, 25-424; State v. Boon, 82-637; State v. Holman, 104-867. **Judge may, when misled in making his charge, call back the jury and remove the wrong impression made:** Buggy Co. v. Dukes, 140-393. **An error in instruction is not cured by subsequently correctly stating the law:** State v. Morgan, 136-628; Tillett v. R. R., 115-662; Williams v. Haid, 118-481; State v. Fuller, 114-885; Wilson v. R. R., 142-333; but see State v. Sanders, 84-728. **Trial judge going to jury room, in absence of counsel, and asking if they were likely to agree, held no error:** Willeford v. Bailey, 132-402. **Where judge states that he adverted fully to the evidence, presumed that statute complied with,** Upchurch v. Robertson, 127-127; Paper Co. v. Chronicle, 115-147.

Where there is any evidence to support a contention it should be submitted to the jury: Brown v. Power Co., 140-333; Dorsett v. Mfg. Co., 131-254; Bolden v. R. R., 123-614; Wood v. Bartholomew, 122-177; Powell v. R. R., 125-370; Cowles v. McNeill, 125-385; Gates v. Max, 125-139; Cox v. R. R., 123-604; State v. Kiger, 115-746; Haynes v. Rogers, 111-228; Machine Co. v. Lumber Co., 109-576. **It not appearing affirmatively that there was error in the judge's charge, this court will assume it to be correct:** State v. Brabham, 108-793; State v. Dickerson, 98-708; Southerland v. R. R., 106-100; State v. Powell, 106-635; Paper Co. v. Chronicle, 115-147; Upchurch v. Robertson, 127-127. **Use of word "plaintiff" for "defendant" not prejudicial, when:** Pittman v. Weeks, 132-81. **Charging the measure of damages:** Watson v. R. R., 133-189. **Charging as to "reasonable doubt" in criminal actions:** State v. Whitson, 111-695; State v. Brabham, 108-793; State v. Debnam, 98-712; State v. Matthews, 66-106;

State v. Sears, 61-146; State v. Parker, 61-473; State v. Fulkerson, 61-233; State v. Oscar, 52-305; State v. Hodge, 61-231; State v. Frank, 50-384; State v. Johnson, 48-266; State v. Cochran, 13-63. **Whether there is evidence is for the court, but it is for the jury to determine the weight of it when there is any:** State v. Powell, 94-965; State v. Simmons, 143-618; Benton v. Toler, 109-238; State v. Goings, 101-706; State v. McBryde, 97-393; Wittkowsky v. Wasson, 71-451; State v. Moses, 13-452.

Section merely referred to: Duckworth v. Orr, 126-674; State v. Johnston, 119-898; McMillan v. Baxley, 112-587; Dupree v. Ins. Co., 92-433. **Charging as to confession of prisoner,** State v. Patrick, 48-443; State v. Davis, 63-578.

ERROR IN CHARGE HARMLESS OR CURED. Instances of harmless error in making charge: Dills v. Hampton, 92-565; Jones v. Call, 93-170; Barbee v. Scoggins, 121-125; Mitchell v. Hoggard, 108-353; Kiser v. Combs, 114-640; State v. Parker, 106-711; State v. Gardner, 94-953. **Where judge charges incorrectly on issue of law, but jury finds it properly, the error is cured:** State v. Grady, 83-643; Hinshaw v. R. R., 118-1047; Moore v. Parker, 91-275; Terry v. R. R., 91-236; Jones v. Bunker, 83-324; Glenn v. R. R., 63-510; Johnson v. Ray, 72-273.

JUDGE ADMONISHING JURY TO AGREE. The following cases are instances of the judge's admonishing the jury as to their duty to agree: Bank v. Gilmer, 116-684; Osborne v. Wilkes, 108-651; Warlick v. Plonk, 103-81; Hannon v. Grizzard, 89-115; Nash v. Morton, 48-3.

536. Instructions in writing, when. Every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action.

Code, s. 414; C. C. P., s. 238. **The word "instructions" construed with reference to this section:** State v. Dewey, 139-556. **The judge must put the charge as to the law in writing, if either party requests it in apt time:** Sawyer v. Lumber Co., 142-162; State v. Crowell, 116-1052; State v. Adams, 115-783; Ward v. R. R., 112-168; State v. Young, 111-715; Jenkins v. R. R., 110-438; Drake v. Connelly, 107-463; Lowe v. Elliott, 107-718; Dupree v. Ins. Co., 92-417; Phillips v. R. R., 130-582; Currie v. Clark, 90-355—**but he can not be forced to put the recapitulation of evidence in writing:** Sawyer v. Lumber Co., 142-162; Jenkins v. R. R., 110-442; Dupree v. Ins Co., 92-417. **An exception to judge's failure to put charge in writing is taken in time if set out in case on appeal:** Sawyer v. Lumber Co., 142-162, and cases cited; but see Phillips v. R. R., 130-582. **Requests that charge be put in writing awkwardly made and not considered a proper request:** Phillips v. R. R., 130-582. **He must read the charge to the jury, when requested to be put in writing, as written, and sign and file same as a part of the record:** State v. Dewey, 139-564; Justice v. Gallert, 131-394; see also Cressler v. Asheville, 138-485. **Section merely referred to:** Cameron v. Power Co., 137-101; Justice v. Gallert, 131-393.

537. Written instructions in jury room, when. Whenever a judge shall put his instructions to the jury in writing either of his own will or at the request of any party to an action on trial, he shall, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury shall return said instructions with their verdict to the court.

1885, c. 137. **At request of either party judge may permit the jury to take instructions to jury room:** Little v. R. R., 119-771; State v. Cagle, 114-835—**also at the request of a juror:** Gaither v. Carpenter, 143-240—**and it is not error, after they have retired, to send upon their request, a written memorandum of certain dates necessary to be remembered in reaching a proper conclusion:** State v. Cagle, 114-835—**or to send deposition read on trial, where all request it:** Lafoon v. Shearin—**but judge can not send papers read in evidence to the jury when objection made:** Williamson v. Thomas, 78-47; Burton v. Wilkes, 66-604; Watson v. Davis, 52-178. **Where charge taken to jury room, but instructions prayed for and given were not taken, not error where counsel present and no objection raised before verdict:** Gaither v. Carpenter, 143-240. **Reason for the law compelling judge to put charge in writing stated to be so as to provide for jurors taking it with them:** State v. Dewey, 139-561; Jenkins v. R. R., 110-442; State v. Crowell, 116-1058.

538. Requests for instructions. Counsel praying of the judge instructions to the jury, shall put their request in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They shall be filed with the clerk as a part of the record.

Code, s. 415; C. C. P., s. 239. **Where no instructions prayed for in writing it is not error to fail to charge on a certain aspect of a case:** Nelson v. Tob. Co., 144-418; Jarrett v. Trunk Co., 144-299; Gaither v. Carpenter, 143-240; State v. Worley, 141-764; Yow v. Hamilton, 136-357; Justice v. Gallert, 131-393; Russell v. R. R., 118-1098; State v. Ridge, 125-655; Howard v. Turner, 125-107; Patterson v. Mills, 121-259; State v. Groves, 119-822; State v. Ussery, 118-1177; Boon v. Murphy, 108-187; Nelson v. Ins. Co., 120-302; Kendrick v. Dellinger, 117-491; State v. Varner, 115-744; Hooks v. Houston, 109-623; State v. Fleming, 107-909; Bethea v. R. R., 106-279; McFarland v. Southern Imp. Co., 107-368; State v. Pritchett, 106-667; Thompson v. Tel. Co., 107-449; Taylor v. Plummer, 105-56; State v. Bailey, 100-528; State v. Debnam, 98-712; King v. Blackwell, 96-322; Willey v. R. R., 96-408; Morgan v. Lewis, 95-296; Branton v. O'Briant, 93-99; Davis v. Council, 92-725; Fry v. Currie, 91-436; State v. Nicholson, 85-548; Terry v. R. R., 91-236; State v. Hardee, 83-619; State v. Caviness, 78-484.

PRAYERS MADE HOW AND WHEN. Prayers for instructions must be put in writing: Craddock v. Barnes, 142--89; Merrell v. Whitmire, 110-367; Lowe v. Elliott, 107-720; Pleasants v. R. R., 95-198—**and oral prayers may be disregarded:** State v. Horton, 100-443; Justice v. Gallert, 131-393. **Prayers should be appropriately addressed to the issue so as to avoid confusion:** Overcash v. Electric Co., 144-572. **The time within**

which special instructions should be requested must be left to the sound discretion of the presiding judge and this court will be slow to review or interfere with the exercise of that discretion, but he should so order his discretion as to afford counsel reasonable time to prepare and present prayers; they will not be allowed to be filed after argument begins without leave of court: Universal Metal Co. v. Durham Rwy., 145-293; Craddock v. Barnes, 142-89; Shober v. Wheeler, 113-370; apparently overruling the following: State v. Hairston, 121-579; State v. Ussery, 118-1177; Luttrell v. Martin, 112-593; Ward v. R. R., 112-168; Merrell v. Whitmire, 110-367; Blackburn v. Fair, 109-465; Posey v. Patton, 109-455; Grubbs v. Ins. Co., 108-472; Marsh v. Richardson, 106-539; Taylor v. Plummer, 105-56; State v. Rowe, 98-629; Owens v. Phelps, 95-286; Davis v. Council, 92-725; State v. Barbee, 92-820; Powell v. R. R., 68-395.

NECESSITY OF PRAYERS. When fuller instructions than those given are desired they must be asked for: Ives v. R. R., 142-131; Simmons v. Davenport, 140-407; Turrentine v. Wellington, 136-313; State v. Kinsauls, 126-1097; Patterson v. Mills, 121-258; Nelson v. Ins. Co., 120-306; Boon v. Murphy, 108-187; Willey v. R. R., 96-408; Morgan v. Lewis, 95-296; Morgan v. Smith, 77-37.

WHERE REQUESTED INSTRUCTIONS SUBSTANTIALLY GIVEN. Instructions need not be in the very words asked, if the judge in his charge substantially covers the same ground giving the same application of the law to the evidence: Horton v. R. R., 145-132; Moseley v. Johnson, 144-257; State v. Burnett, 142-577; Horne v. Power Co., 141-50; Brown v. Power Co., 140-333; Yarborough v. Hughes, 139-199; Griffin v. R. R., 138-55; State v. Davis, 134-633; Harris v. R. R., 132-160; State v. Wilcox, 132-1120; Wilkie v. R. R., 127-203; Norton v.. R. R., 122-911; Cox v. R. R., 126-103; State v. Booker, 123-713; Edwards v. Phifer, 121-388; Mitchell v. Corpening, 124-472; State v. Mills, 116-992; Downs v. Highpoint, 115-182; Alexander v. R. R., 112-720; Leavering v. Smith, 115-385; Cornelius v. Brawley, 109-542; Whitford v. Newbern, 111-272; McMillan v. Baxley, 112-578; Black v. Black, 110-398; State v. Brabham, 108-793; Thompson v. Tel. Co., 107-449; Everett v. Williamson, 107-204; Bethea v. R. R., 106-279; Carlton v. R. R., 104-365; Michael v. Foil, 100-178; Conwell v. Mann, 100-234; Newby v. Harrell, 99-149; State v. Brewer, 98-607; State v. Jones, 97-469; Clements v. Rogers, 95-248; McDonald v. Carson, 94-497; State v. Anderson, 92-732; State v. McNeill, 92-812; Patterson v. McIver, 90-493; Overcash v. Kitchie, 89-384; Rencher v. Wynne, 86-269; State v. Hinson, 83-640; State v. Boon, 82-637; Brink v. Black, 77-59; State v. Scott, 64-586.

REFUSAL OF PROPER INSTRUCTIONS. Refusal to give proper instructions duly requested is error: Moseley v. Johnson, 144-257; Baker v. R. R., 144-36; Davis v. Evans, 139-440; Thompson v. Tel. Co., 106-549; State v. Gaskins, 93-547; Brink v. Black, 77-59—and are deemed excepted to, though exception is waived unless set out in case on appeal: State v. Blankenship, 117-808; Davis v. Duval, 112-833; Marshal v. Stine, 112-697; Taylor v. Plummer, 105-56; McKinnon v. Morrison, 104-354.

GENERALLY. Where instruction prayed for is correct in part but incorrect as an entirety, the trial judge is not called upon to dissect it

and give so much of it as is good: State v. Neal, 120-613; Harris v. R. R., 132-160; Vanderbilt v. Brown, 128-498. **Verdict may sometimes cure error in not giving instructions asked:** Andrews v. Tel. Co., 119-403. **It is the duty of the trial judge to give a requested prayer for special instruction, which is correct in itself, material to the case and based upon certain phases of facts reasonably assumed upon the evidence; and a general and abstract charge of the law applicable to the case is not sufficient. The error is not cured by giving such requested charge upon an unanswered issue concerning which the instruction was not asked:** Baker v. R. R., 144-36. **If party wishes to avail himself of the doctrine of res ipsa loquitur, he must pray for an instruction in due time:** Isley v. Bridge Co., 141-220. **Where erroneous instruction excepted to, party excepting may avail himself of the error though he asked no special instruction:** Chaffin v. Mfg. Co., 135-95.

539. Demurrer to evidence. When on trial of an issue of fact in a civil action, or special proceeding, the plaintiff shall have produced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment, as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the supreme court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant shall have the benefit of his exception on appeal to the supreme court. But after the motion is refused he may waive his exception and then introduce his evidence just as if he had not made the motion. But he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury shall have rendered its verdict, he shall have the benefit of such latter exception on appeal to the supreme court.

1897, c. 109; 1899, c. 131; 1901, c. 594. **The effect of this section upon the law existing prior to its passage:** Prevatt v. Harrelson, 132-252; Means v. R. R., 126-424. **This section applies to civil actions and special proceedings:** State v. Hagan, 131-803. **A demurrer to the evidence of the plaintiff admits the truth thereof and any reasonable inference that may be drawn therefrom:** Snider v. Newell, 132-614; Roscoe v. Lumber Co., 124-42. **As to whether the judge, in his discretion, can allow plaintiff, after motion to dismiss, to introduce further testimony;** Featherston v. Wilson, 123-623. **If there is sufficient evidence to support the finding of the jury, a motion as of nonsuit upon the evidence should be refused:** Brown v. Rwy., 144-634; Mfg. Co., v. Machine Works, 144-689; Bivings v. Gosnell, 133-574—**and in order to ascertain whether evidence sufficient to support a finding by the jury the plaintiff's evidence must be accepted as true and construed in a light most favorable to him:** Biles v. R. R., 143-78, 139-528; Gerock v. Tel. Co., 142-22; Bd. of Education v. Makely, 139-31; Craft v. R. R., 136-49; Hancock v. Comrs., 132-213; Snider v. Newell, 132-614; House v. R. R., 131-103; Hopkins v. R. R., 131-

147-335
147-201

463; Coley v. R. R., 129-413 and cases cited; Moore v. R. R., 128-455; Brinkley v. R. R., 126-88; Cowles v. McNeill, 125-385; Printing Co. v. Raleigh, 126-516; McMillan v. R. R., 126-725; Gates v. Max, 125-139; Cox v. R. R., 123-604; Cable v. Rwy., 122-892; Johnson v. Rwy., 122-955; Purnell v. R. R., 122-832; Spruill v. Ins. Co., 120-141; Collins v. Swanson, 121-67; Howell v. R. R., 124-24; Roscoe v. Lumber Co., 124-42; Dunn v. R. R., 124-252; Whitley v. R. R., 122-987; Bazemore v. Mountain, 121-59; Everett v. Receivers, 121-519—**and there must be more than a scintilla:** Bingham v. R. R., 130-625; Cogdell v. R. R., 129-398; Cobb v. Perry, 127-81; Gates v. Max, 125-139; Brinkley v. R. R., 126-88; Cable v. R. R., 122-892; Wood v. Bartholomew, 122-177. **Where evidence of plaintiff shows concurrent negligence of both plaintiff and defendant up to the last moment a judgment as of nonsuit is proper:** Neal v. R. R., 126-634.

If motion to nonsuit not allowed defendant may waive his exception and introduce his evidence just as if he had made no motion; Parlier v. R. R., 129-262; Means v. R. R., 126-424; Worth v. Ferguson, 122-381—**and he may again move to dismiss after all evidence on both sides is in, and if motion denied, after jury shall have rendered its verdict, he shall have benefit of such latter exception on appeal:** Miller v. R. R., 128-26; see also Parlier v. R. R., 129-263—**but is deemed to have waived exception, when motion not renewed:** Earnhardt v. Clement, 137-91; Blalock v. Clark, 137-140; see also McCall v. R. R., 129-298; Fritz v. R. R., 130-279. **Where motion as of nonsuit is not allowed in court below, but, on appeal, is allowed, on coming down of opinion the court below should dismiss:** Hollingsworth v. Skelding, 142-246.

Demurrers to evidence under act of 1897, prior to act of 1899: Parlier v. R. R., 129-262; Purnell v. R. R., 122-832; Worth v. Ferguson, 122-381; Wood v. Bartholomew, 122-177.

Not the intention of this section to make the weight and effect of evidence questions of law: Willis v. R. R., 122-905. **Cases based upon this section but not construing section:** Winders v. Hill, 144-614; Doggett v. Hardin, 132-690; Bessent v. Rwy. Co., 132-934; Shoaf v. Ins. Co., 127-312.

In case of nonsuit in action for negligence contributory negligence should not be considered: Whitesides v. Rwy., 128-229.

Where judge intimates an opinion on the law which lies at the foundation of the action, adverse to plaintiff, or excludes evidence offered by plaintiff which is material he may submit to nonsuit and appeal: Merrick v. Bedford, 141-505; Hayes v. R. R., 140-131; Hickory v. R. R., 138-311; Mobley v. Watts, 98-284; Tiddy v. Harris, 101-589; Hedrick v. Pratt, 94-101; Gregory v. Forbes, 94-221—**and the plaintiff's evidence is entitled to the most favorable interpretation:** McCaskill v. Walker, 145-252; Millhiser v. Leatherwood, 140-231—**but in the following cases his nonsuit and appeal held premature:** Merrick v. Bedford, 141-504; Midgett v. Mfg. Co., 140-361. **Where involuntary nonsuit reversed on appeal, parties start even again with trial de novo:** Hickory v. R. R., 138-311.

540. Jury trial waived, how. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and

with the assent of the court in other actions in the manner following:

See also annotations under section 519, as to waiver of trial by jury in references; see also generally: Armfield v. Brown, 70-27. **Counsel may waive jury trial without special authority:** Stevenson v. Felton, 99-58; see also White v. Morris, 107-92. **A reference by consent waives right of trial by jury:** Driller Co. v. Worth, 117-515; Grant v. Reese, 82-72; also see cases under sections 518 and 525. **As to whether jury trial may be waived in criminal actions appealed from justice where he has final jurisdiction;** see State v. Wells, 142-590. **The trial judge may disregard the agreement that a jury trial be waived:** Lumber Co. v. Lumber Co., 137-431. **Waiver of jury trial on questions of fact in special proceedings by failure to demand in time:** Navigation Co. v. Worrell, 133-93; Ledbetter v. Pinner, 120-455; Railroad v. Parker, 105-246. **The provision of the Federal Constitution that "no person shall be deprived of his property without due process of law" does not imply that all trials in state courts shall be by jury:** Caldwell v. Wilson, 121-425.

1. By failing to appear at the trial.

Caldwell v. Wilson, 121-466.

2. By written consent, in person or by attorney, filed with the clerk.

Waiver must be written and filed with the papers in the case, or oral and entered on the minute docket: Hahn v. Brinson, 133-7; Caldwell v. Wilson, 121-466.

3. By oral consent, entered in the minutes.

Must be entered on the minute docket: Hahn v. Brinson, 133-7. See subchapter herein, Controversy Without Action sections 803-805. Where case heard by judge by consent and decision of law reversed on appeal, on coming back to superior court parties must have trial by jury unless waived: Isler v. Koonce, 83-55; Benbow v. Robbins, 72-422.

Code, s. 416; C. C. P., s. 240.

541. Findings of fact and conclusions of law by judge. Upon the trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk during the court at which the trial takes place. Judgment upon the decision shall be entered accordingly.

Code, s. 417; C. C. P., s. 241. **Judge can only pass upon issues of fact when jury trial waived:** Wilson v. Bynum, 92-717; McCanless v. Flinchum, 98-358; Chasteen v. Martin, 81-51; Leggett v. Leggett, 66-420. **Where trial by jury waived, the court should find the facts and state its conclusions separately and in writing, and then enter judgment in accordance therewith:** Parks v. Davis, 98-481. **Where mixed question of law and fact the findings of fact and conclusions of law should be stated separately:** Foushee v. Pattershall, 67-453; Mining Co. v. Smelting Co., 99-

464. **This section not applicable to a motion in a provisional remedy:** Millhiser v. Balsley, 106-433; Whitehead v. Hale, 118-601. **Where court fails to find some material fact, supreme court may remand it that such fact may be found:** Knott v. Taylor, 96-553. **For findings of fact in cases of reference, see section 525. Where judge's findings of fact not excepted to by defendant, and plaintiff appeals from the judgment for defendant on such facts and supreme court reverses the judgment, defendant not entitled to trial de novo:** Matthews v. Fry, 143-384.

The findings of fact by the judge, when authorized by law or by consent of parties, are as conclusive as when found by a jury, if there is any evidence to support them: Matthews v. Fry, 143-384; Shoaf v. Frost, 127-306; Brafford v. Reed, 125-311; Roberts v. Ins. Co., 118-429; Nimocks v. Shingle Co., 110-230; Travers v. Deaton, 107-500; Millhiser v. Balsley, 106-433; Branton v. O'Briant, 93-99; see also section 542; also see sections 513 and 525—**but the judgment thereon is reviewable:** Ladd v. Teague, 126-544; Norton v. McLaurin, 125-185; see section 513; also see Baker v. Belvin, 122-190.

Where judge in finding the facts adopts the findings of fact in a certain deposition, the supreme court will consider the evidence incorporated in the deposition: Lee v. Baird, 134-410—**also when evidence made a part of the findings, etc., Bank v. Swink, 129-255. Where findings of fact are contradictory and irreconcilably conflicting, judgment can not be pronounced, and a new trial will be awarded:** Davis v. Lumber Co., 130-174. **Exceptions to findings of fact by the trial judge, filed after the adjournment of the court for the term, will not be entertained:** Electric Light Co. v. Electric Light Co., 116-112. **When judge finds the facts it is presumed, unless objection appears, that it was by consent of the parties:** White v. Morris, 107-92. **Where jury waived, and judge tries the facts, errors committted by him in the reception or rejection of evidence are reviewable:** Puffer v. Baker, 104-148. **Agreement that trial judge find facts waives defects in pleadings:** Early v. Early, 134-258.

For exceptions to referee's report, see under section 525.

Findings of fact by the judge are not subject to exceptions: Matthews v. Fry, 143-384; Parker v. McPhail, 112-502; Travers v. Deaton, 107-500; Taylor v. Pope, 106-267; Avent v. Arrington, 105-377; McAden v. Banister, 63-479; Greensboro v. Scott, 84-184; Burke v. Turner, 85-500; see also sections 513-525. **Where an appeal is taken to this court from the action of a judge, in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the judge which it is sought to have reviewed, and the case ought not to be sent to this court to be heard only on the exceptions taken to the ruling of the referee:** Bank v. Mfg. Co., 96-298.

542. Exceptions, when and how taken. 1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury: Provided, that where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise,

either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. And either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case must briefly specify the facts found by him, and his conclusions of law.

Code, s. 418; C. C. P., s. 242. **For exceptions generally to judge's rulings, etc., see section 554.**

543. Proceedings upon judgment on issue of law. On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of section numbered five hundred and fifty-six, upon failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section numbered five hundred and fifty-seven.

Code, s. 419; C. C. P., s. 243.

XXII. Issues.

544. Defined. Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

Tucker v. Satterthwaite, 120-121; Christmas v. Haywood, 119-130; Miller v. Miller, 89-209; McElwee v. Blackwell, 82-345; Fortescue v. Crawford, 105-29; Patton v. R. R., 96-455; Wright v. Cain, 93-296; Armfield v. Brown, 70-27; Klutts v. McKenzie, 65-102; Heilig v. Stokes, 63-612.

1. Of law; and,
2. Of fact.

As to how issues of law arise, see section 545. "Issues of fact" are technical words; they mean such matters of fact as are put in issue by pleadings and a decision of which would be final and conclude the parties upon the matters in controversy, Heilig v. Stokes, 63-614; see also cases under section 546. **Section merely referred to:** Stancill v. Spain, 133-79; McQueen v. Bank, 111-515.

Code, s. 391; C. C. P., s. 219.

545. Of law. An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Code, s. 392; C. C. P., s. 220. Andrews v. Pritchett, 66-387; see also section 474. 147-545

546. Of fact. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; or,

An issue of fact is where a matter is alleged on one side and denied on the other the decision of which would be final and conclude the parties as to the matter in controversy: Kirk v. R. R., 97-82; Wright v. Cotten, 140-1; Crawford v. Masters, 140-205; Tucker v. Satterthwaite, 120-118; Patton v. R. R., 96-455; McAdoo v. R. R., 105-140; Armfield v. Brown, 70-27; Heilig v. Stokes, 63-612; Klutts v. McKenzie, 65-102—**distinguished from question of fact** in Goode v. Rogers, 126-62; Keener v. Finger, 70-35; Beavans v. Goodrich, 98-217; Foushee v. Pattershall, 67-453. **An issue as to whether one is indebted to another is an issue of fact and not of law:** Jordan v. Farthing, 117-181. **"Whether plaintiff is entitled to recover" is a question of law arising upon the answers to the issues, and is not an issue of fact:** Braswell v. Johnston, 108-150; Nathan v. R. R., 118-1066; Denmark v. R. R., 107-185. **Where answer raises a material issue, though matter not alleged in complaint, the issue may be submitted:** Shaw v. McNeill, 95-535; Main v. Field, 144-307. **Where a material defense is pleaded, an issue should be submitted on it:** Owens v. Phelps, 95-286. **The answer simply denying knowledge of facts alleged in complaint does not put these facts in issue:** Woodcock v. Bostic, 128-243—**nor does a demand of strict proof of such facts,** Ibid.

Only such issues as arise on the pleadings and are material to the final adjudication of the controversy should be submitted: Shoe Co. v. Hughes, 122-296; Clark v. Guano Co., 144-64; Patterson v. Mills, 121-258; Coley v. Statesville, 121-301; Tucker v. Satterthwaite, 120-118; Cornelius v. Brawley, 109-542; Fortescue v. Crawford, 105-29; Howard v. Early, 126-170; Sprinkle v. Ins. Co., 126-678; Bean v. R. R., 107-731; Emery v. R. R., 102-209; Davidson v. Gifford, 100-18; Carpenter v. Tucker, 98-316; Patton v. R. R., 96-455; Cuthbertson v. Ins. Co., 96-480; Quarles v. Jenkins, 98-258; Kirk v. R. R., 97-82; Carr v. Askew, 94-212; Wright v Cain, 93-296; Miller v. Miller, 89-209; Grant v. Bell, 87-34; Cedar Falls Co. v. Wallace, 83-225; Armfield v. Brown, 70-27; Heilig v. Stokes, 63-612—**and the real test as to their sufficiency is, did they afford opportunity to introduce all pertinent evidence and apply it fairly:** Tuttle v. Tuttle, 145-; Kimberly v. Howland, 143-398; Clark v. Guano Co., 144-71, and cases cited Pretzfelder v. Ins. Co., 123-164; Willis v. R. R., 122-905; Black v. Black, 110-398.

Issues should not be submitted which are not raised by the pleadings: Streator v. Streator, 145-; Dickens v. Perkins, 134-220, and cases therein cited; Sprinkle v. Indemnity Co., 126-678; Christmas v. Haywood, 119-130; Clark v. Guano Co., 144-64; Sprague v. Bond, 113-551; McAbsher v. R. R., 108-344; Carpenter v. Tucker, 98-316; Lewis v. R. R., 95-179; Willis v. Branch, 94-142—**which have no evidence to support them,** Ellerbe v. R. R., 118-1024; Vanstory v. Thornton, 112-196; Best v. Frederick, 84-176—**which are on points not material to the adjudication of the case,** Henry v. Rich, 64-379; Simmons v. Allison, 118-761; Horne v. Bank, 108-109; Mace v. Life Asso., 101-122; Cummings v. Barber, 99-332; McMillan v. Baker, 97-197; Cuthbertson v. Ins. Co., 96-480; McDonald v. Carson,

94-497; Willis v. Branch, 94-142—**where party asking has opportunity to present fully under other issues his evidence and the law arising thereon:** Johnston v. Lumber Co., 144-717; Clark v. Guano Co., 144-64; Main v. Field, 144-307; Kimberly v. Howland, 143-398; Jackson v. Tel. Co., 139-347; Grocery Co. v. R. R., 136-396; Albert v. Ins. Co., 122-92; Luttrell v. Martin, 112-593; Pretzfelder v. Ins. Co., 123-164; Ricks v. Stancill, 119-99; Bradsher v. Hightower, 118-399; Downs v. High Point, 115-182; Kimsey v. Munday, 112-816; Hamilton v. Buchanan, 112-463; Meredith v. Cranberry Co., 99-576—**where issues arise upon matters evidential,** Wright v. Cotten, 140-1; Jackson v. Tel. Co., 139-347; Coxe v. Singleton, 139-361; Patterson v. Mills, 121-266; Cornelius v. Brawley, 109-548; Howard v. Early, 126-170; Patton v. R. R., 96-455; Fortescue v. Crawford, 105-29; Wright v. Cain, 93-296—**where issues submitted presented every phase of case, are such as arise upon pleadings and are a sufficient basis for the judgment rendered and the defendant was given every opportunity to present every defense he had:** Kimberly v. Howland, 143-398; Clark v. Guano Co., 144-64.

Where issues not arising on pleadings are submitted without objection, the findings must stand: Porter v. R. R., 97-66; Carey v. Carey, 108-267; Chemical Co. v. Johnson, 101-223; Gatling v. Boone, 101-61; Clements v. Rogers, 95-248; Wilson v. Hughes, 94-182—**also where an issue arising on pleadings is not submitted and party does not object,** Wagon Co. v. Byrd, 119-461.

CASES THROWING SOME LIGHT ON PROPER ISSUES OF FACT: In action for goods sold and delivered, Coal Co. v. Ice Co., 134-574; Fickey v. Merrimon, 79-585—**for specific recovery of a chattel,** Wilson v. Hughes, 94-182—**for recovery on policy of fire insurance,** Pretzfelder v. Ins. Co., 123-164; Cuthbertson v. Ins. Co., 96-480—**for recovery on policy of life insurance,** Kendrick v. Ins. Co., 124-315; Maynard v. Ins. Co., 132-711—**for damages for conversion of personal property,** Rhea v. Deaver, 85-337—**for recovery of land, generally,** Vanderbilt v. Brown, 128-498; Love v. Gregg, 117-467; Vaughan v. Parker, 112-96; Kimsey v. Munday, 112-816; Redmond v. Mullenax, 113-505; Gordon v. Collett, 102-532; Davidson v. Gifford, 100-18; Casey v. Cooper, 99-395; Morrison v. Watson, 95-479; Cheek v. Watson, 90-302; Overcash v. Kitchie, 89-384—**for recovery of land partly owned by wife which was sold under execution against husband,** Ray v. Long, 132-891—**for sale of decedent's land for assets,** Stainback v. Harris, 115-100—**for land fraudulently sold by administrator,** Morrow v. Cole, 132-678—**for re-execution of paper alleged to be lost,** Hendon v. R. R., 125-124—**for debt on promissory note,** Parrish v. Graham, 129-230; Reade v. Street, 122-301; Wiggins v. Kirkpatrick, 114-298; Carrington v. Allen, 87-354—**for debt on note of deceased where administrator sets up mental incapacity, etc., on part of maker,** Ducker v. Whitson, 112-44—**for processioning boundary lines,** Williams v. Hughes, 124-3—**to set aside deed as fraudulent,** Redmond v. Chandley, 119-575—**for breach of contract,** Crews v. Cantwell, 125-516; Spencer v. Fortescue, 112-268—**for injury or death by negligence of other than railroad company,** Womble v. Gro. Co., 135-474; McDougald v. Lumberton, 129-200; Rittenhouse v. Street Rwy. Co., 120-544; Andrews v. Tel. Co., 119-403;

Sherrill v. Tel. Co., 117-352; Brunhild v. Potter, 107-415—**for injury or death by negligence of railroad company,** Griffin v. R. R., 134-101; Mott v. R. R., 131-234; Curtis v. R. R., 130-437; McCall v. R. R., 129-298; Edwards v. R. R., 129-78; Pierce v. R. R., 124-83; Bradley v. R. R., 126-735; Cox v. R. R., 123-604; Norton v. R. R., 122-910; Willis v. R. R., 122-905; Kinney v. R. R., 122-961; Nathan v. R. R., 118-1066; Baker v. R. R., 118-1015; Ellerbe v. R. R., 118-1024; Pickett v. R. R., 117-616; Denmark v. R. R., 107-185; McAdoo v. R. R., 105-140; Deberry v. R. R., 100-310; Bottoms v. R. R., 109-72; Smith v. R. R., 99-241; Kirk v. R. R., 97-82; Scott v. R. R., 96-428—**proceeding for probate of will,** Cornelius v. Brawley, 109-542—**for recovery for services rendered decedent under a special contract,** Tussey v. Owen, 139-457; Hatcher v. Dabbs, 133-239—**for damages for malicious prosecution and false arrest,** Kelly v. Traction Co., 133-418—**for malicious prosecution and slander,** McGowan v. McGowan, 122-148—**for negligent injury to land by canal,** Pinnix v. Canal Co., 132-124—**for recovery against surety where he relies on release by extension of time to principal:** Sutton v. Walters, 118-495—**for partition of land where issue of sole seizin,** Henning v. Warner, 109-406—**for damages for diverting water,** Geer v. Water Co., 127-350—**for false warranty of machinery accepted,** Mfg. Co. v. Gray, 129-438—**to correct mistake in deed,** Warehouse Co. v. Ozment, 132-839—**for specific performance of contract,** Boles v. Caudle, 133-532—**where interpleader in attachment,** Mfg. Co. v. Tierney, 133-630—**for cancellation of deed and damages,** Gillis v. Arringdale, 135-295—**for damages for mental anguish,** Hunter v. Tel. Co., 135-458; Sherrill v. Tel Co., 117-532—**for trespass on land,** Lumber Co. v. Lumber Co., 137-432.

2. Upon new matter in the answer, controverted by the reply; or,

3. Upon new matter in the reply, except an issue of law is joined thereon.

Nimocks v. McIntyre, 120-325.
Code, s. 393; C. C. P., s. 221.

547. Which to be first tried. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise directs.

Code, s. 394; C. C. P., s. 222. **Pleas in bar must be tried before a reference ordered:** Sloan v. McMahon, 85-296; Smith v. Goldsboro, 121-350; Woody v. Brooks, 102-334; see also cases under section 519.

548. When and by whom made up. The issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, before or during the trial.

Code, s. 395. **This section contemplates that the issues shall be drawn before the introduction of testimony:** Beasley v. Surles, 140-605—**and only such as are "material to be tried,"** Cecil v. Henderson, 121-246. **It is the duty of the court to submit to the jury every material issue raised**

by the pleadings unless waived by the parties: Gordon v. Collett, 104-381; McDonald v. Carson, 94-497. **This section is mandatory, and binding equally upon the court and counsel, and it is the duty of the trial judge to submit such issues as are necessary to settle the material controversies arising on the pleadings:** Tucker v. Satterthwaite, 120-118; Falkner v. Pilcher, 137-449; Burton v. Mfg. Co., 132-17; Shoe Co. v. Hughes, 122-296; Strauss v. City of Wilmington, 129-99; Denmark v. R. R., 107-185; Gordon v. Collett, 102-532; Davidson v. Gifford, 100-18; Porter v. R. R., 97-66; Bowen v. Whitaker, 92-367; Arnold v. Estis, 92-162; Rudasill v. Falls, 92-222. **The discretion of the judge in settling the issues is not reviewable if the parties have opportunity to present every material phase of their contentions:** Cunningham v. R. R., 139-427; Rittenhouse v. R. R., 120-544; Johnston v. Lumber Co., 144-717; Clark v. Guano Co., 144-64; Moseley v. Johnson, 144-263; Downs v. High Point, 115-182; Redmond v. Mullenax, 113-505—**unless the discretion operates to a party's injury,** Williams v. Gill, 122-967; Pickett v. R. R., 117-616.

Must be made up by the attorneys: Tucker v. Satterthwaite, 120-121; Wilson v. Featherstone, 120-448; Bowen v. Whitaker, 92-367—**or by the judge, when:** Tucker v. Satterthwaite, 120-121; Wilson v. Featherstone, 120-448; Springer v. Shavender, 116-12; Emery v. R. R., 102-209; Fisher v. Mining Co., 94-397; McDonald v. Carson, 94-497; Bowen v. Whitaker, 92-367—**and even though agreed upon by counsel the judge can submit others, when,** Lumber Co. v. Lumber Co., 135-744. **May be changed during trial in court's discretion:** Blackwell v. R. R., 111-151; Buffkins v. Eason, 112-162.

Counsel's duty to tender the issues: Mfg. Co. v. Cloer, 140-128; Pollock v. Warwick, 104-638; Mining Co. v. Smelting Co., 99-445; Simmons v. Mann, 92-12; Oakley v. Van Noppen, 95-60—**and if he does not, he can not be heard to say after the trial that issues which might properly have been submitted were not,** Wagon Co. v. Byrd, 119-460; Walker v. Scott, 106-56;and cases cited; Pollock v. Warwick, 104-638; Alexander v. Robinson, 85-275; Silver Valley Co. v. Baltimore Co., 99-445; Oakley v. Van Noppen, 95-60; Simmons v. Mann, 92-12; McDonald v. Carson, 95-377; Kidder v. McIlhenny, 81-123; Curtis v. Cash, 84-41—**and if a material issue is not tendered and the issues submitted are not objected to, party can not complain,** Maxwell v. McIver, 113-288—**but it is not incumbent upon party to tender issue when court has already declared it would not be submitted,** Falkner v. Pilcher, 137-451.

Issues that are submitted by the judge without objection on the part of counsel, can not be made the ground of exception: Carey v. Carey, 108-267; Cotton Mills v. Abernathy, 115-402; Lewis v. Foard, 112-402; Lowe v. Elliott, 107-718; Chemical Co. v. Johnson, 101-223; Gatling v. Boone, 101-61; Phifer v. Alexander, 97-335; Porter v. R. R., 97-66; Clements v. Rogers, 95-248; Moore v. Hill, 85-218; Wilson v. Hughes, 94-182.

549. Form. Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided, by not having too many issues.

Code, s. 396. **The form in which issues are submitted is of little conse-**

quence, and the judge's discretion in framing them is not reviewable, when it appears that the material facts in controversy, as raised by the pleadings, are clearly presented by them, that a verdict thereon would be a sufficient basis for a judgment and that they will afford the parties opportunity to present to the jury any material view of the law arising out of the testimony which counsel may request the court to embody in instructing the jury: Ormond v. Conn. Mut., 145-; Tuttle v. Tuttle, 145-; Paper Co. v. Chronicle, 115-147; Moseley v. Johnson, 144-263; Clark v. Guano Co., 144-71; Ruffin v. R. R., 142-120; Wilson v. Cotton Mills, 140-52; Coxe v. Singleton, 139-361; Deaver v. Deaver, 137-246; Falkner v. Pilcher, 137-449; Ratliff v. Ratliff, 131-425; Rittenhouse v. Street Rwy., 120-544; Bradley v. R. R., 126-735; Williams v. Gill, 122-967; Redmond v. Chandley, 119-575; Sherrill v. Tel. Co., 117-352; Pickett v. R. R., 117-616; Simmons v. Allison, 118-778; Jordan v. Farthing, 117-181; Cotton Mills v. Abernathy, 115-402; Fleming v. R. R., 115-676; Redmond v. Mullenax, 113-505; Vaughan v. Parker, 112-96; Allen v. Allen, 114-121; Black v. Black, 110-398; Humphrey v. Church, 109-132; Bonds v. Smith, 106-553; Grubbs v. Ins. Co., 108-478; Waller v. Bowling, 108-294; Everett v. Williamson, 107-204; Boyer v. Teague, 106-576; Lineberger v. Tidwell, 104-506; Emery v. R. R., 102-209; Brown v. Mitchell, 102-347; Mace v. Life Ins. Co., 101-122; Cuthbertson v. Ins. Co., 96-480.

Where issues are so framed that the answers thereto are confused a new trial will be ordered: Bottoms v. R. R., 109-72; Allen v. Sallinger, 105-333. **A defect in the form of the issue, not excepted to, can not be assigned as error:** Robinson v. Sampson, 121-99. **Elimination of superfluous words:** Allen v. R. R., 119-710; Davis v. Keen, 142-496. **It is sufficient if the issue be submitted in the language of the pleading:** McKinnon v. Morrison, 104-354. **Two propositions to which different responses might be made must not be embodied in one issue:** Carey v. Carey, 108-271; Mfg. Co. v. Assurance Co., 106-28; Emery v. R. R., 102-209.

For matters to keep in mind in framing issues, see Coxe v. Singleton, 139-361; Baker v. R. R., 118-1015; McAdoo v. R. R., 105-140; Emery v. R. R., 102-209; Denmark v. R. R., 107-185; Braswell v. Johnston, 108-150; Miller v. Miller, 89-209; see also Kimberly v. Howland, 143-398; Clark v. Guano Co., 144-64; Wright v. Cotten, 140-1.

Issues must not be so framed as to exclude any pertinent evidence affecting the merits, but to embrace the whole of the material allegations controverted: Davidson v. Gifford, 100-18.

XXIII. Verdict.

550. General and special. A general verdict is that by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

Code, s. 408; C. C. P., s. 232. **How verdict to be construed:** Rollins v. Ebbs, 138-140; Johnson v. Townsend, 122-442; R. R. v. Purifoy, 95-302. **The verdict, whether in response to one or many issues, must establish**

facts sufficient to enable the court to proceed to judgment: Emery v. R. R., 102-209.

GENERAL VERDICT. A general verdict is a finding in favor of one of the parties: Morrison v. Watson, 95-479—where the jury responds affirmatively or negatively to the issues, Porter v. R. R., 97-66.

SPECIAL VERDICT. A special verdict finds the facts, but not in favor of either party, leaving the court to apply the law to them: Porter v. R. R., 97-66; Morrison v. Watson, 95-479—and it must find in an intelligible manner all the facts necessary to enable the court to give judgment, State v. Hanner, 143-652; State v. Corporation, 111-661; State v. Yount, 110-597; State v. Oakley, 103-408; State v. Crump, 104-763; State v. Finlayson, 113-628; Hilliard v. Outlaw, 92-266; State v. Bray, 89-480; State v. Blue, 84-807; State v. Lowry, 74-121; State v. Curtis, 71-56; State v. Custer, 65-339—and not merely state the evidence which may tend to prove them, State v. Hanner, 143-633.

PRACTICE IN POLLING JURY. Jury need not be polled: State v. Best, 111-638; State v. Toole, 106-736; State v. Jones, 91-654—but either party in an action can have it polled, Smith v. Paul, 133-66; State v. Best, 111-638; State v. Young, 77-498; State v. Sheets, 89-543—and if polled and a juror is reluctant but assents to verdict, it is still a valid verdict, Lowe v. Dorsett, 125-301; State v. Sheets, 89-543—not a valid verdict, however, if one dissents, even though having concurred previously, Owens v. R. R., 123-183. Counsel need not be present when verdict rendered to make it valid: State v. Austin, 108-780; State v. Jones, 91-654. Defendant can waive his right to be present at rendition of verdict, except in capital cases, State v. Austin, 108-780. Special verdict being rendered in criminal action, judge should not have formal verdict entered: State v. Spray, 113-686; State v. Ewing, 108-759; State v. Hanner, 143-632; overruling State v. Monger, 107-771; State v. Nies, 107-820; State v. Moore, 107-770; State v. Smith, 95-680; State v. Morris, 104-837. A verdict "guilty of taking the money" is not larceny, State v. Overby, 127-514.

551. Character of, for different actions. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may

direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

Code, s. 409; C. C. P., s. 233. **Cases bearing upon verdicts rendered hereunder in actions for the recovery of specific personal property:** Hall v. Tillman, 110-220; Bank v. Furniture Co., 120-475; Holmes v. Godwin, 69-467—**for the recovery of money only or of specific real property,** Comrs. v. Lash, 89-159; Porter v. R. R., 97-66; Foster v. Hackett, 112-546; Moody v. Johnson, 112-804; Henning v. Warner, 109-406; Gilchrist v. Middleton, 107-663; Bean v. R. R., 107-731; Allen v. Sallinger, 103-14; Porter v. R. R., 97-66; Comrs. v. Lash, 89-159. **In all actions except for recovery of money only or "specific real property" the court has the power to direct a special verdict:** Comrs. v. Lash, 89-159; Bean v. R. R., 107-742.

552. Special controls general. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Code, s. 410; C. C. P., s. 234. Morrison v. Watson, 95-481; Porter v. R. R., 97-69.

553. Jury to assess damages, when; counterclaim. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established, beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a counterclaim, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Code, s. 411; C. C. P., s. 235. **Verdicts as to interest on debts:** Reade v. Street, 122-301; Bank v. Furniture Co., 120-475; Greenleaf v. R. R., 91-33—**on damages recovered,** Lance v. Butler, 135-419—**on taxes,** Wilmington v. McDonald, 133-548. **The trial judge has no power to reduce the amount awarded in a verdict without the consent of the person in whose favor verdict rendered:** Isley v. Bridge Co., 143-51.

554. Entry of; motion for new trial; exceptions, when and how taken. 1. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict.

Duty of judge as to informal and inconsistent verdicts in criminal actions: State v. Godwin, 138-582. **If verdict informal court may order**

jury to reconsider it: State v. Godwin, 138-582; State v. Whitson, 111-695; State v. Whitaker, 89-472; State v. Arrington, 7-571—**or if there is a mistake it may be corrected before it is recorded and jury discharged,** State v. Shelly, 98-673—**or if it is taken by the clerk and is imperfect the judge may have it perfected:** Mitchell v. Mitchell, 122-332; Petty v. Rousseau, 94-355; Wright v. Hemphill, 81-33; Robeson v. Lewis, 73-107; Willoughby v. Threadgill, 72-438; see also Cole v. Laws, 104-651—**and the judge may instruct the jury to change its finding, when,** Britton v. Ruffin, 123-70. **Clerk can not receive verdict except court so authorize:** Mitchell v. Mitchell, 122-332; Ferrell v. Hales, 119-199; State v. Austin, 108-780; Petty v. Rousseau, 94-355.

Entering the judgment, generally: Taylor v. Ervin, 119-277; Hardy v. Carr, 104-33; Dickerson v. Wilcoxon, 97-309; Kenner v. Mfg. Co., 91-421—**by the clerk upon the verdict,** Ferrell v. Hales, 119-199; Jacobs v. Burgwyn, 63-193; Davis v. Shaver, 61-18. **If judgment or order inadvertently entered the court may, on application of one interested, or ex mero motu, have same corrected:** Cook v. Moore, 100-294; Strickland v. Strickland, 95-471. **Verdict can be rendered on Sunday,** Tuttle v. Tuttle, 145-. **Judgment may be entered on Sunday, when:** Taylor v. Ervin, 119-274—**but not on Monday after verdict rendered Saturday night of the last week of term,** Ferrell v. Hales, 119-199. **Refusal of judgment upon verdict is appealable,** Oil Co. v. Gro. Co., 136-354.

2. If an exception be taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same shall be entered in the judge's minutes and be filed with the clerk as a part of the case upon appeal.

Attorney's language in argument objected to, judge should write down words at once with exception: Moseley v. Johnson, 144-257. **Objection waived if not objected to at the time:** Byrd v. Hudson, 113-203. **An exception to evidence must show that objection was taken when evidence was offered, that it was overruled and that exception was entered:** Jordan v. Furnace Co., 126-143.

Exceptions must be made to all errors and all misconduct at the trial, at the time such take place, except errors in the judge's charge itself: Moseley v. Johnson, 144-257; Alley v. Howell, 141-113; State v. Murray, 139-540; Hart v. Cannon, 133-10; Wilson v. Lumber Co., 131-163; Dobson v. Rwy., 132-900; Phillips v. R. R., 130-582; Cotton Mills v. Abernathy, 115-402; Posey v. Patton, 109-455; Lowe v. Elliott, 107-718; Carr v. Alexander, 112-783; Taylor v. Plummer, 105-56; State v. Braddy, 104-737; State v. Brown, 100-519; Wiggins v. Guthrie, 101-661; Gibbs v. Lyon, 95-146; Jones v. Jones, 94-111; Shields v. Whitaker, 82-516; State v. Ballard, 79-627—**but where evidence is made incompetent by statute, this is not required; exception may be taken after verdict,** Broom v. Broom, 130-562; Presnell v. Garrison, 121-367; Johnson v. Allen, 100-131; State v. Gee, 92-756; State v. Ballard, 79-627. **Exceptions to the reception of evidence must point out the evidence specifically and must show the nature of the error complained of:** Tilley v. Bivens, 110-343; Everett v. Williamson, 107-204; Allred v. Burns, 106-247; Wilhelm v. Burleyson, 106-381; Sumner v.

Candler, 92-634—**to the rejection of evidence must show what was the proposed evidence and also that prejudice was caused by its rejection,** Knight v. Killebrew, 86-400; State v. Rhyne, 109-794; State v. McNair, 93-628; Sumner v. Candler, 92-636; State v. Purdie, 67-326; Street v. Bryan, 65-619; Bland v. O'Hagan, 64-471; Whitesides v. Twitty, 30-431.

Where party refused, upon request of court, to state his objection to evidence excepted to, his exception will avail nothing on appeal: State v. Wilkerson, 103-337. **The judge's notes, on exceptions being made, should be filed with the papers in the case:** Wood v. R. R., 118-1056. **Exceptions must always state specifically and definitely the error assigned:** Greensboro v. McAdoo, 110-430. **Exception that there is no evidence upon which to go to the jury must be taken before verdict:** Printing Co. v. Herbert, 137-317; Hart v. Cannon, 133-10; State v. Huggins, 126-1055; State v. Harris, 120-577 and many cases therein cited. **Where nonsuit should have been entered, exceptions to instructions and requests for instructions will not be considered on appeal,** Smith v. R. R., 145-98.

3. If there shall be error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections.

While it is the better practice to state the exceptions to the charge in the motion for a new trial such exceptions can be stated for the first time in the case on appeal: Bank v. Sumner, 119-591; Lowe v. Elliott, 107-718; State v. Harris, 120-577; Wilson v. Lumber Co., 131-164; Bernhardt v. Brown, 118-700; Marriner v. Lumber Co., 113-52; Blackburn v. Ins. Co., 116-821; Tillett v. R. R., 116-937; Smith v. Smith, 108-365; State v. Varner, 115-744; Lee v. Williams, 112-510; Hinson v. Powell, 109-534; Taylor v. Plummer, 105-56; Boon v. Murphy, 1108-187; Walker v. Scott, 106-56; Pollock v. Warwick, 104-638; McKinnon v. Morrison, 104-354—**but can not be stated later, or for the first time in the supreme court, being waived by failure to state them on case on appeal:** Barrett v. McCrummen, 128-81; State v. Harris, 120-577; Blackburn v. Ins. Co., 116-821; Lee v. Williams, 111-200; Lowe v. Elliott, 107-718; Whitehurst v. Pettipher, 105-40; McKinnon v. Morrison, 104-354; Pollock v. Warwick, 104-638; Scott v. R. R., 96-428; Pleasants v. R. R., 95-195; Ware v. Nesbit, 94-664; Lytle v. Lytle, 94-552; State v. Craige, 89-475; White v. Clark, 82-6; State v. Hardee, 83-619; Whisenhunt v. Jones, 80-348; State v Secrest, 80-450; Sampson v. R. R., 70-404; State v. Jones, 69-16. **Exceptions to refusal of court to grant prayer for instructions, or in granting prayer, or to instructions generally can not be taken for first time in supreme court, but it is sufficient if assigned for the first time in case on appeal:** Lee v. Williams, 111-200; 112-510—**and is not so assigned, the exception is deemed waived,** Davis v. Duval, 112-833; Wilson v. Wilson, 125-527; Whitehurst v. Pettipher, 105-41. **An exception for failure to give instruction requested should point out error and if it involves any question as to evidence it should be set out:** Coltrane v. Lamb, 109-209—**but instruction must be requested to be subject of exception for failure to charge,** Emry v. R. R., 109-602. **Such exceptions must be specific and not a "broadside" or general exception to the charge as given:** Streator v.

Streator, 145-337; Davis v. Keen, 142-496; State v. Dewey, 139-556; Sigman v. R. R., 135-181; Kelly v. Johnson, 135-650; Joines v. Johnson, 133-487; Wilson v. Lumber Co., 131-163; Carson v. R. R., 128-95; Pierce v. R. R., 124-83; Wood v. Bartholomew, 122-177; State v. Webster, 121-586; State v. Moore, 120-570; Burnett v. R. R., 120-517; Hampton v. R. R., 120-534; State v. Melton, 120-591; Gossler v. Wood, 120-69; Andrews v. Tel. Co., 119-403; Barcello v. Hapgood, 118-712; State v. Downs, 118-1242; Kendrick v. Dellinger, 117-491; State v. Page, 116-1016; State v. Varner, 115-744; Gwaltney v. Timber Co., 115-579; Paper Co. v. Chronicle, 115-147; Shober v. Wheeler, 113-370; Ward v. R. R., 112-168; Hemphill v. Morrison, 112-757; Hopkins v. Bowers, 111-175; State v. McKinney, 111-683; Davis v. Duval, 112-833; Greensboro v. McAdoo, 110-430; Bottoms v. R. R., 109-72; Hooks v. Houston, 109-623; Hinson v. Powell, 109-534; State v. Brabham, 108-793; Everett v. Williamson, 107 204; State v. McDuffie, 107-885; Thompson v. Tel Co., 107-449; State v. Parker, 106-711; Taylor v. Navigation Co., 105-484; Helms v. Green, 105-251; Carlton v. R. R., 104-365; McKinnon v. Morrison, 104-362; Pollock v. Warwick, 104-638; Hammond v. Schiff, 100-161; Dugger v. McKesson, 100-1; Leak v. Covington, 99-559; Newby v. Harrell, 99-149; Caudle v. Fallen, 98-411; Sellers v. Sellers, 98-13; Boggan v. Horne, 97-268; Barber v. Roseboro, 97-192; State v. Nipper, 95-653; Clements v. Rogers, 95-248; Pleasants v. R. R., 95-195; Williams v. Johnston, 94-633; Lytle v. Lytle, 94-522; McDonald v. Carson, 94-497; State v. Eliason, 91-564; Bost v. Bost, 87-477—**and must be stated separately, in articles numbered, and no exception should contain more than one proposition,** Gwaltney v. Assurance Society, 132-925—**but general exception sufficient if only one proposition of law is in charge,** Mitchell v. Baker, 129-63. **An appellant is not bound to except to an instruction when there is no evidence to warrant it:** Barrett v. Brewer, 143-88.

4. The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

For settlement of case on appeal, see section 591. Judge must state whether or not he set the verdict aside "in his discretion:" Jarrett v. Trunk Co., 142-466; Abernethy v. Yount, 138-337. **Every presumption is in favor of the verdict and it should not lightly be set aside:** Cable v. R. R., 122-902. **Judge can not reverse the answer of a jury, though he may set the verdict aside:** Sprinkle v. Wellborn, 140-163—**and can not amend or modify,** Hemphill v. Hemphill, 99-436; Leggett v. Leggett, 88-108; Shields v. Lawrence, 72-43. **As to power of court to grant new trials on part only of the issues or on particular or restricted issues,** see Tuttle v. Tuttle, 146-; Jarrett v. Trunk Co., 144-299; Benton v. Collins, 125-83; Satterthwaite v. Goodyear, 137-304; Strother v. R. R., 123-197; Mitchell v. Mitchell, 122-332; Mfg. Co. v. R. R., 117-579; Mining Co. v. Smelting

Co., 122-542; Rittenhouse v. R. R., 120-544; Nathan v. R. R., 118-1066; Pickett v. R. R., 117-616; Blackburn v. Ins. Co., 116-821; Tillett v. R. R., 115-662; Jones v. Swepson, 94-700; Boing v. R. R., 91-199; Jones v. Mial, 89-89; Lindley v. R. R., 88-547; Crawford v. Mfg. Co., 88-554; Roberts v. R. R., 88-560; Burton v. R. R., 84-192; Meroney v. McIntyre, 82-103; Holmes v. Godwin, 71-306; Barnes v. Brown, 69-439; Key v. Allen, 7-523. **Motion for new trial must be made and heard at the same term the case is first tried, and there can be no continuance of the motion:** Turner v. Davis, 132-187; England v. Duckworth, 75-309; Flowers v. Alford, 111-248; Clemmons v. Field, 99-400; Beck v. Bellamy, 93-129; Moore v. Hinnant, 90-163; Quincy v. Perkins, 76-295—**but, by consent of both parties, the trial judge may hear the motion at a subsequent time,** Myers v. Stafford, 114-231. **Application for a new trial, except for error of law in the conduct of the trial, is addressed solely to the discretion of the judge which he must exercise by a sound and enlightened judgment, and his decision is not appealable unless this discretion has been grossly abused and resulted in oppression:** Jarrett v. Trunk Co., 142-466; Slocumb v. Construction Co., 142-349; Bird v. Bradburn, 131-490; Benton v. R. R., 122-1007; Edwards v. Phifer, 120-405; State v. Perry, 121-533; Hinkle v. R. R., 109-472; Allison v. Whittier, 101-490; State v. Braddy, 104-737; State v. Harper, 101-761; State v. Rogers, 94-860; Jones v. Parker, 97-33; Owens v. Phelps, 95-286; Spence v. Clapp, 95-545; Carson v. Dellinger, 90-226; State v. Gould, 90-658; State v. Brittain, 89-481—**and where he sets it aside in his discretion it is not necessary to find and report the facts,** Bird v. Bradburn, 131-490 and cases cited. **Appellant should except to refusal of new trial, if refusal is not discretionary, in order to have his decision reviewed:** Grant v. Grant, 109-710. **Irregularities occurring on trial below for which judge might set aside verdict, not sufficient ground to support a motion in supreme court for a new trial:** Daniels v. Fowler, 123-35. **Where defendant introduces no evidence and excepts to nothing, he can not move for new trial on the ground that the testimony did not justify the verdict:** State v. Leach, 119-828. **Motion for new trial on the ground that the verdict is against the weight of the evidence is addressed entirely to the discretion of the court below and not reviewable unless it is shown that the judge was influenced by an erroneous view of the law:** Davenport v. Terrell, 103-53; McCord v. R. R., 134-53; State v. Rose, 129-575; Whitted v. Fuquay, 127-68; Jordan v. Farthing, 117-181; Ferrell v. Thompson, 107-420; Fertilizer Co. v. Reams, 105-283; McKinnon v. Morrison, 104-354; Spruill v. Ins. Co., 120-141; State v. Maultsby, 130-664; State v. Ellsworth, 131-773; Whitehurst v. Pettipher, 105-40; Redmond v. Stepp, 100-212; Goodson v. Mullin, 92-211; Thomas v. Myers, 87-31; Brink v. Black, 74-329; Watts v. Bell, 71-405; Vest v. Cooper, 68-131. **Only the errors pointed out in the motion for new trial will be considered by the supreme court, all others being waived:** Leak v. Covington, 99-559; but see Lowe v. Elliott, 107-718. **As to motions for new trial on the ground of newly discovered evidence,** see State v. Lilliston, 141-857; Wilkie v. R. R., 127-203; Faison v. Williams, 121-152; Clark v. Riddle, 118-692; Nathan v. R. R., 118-1066; Sledge v. Elliott, 116-716; State v. DeGraff, 113-688; Ferrell v. Thompson, 107-420; Brown v. Mitchell, 102-347; Redmond v. Stepp, 100-212; Carson v. Dellinger,

90-226; State v. Starnes, 97-423; Dupree v. Ins. Co., 93-237; Munden v. Casey, 93-97; Henry v. Smith, 78-27; Shehan v. Malone, 72-59; Holmes v. Godwin, 69-467; Bledsoe v. Nixon, 69-81. **When trial judge thinks that the damages awarded are either excessive or inadequate, the verdict may be set aside in his discretion, and such discretion is not reviewable:** Boney v. R. R., 145-248; Isley v. Bridge Co., 143-53; Benton v. Collins, 125-83; Phillips v. Tel. Co., 130-513; Burns v. R. R., 125-304; see also Norton v. R. R., 122-910. **The judge has unquestioned power to set aside verdict, when there is no evidence to support it:** Brown v. Power Co., 140-333. **An agreement empowering judge to sign judgment out of term gave him no power after adjournment of term to consider motion to set aside verdict:** Knowles v. Savage, 140-372. **The verdict having been set aside, not as a matter of discretion, but upon a ruling as to its legal effect, an appeal lies:** Oil Co. v. Grocery Co., 136-354; Johnson v. Reformers, 135-385; Wood v. R. R., 131-48; Thomas v. Meyers, 87-31; Gay v. Nash, 84-333—**and in such case the judge should find and report the facts,** Bird v. Bradburn, 131-490; Moore v. Edmiston, 70-471; Johnson v. Bell, 74-355. **The remedy for contradictory and inconsistent findings is to set aside the verdict:** Temple v. Ins. Co., 124-66; Allen v. Sallinger, 105-339; Smith v. Fite, 98-517; Porter v. R. R., 97-66; Morrison v. Watson, 95-479; Turrentine v. R. R., 92-638—**if it is too late to have it reformed by the jury,** Brown v. Lumber Co., 117-296; Allen v. Sallinger, 105-339.

The reason of the judge for setting aside a verdict, if insufficient, is immaterial where there appears a valid reason in the record for sustaining his rulings: Metal Co. v. Railroad, 145-293.

Code, s. 412; C. C. P., s. 236.

XXIV. Judgment.

555. Defined. A judgment is either interlocutory, or the final determination of the rights of the parties in the action.

Code, s. 384; C. C. P., s. 216.

JUDGMENTS FINAL. A judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them, and does not embrace any matters which might have been brought into the litigation, or any cause of action which the plaintiff might have joined, but which are neither joined or embraced in the pleadings: Shakespeare v. Land Co., 144-516; Tyler v. Capeheart, 125-64; Wagon Co. v. Byrd, 119-460. **A judgment is final which decides the case upon its merits, without reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court:** Bunker v. Bunker, 140-18; Flemming v. Roberts, 84-532. **A judgment as a final determination of the rights of the parties an estoppel forever:** Shakespeare v. Land Co., 144-516; Bunker v. Bunker, 140-18; Scott v. Life Assn., 137-515; Parker v. Taylor, 133-103; Trust Co. v. Benbow, 131-413; Willoughby v. Stevens, 132-254; Aiken v. Lyon, 127-176; Weeks v. McPhail, 128-130; Hinton v. Pritchard, 126-8; Stancill v. James, 126-190; Tyler v. Capeheart, 125-64; Land Co. v. Guthrie, 123-185; Bear v. Comrs., 122-434; State v.

Joyce, 121-610; Hussey v. Hill, 120-312; Person v. Montgomery, 120-111; Chamblee v. Broughton, 120-170; Morrison v. Craven, 120-327; Wagon Co. v. Byrd, 119-460; Steam Works v. Dunn, 119-79; Fleming v. Strohecker, 117-366; Jordan v. Farthing, 117-181; Jones v. Beaman, 117-259; Turner v. Rosenthal, 116-437; Baugert v. Blades, 117-221; Miller v. Asheville, 112-759; Garrison v. Finley, 112-652; Edwards v. Jones, 113-453; Ladd v. Byrd, 113-466; Wilson v. Craige, 113-463; Donnelly v. Wilcox, 113-408; Bryan v. Alexander, 111-142; Fowler v. Osborne, 111-404; Henning v. Warner, 109-406; Dickens v. Long, 109-172; Moore v. Garner, 109-157; Collins v. Smith, 109-468; Davie v. Davis, 108-501; Stewart v. Register, 108-588; Peck v. Culberson, 104-425; Allen v. Salinger, 103-14; Spivey v. Harrell, 101-48; Rogers v. Kinsey, 101-559; Warden v. McKinnon, 99-251; Jones v. Coffey, 97-347; Ward v. Lowndes, 96-367; Benton v. Benton, 95-559; Williams v. Clouse, 91-322; Grantham v. Kennedy, 91-148; Williams v. Batchelor, 90-364; Vick v. Pope, 81-22; Greene v. Branton, 16-504; Frazier v. Felton, 8-231; Johnson v. Pate, 90-334—**and this includes the rights of the parties on the same side:** Baugert v. Blades, 117-221; McNeill v. Hodges, 105-55; Hulbert v. Douglas, 94-128; Hughes v. Boone, 81-204; Clark v. Williams, 70-679; Parrish v. Graham, 129-230; Banking Co. v. Morehead, 126-282; Proctor v. Ins. Co., 124-268.

JUDGMENTS NOT FINAL. **An order of sale in partition is not a final decree,** In re Dickerson, 111-108. **An action is not ended by the rendition of a judgment; it remains open for all motions and proceedings for its enforcement:** Turner v. Holden, 109-182. **An order or decree or unexecuted judgment made during a term of court is in fieri and subject to be vacated or modified during the term:** Culbreth v. Smith, 124-289; Gwinn v. Parker, 119-19; State v. Manly, 95-661; Wilson v. Hughes, 94-182; State v. Brittain, 93-587. **An interlocutory order or decree is under the control of the court, and, upon good cause shown, can be amended, modified, changed or rescinded as the court may think proper:** Maxwell v. Blair, 95-317; Alexander v. Alexander, 120-472; Jackson v. McLean, 96-474; Welch v. Kingsland, 89-179; Miller v. Justice, 86-26; Shinn v. Smith, 79-310; Worth v. Gray, 59-4; Ashe v. Moore, 6-383. **As to whether interlocutory orders in ancillary proceedings can be amended out of term,** see Coates v. Wilkes, 94-174.

As to statutes of judgments of sister states: Levin v. Gladstein, 142-482.

556. By default final, when. Judgment by default final may be had on failure of defendant to answer, as follows:

A failure to take judgment by default as soon as allowable does not work a discontinuance: University v. Lassiter, 83-38. **The term of court at which complaint filed within the first three days thereof is practically the return term at which judgment is allowable:** Brown v. Rhinehart, 112-772; Roberts v. Allman, 106-391. **Where plaintiff was entitled to judgment by default final, but judgment by default and inquiry entered and upon inquiry being executed, judgment was rendered, judgment valid:** Scott v. Life Asso., 137-515.

Judgment by default final held proper in the following cases: Streator v. Streator, 145-337; Banking Co. v. Duke, 121-110; Cowles v. Cowles, 121-272; Williams v. Lumber Co., 118-936; Griffin v. Light Co., 111-434; Hartman v. Farrior, 95-177; Alford v. McCormac, 90-151; Rogers v. Moore, 86-86; Wynne v. Prairie, 86-73; Walton v. Walton, 80-26; Adrian v. Jackson, 75-536.

Held irregular when action is on implied contract for goods sold and delivered: Jeffries v. Aaron, 120-167; Witt v. Long, 93-388—**when action to recover money collected on collateral notes and embezzled,** Stewart v. Bryan, 121-46—**when on official bond of public officer,** Battle v. Baird, 118-854—**when in action on contract the amount due can not be ascertained by computation,** Battle v. Baird, 118-854; Skinner v. Terry, 107-103—**when action sounds in damages for an unliquidated money demand,** Moore v. Mitchell, 61-304; Hartsfield v. Jones, 49-309—**when action is on bail bond,** Roulhac v. Miller, 90-174—**when new party brought in and no complaint as to him filed,** Vass v. Bldg. Asso., 91-55—**when answer filed before time limited expired but after judge left court without adjourning it,** Foley v. Blank, 92-476—**when complaint not verified,** Cole v. Boyd, 125-496; Phifer v. Ins. Co., 123-410; Hammerslaugh v. Farrior, 95-135; Witt v. Long, 93-388—**when in ejectment defendant files verified answer and defense bond,** Beeton v. Dunn, 137-559. **The fact that defendant doesn't appear in person or by counsel is no reason why judgment by default should be entered when answer has been filed; the plaintiff must go to the jury upon the issues raised by the pleadings:** Investment Co. v. Kelly, 123-388.

1. Where complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered at the return term for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

Effect when complaint fails to set forth a contract to pay a certain sum, or a sum that can be ascertained therefrom: Faucette v. Ludden, 117-173; Hartman v. Farrior, 95-177. **Where plaintiff sued to recover assessments, etc., paid on life insurance policy wrongly cancelled, and defendant failed to answer the verified complaint, plaintiff was entitled to judgment by default,** Scott v. Life Asso., 137-515. **If plaintiff's claim for damages is precise and fixed by agreement, or can be rendered certain by computation, failure to answer admits the claim:** Scott v. Life Asso., 137-522; Cowles v. Cowles, 121-272; Parker v. Smith, 64-291. **Breach of an official bond is not a "breach of an express or implied contract to pay" hereunder:** Battle v. Baird, 118-854. **The "return term" spoken of in the section is the one at which the complaint must be filed before the third day thereof:** Brown v. Rhinehart, 112-772; but see Roberts v. Allman,

106-391. **Judge may allow error in verification to be corrected:** Best v. Dunn, 126-560. **Where no service of summons on defendant, judgment may be set aside:** Flowers v. King, 145-234. **The trial court can permit answer to be filed after supreme court has decided that judgment by default should have been entered for plaintiff:** Cook v. Bank, 131-96; Griffin v. Light Co., 111-434. **Where complaint properly verified would have entitled plaintiff to judgment final in default of an answer, when complaint unverified judgment should be by default and inquiry:** Cole v. Boyd, 125-496; Best v. Dunn, 126-561.

2. Where the defendant, by his answer in such action, shall not deny the plaintiff's claim, but shall set up a counterclaim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting such counterclaim, which statement shall be annexed to and be a part of the judgment roll.

In case where counterclaim set up exceeds plaintiff's claim, defendant not entitled to judgment by default when formal denial entered by leave of court: Bernhardt v. Dutton, 146; Tillinghast v. Cotton Mills, 143-268; but see Wilmington v. Bryan, 141-682.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

4. In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

There may be judgment by default final for real property in action of ejectment, and default and inquiry as to mesne profits: Jones v. Best, 121 154. **Where action brought against landlord and tenant and tenant fails to answer, the complaint being verified, judgment against tenant will be entered:** Harkey v. Houston, 65-137. **In action to determine conflicting**

claims to real property, failure of defendant to answer entitles plaintiff to judgment without inquiry or proof of facts: Junge v. MacKnight, 137-285; Eason v. Dortch, 136-293.

AS TO THE UNDERTAKING. See section 453. **The undertaking specified may be given at the trial in the discretion of the court:** Carraway v. Stancill, 137-472. **Judgment by default for failure of defendant to give bond should not be awarded until notice to defendant be given so he can have a chance to file bond:** Becton v. Dunn, 137-563; Cooper v. Warlick, 109-672; McMillan v. Baker, 92-110; Russell v. Saunders, 48-432; Brittain v. Howell, 19-107. **Failure to give undertaking when required herein entitles defendant to judgment by default:** Credle v. Ayers, 126-15; Norton v. McLaurin, 125-185; Vick v. Baker, 122-98; Jones v. Best, 121-154.

Code, ss. 385, 390; C. C. P., s. 217; 1870-1, c. 42; 1869-70, c. 193, s. 4.

557. By default and inquiry. In all other actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account be necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases, the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law.

Code, s. 386. **Differences between judgment by default final and judgment by default and inquiry pointed out:** Junge v. MacKnight, 137-288; Eason v. Dortch, 136-294. **A judgment by default and inquiry admits only a cause of action and carries only nominal damages and costs, and the burden of proving damages beyond a penny is still upon the plaintiff:** Stockton v. Mining Co., 144-595; Osborn v. Leach, 133-427; Darden v. Blount, 126-250; Cowles v. Cowles, 121-277; Banks v. Mfg. Co., 108-282; Lee v. Knapp, 90-171; Anthony v. Estes, 101-541; Rogers v. Moore, 86-86; Parker v. Smith, 64-291; Parker v. House, 66-374.

Judgment by default and inquiry for want of an answer and not by default final may be entered when in action on contract the amount due can not be ascertained by computation: Battle v. Baird, 118-854; Faucette v. Ludden, 117-173; Hartman v. Farrior, 95-177; Skinner v. Terry, 107-103—**when action is on official bond,** Battle v. Baird, 118-854—**when action is for commissions as consignee, when defendant interposes counterclaim for unliquidated damages,** Faucette v. Ludden, 117-170—**when action sounds in damages for an unliquidated money demand,** Moore v. Mitchell, 61-304; Hartsfield v. Jones, 49-309—**when action on implied contract for goods sold and delivered, or for services,** Jeffries v. Aaron, 120-167; Witt v. Long, 93-388; Hartman v. Farrior, 95-177; Rogers v. Moore, 86-86; Wynne v. Prairie, 86-73—**in an action for damages for negligence generally,** Manning v. R. R., 122-824—**in an action for conversion and embezzlement,** McLeod v. Nimocks, 122-437; Stewart v. Bryan, 121-46.

The "return term" spoken of is the one at which the complaint must be filed before the third day thereof: Brown v. Rhinehart, 112-772—**but if complaint filed after return term it stands on file during the first three days of the next succeeding term and judgment by default for want of answer at that term may be rendered,** Roberts v. Allman, 106-391.

558. By default for defendant, when. If the answer contain a statement of new matter consisting a counterclaim, and the plaintiff fail to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case require it, an order for an inquiry of damages by a jury may be made.

Code, s. 249; C. C. P., s. 106. **This section regarded as not an express provision in favor of a defendant whose counterclaim exceeds plaintiff's claim, and intimation made that there should be separate judgments in** Wilmington v. Bryan, 141-682. **Cases illustrating doctrine of section:** Bank v. Ireland, 122-576; Rumbough v. Improvement Co., 109-703; Dempsey v. Rhodes, 93-120; Barnhardt v. Smith, 86-473. **A defendant is entitled to judgment upon a counterclaim if no reply or demurrer has been interposed, although it would have been refused if objection had have been made in apt form and time:** Rountree v. Britt, 94-104. **Where an administrator recovers judgment upon his cause of action and the defendant also upon his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant's judgment will be stayed until it is ascertained what amount of the assets of the estate of the inestate is applicable thereto:** Rountree v. Britt, 94-104.

559. Rendered in vacation, when. In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Code, s. 230; 1871-2, c. 3. **Judgments may be taken in vacation by consent:** Westhall v. Hoyle, 141-337; Benbow v. Moore, 114-263; Bank v. Gilmer, 118-668; Coates v. Wilkes, 94-174; McDowell v. McDowell, 92-227; Shackleford v. Miller, 91-181; Hardin v. Ray, 89-364; Harrell v. Peebles, 79-26; Hervey v. Edmunds, 68-243. **Amendment of judgment by judge after last session of court, without the consent and in the absence of the opposing counsel, is invalid:** Hinton v. Ins. Co., 116-22.

560. On frivolous pleading. If a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to the court or to the judge thereof for judgment thereon, and judgment may be given accordingly.

Code, s. 388; C. C. P., s. 218. **For frivolous answers and demurrers, see section 472. When frivolous answer filed judgment can be rendered for plaintiff on a note, complaint being verified:** Bank v. Pearson, 119-494—**so also when a frivolous demurrer interposed plaintiff entitled to judgment,** Joyner v. Roberts, 112-113; Cowan v. Baird, 77-201. **Judgment non**

obstante veredicto should be entered when answer admits complaint but sets up some avoidance that is frivolous or insufficient: Sutton v. Walters, 118-495; Harrison v. Ray, 108-215; Walker v. Scott, 106-56; Ward v. Phillips, 89-215; Rowland v. Windley, 82-131; Moye v. Petway, 76-327. **This section simply puts the demurrer out of the way and leaves the party prejudiced by it to obtain his judgment as if it had not been filed:** Skinner v. Terry, 107-108.

561. Stands until reversed. Every judgment given in a court of record having jurisdiction of the subject, shall be, and continue in force until reversed according to law.

Code, s. 935; R. C., c. 31, s. 103; 4 Hen. IV., c. 23. Spivey v. Harrell, 101-48; McIver v. Stephens, 101-255; England v. Garner, 90-197. **An action is not ended by the rendition of a judgment; it remains open for all motions and proceedings for its enforcement, including proceedings supplementary to execution:** Turner v. Holden, 109-182.

562. Applicable to justice's courts. This subchapter shall apply, as near as may be, to proceedings in courts of justices of the peace.

Code, s. 389. Durham v. Wilson, 104-598.

563. For whom and against whom given; failure to prosecute; married women. 1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

As to a judgment's being a final determination of the rights of parties see cases cited under section 555. Judgment should be drawn so as to determine all rights: Fisher v. Water Co., 128-379—**whether they be legal or equitable,** Hutchinson v. Smith, 68-354—**but can not exceed sum named in summons and attachment,** Cotton Mills v. Weil, 129-452—**and should be entered on material issues without regard to immaterial issues,** Corporation Commission v. R. R., 137-1. **While it is the better course to always sign a judgment, yet it is not mandatory:** Sledge v. Elliott, 116-712; Bond v. Wool, 113-20; Range Co. v. Carver, 118-328; Spencer v. Credle, 102-68; Keener v. Goodson, 89-273; Rollins v. Henry, 78-342; Matthews v. Joyce, 85-258—**but statute merely directory,** Young v. Jackson, 92-144; Keener v. Goodson, 89-273.

2. And it may grant to the defendant any affirmative relief to which he may be entitled.

As to granting judgment for any relief to which pleadings and issues show party entitled, see cases under sections 467, 558 and 565.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

As to joint and several debtors, see sections 412, 413, 455-459. Where ejectment brought against landlord and tenant and tenant fails to answer,

the complaint being verified, judgment can be taken as to tenant: Harkey v. Houston, 65-137.

JUDGMENTS RENDERED IN VARIOUS PROCEEDINGS THAT MAY BE OF INTEREST. In action by one tenant in common to recover his interest in land: Vick v. Baker, 122-99. **In action on parol contract to sell land, where contract avoided and betterments allowed,** Vann v. Newsome, 110-122. **In action of ejectment,** Credle v. Ayers, 126-11; Moore v. Angel, 116-843; Arrington v. Arrington, 114-116; Pearson v. Carr, 97-194; Cowles v. Ferguson, 90-308. **In action to recover for labor upon a house,** McMillan v. Williams, 109-252; Oakley v. Van Noppen, 95-60. **In action to recover of surities upon official bonds,** Davenport v. McKee, 98-500. **In action by partnership against individual who has counterclaim against one member of the firm,** Sloan v. McDowell, 71-356; Davis v. Mfg. Co., 114-321. **In action to foreclose for collection of purchase money,** Burnap v. Sideberry, 108-307. **In action for specific performance where statute of frauds pleaded,** Pendleton v. Dalton, 92-185. **In action to set aside fraudulent deed of assignment,** Rouse v. Bowers, 108-182. **In action against executor as manager of the business of deceased under his will,** Froelich v. Trading Co., 120-39; Banking Co. v. Morehead, 116-410. **In action against married woman for her husband's debt,** McLeod v. Williams, 122-451. **In action on note,** Reade v. Street, 122-301. **In action for taxes,** Wilmington v. McDonald, 133-548—**for distribution of trust fund,** Isler v. Brock, 134-428—**for damages for locating right-of-way of railroad,** Beal v. R. R., 136-298—**for recovery of specific personal property, see section 570 —for trespass on land,** Lumber Co. v. Lumber Co., 137-432—**where issue of devisavit vel non,** Collins v. Collins, 125-98.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise.

Judgments against married women: Harvey v. Johnson, 133-355; McLeod v. Williams, 122-451 (see dissenting opinion of Clark, J.); Moore v. Wolfe, 122-711; Green v. Ballard, 116-144; Dougherty v. Sprinkle, 88-300; Pippen v. Wesson, 74-437—**are as binding as against any one sui juris,** Harvey v. Johnson, 133-356; Neville v. Pope, 95-351; Grantham v. Kennedy, 91-148; Vick v. Pope, 81-22—**except when judgment by consent,** McLeod v. Williams, 122-451 (Clark and Montgomery, J. J., dissenting); see also Vanderbilt v. Brown, 128-498. **The fact that no complaint has been filed will not make judgment void:** Little v. McCarter, 89-233; McLean v. Breece, 113-390; Robeson v. Hodges, 105-49; McNeill v. Hodges, 105-52; Stancill v. Gay, 92-455; Mebane v. Pope, 81-22; Leach v. R. R., 65-486.

Code, s. 424; C. C. P., s. 248.

564. How entered, party dying after verdict. In no action shall the death of either party between the verdict and the judgment be alleged for error, if such judgment be entered within two terms after the verdict.

Code, s. 938; R. C., c. 31, s. 112; 17 Charles II., c. 8. **As to judgments in favor of or against dead persons:** Wood v. Watson, 107-52; Knott v. Taylor, 99-511; Lynn v. Lowe, 88-478.

565. Limited by demand in complaint, when. The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Code, s. 425; C. C. P., s. 249. **For demand for relief in complaint, see section 467. A plaintiff, if there be an answer, is entitled to such relief as the facts stated in the complaint and the proof will admit, although he misconceives the manner in which it may be afforded:** Wright v. Ins. Co., 138-488; Reade v. Street, 122-301; Gillam v. Ins. Co., 121-369; Adams v. Hayes, 120-383; Simmons v. Allison, 118-763; Scarlett v. Norwood, 115-284; Johnson v. Loftin, 111-319; Barnes v. Barnes, 104-613; Moore v. Nowell, 94-265; Harris v. Sneeden, 104-369; McNeill v. Hodges, 105-52; Patrick v. R. R., 93-422; Moore v. Cameron, 93-51; Lumber Co. v. Wallace, 93-22; Kiff v. Weaver, 94-278; Knight v. Houghtalling, 85-17; Jones v. Mial, 82-252—**but if there is no answer judgment can not be entered for more than complaint demands,** Jones v. Mial, 82-257—**though he can not recover upon a state of facts other than those set out in complaint,** Cox v. Ward, 107-507; Browning v. Berry, 107-231; Willis v. Branch, 94-142; Johnson v. Finch, 92-205; Shelton v. Davis, 69-324. **Relief that may be granted in action for price of services rendered:** Fulps v. Mock, 108-601; Stokes v. Taylor, 104-394; Lewis v. R. R., 95-179—**in action on a special contract,** Jones v. Mial, 82-252; Sams v. Price, 119-572—**in action for claim and delivery of personalty,** Webb v. Taylor, 80-305; Haughton v. Newberry, 69-456—**in action by guardian for recovery of money loaned to partnership of which he was member,** Gudger v. Baird, 66-438.

566. Legal title with covenants passed by, when. In any action wherein the court shall declare that a party is entitled to the possession of property, real or personal, the legal title whereof may be in another or others, parties to the suit, and the court shall order a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court shall order that one of the parties holding property in trust shall convey the legal title therein to be held in trust to another person although not a party, the court, after declaring the right and ordering the conveyance, shall have power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that

the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered was in fact executed; and shall bind and entitled the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as may be adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. And any party taking benefit under the judgment may have the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed.

Code, s. 426; R. C., c. 32, s. 24; 1850, c. 107; 1874-5, c. 17. **A decree hereunder does not operate as a conveyance unless it complies with the requirements of the statute by declaring that "the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made the legal, title, etc.:"** Davis v. Rogers, 84-412; Morris v. White, 96-91; Rollins v. Henry, 78-352; Thaxton v. Williamson, 72-125; see also Smith v. King, 107-273—**but it is not necessary that a decree for specific performance should declare that it should operate as a conveyance in order to constitute a complete adjudication on the rights of the holder of the naked legal title,** Skinner v. Terry, 134-305. **See** dissenting opinion of Clark, C. J., in Allred v. Smith, 135-455; also see North v. Bunn, 122-769.

567. Regarded as a deed and registered, when. Every judgment, in which the transfer of title shall be so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the same rules and regulations as may be prescribed for conveyances of similar property executed by the party; and all laws which may be passed for extending the time for registration of deeds shall be deemed to include such judgments, provided the conveyance, if actually executed, would be so included.

151-85

Code, s. 427; R. C., c. 32, s. 25; 1850, c. 107, s. 2; 1874-5, c. 17, s. 2. Smith v. King, 107-277; Morris v. White, 96-91. **A decree in specific performance, directing a conveyance and reciting that its effect should be to convey title, need not be recorded:** Skinner v. Terry, 134-305.

568. How registered. The party desiring registration of such judgment shall produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate.

Code, s. 429; R. C., c. 32, s. 27; 1850, c. 107, s. 4; 1874-5, c. 17, s. 4.

569. Certified registered copy evidence. In all legal proceedings, touching the right of parties derived under such judgment, a certified copy thereof from the register's books shall be evidence of its existence and of the matters therein contained, as fully as if the same were proved by a perfect transcript of the whole case.

Code, s. 428; R. C., c. 32, s. 26; 1850, c. 107, s. 3; 1874-5, c. 17, s. 3.

570. In action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof, in case a delivery can not be had, and the damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof, in case a return can not be had, and damages for taking and withholding the same.

Code, s. 431; C. C. P., s. 251. **See sections 793, 795 and 800. Judgments for plaintiff hereunder:** Oil Co. v. Grocery Co., 136-354; Griffith v. Richmond, 126-379; Grubbs v. Stephenson, 117-66; Spencer v. Bell, 109-43; Taylor v. Hodges, 105-344; Asher v. Reizenstein, 105-215; Hall v. Tillman, 103-280; Smithdeal v. Wilkerson, 100-55; Horton v. Horne, 99-219; Jarman v. Ward, 67-32—**for defendant,** Rawlings v. Neal, 126-271; Asher v. Reizenstein, 105-215; Horton v. Horne, 99-219; Council v. Averett, 90-168. **Judgment where there is no property in specie, as for instance where it has been sold by order of court:** Hall v. Tillman, 110-220, 115-500—**where plaintiff and defendant each entitle to part sued for,** Horton v. Horne, 99-219.

571. What judge approves judgments. In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions.

Code, s. 432; 1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51.

For judge approving when infants are petitioners, see section 720.

572. Judgment roll. Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

Code, s. 434; C. C. P., s. 253. Dewey v. Sugg, 109-335.

Acts 1909 c 1104

573. Docketed and indexed; all of same term as of first day. Every judgment of the superior court, affecting the right to real property, and any judgment requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of said court. The entry shall contain the names of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the superior court thereof, during a term of the court, and docketed during the same term, or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term.

Code, s. 433; C. C. P., s. 252; Supr. Ct. Rule VIII. **For lien of docketed judgment, see section 574. One indispensable requirement is that the record shall contain an index and cross-index of the names of the parties to the judgment:** Dewey v. Sugg, 109-328; Darden v. Blount, 126-247; Redmond v. Staton, 116-140; Holman v. Miller, 103-118—**the purpose of which being to facilitate the search for incumbrances created by such judgments; each of several judgment debtors must be specifically mentioned, but the name of only one of several plaintiffs need be mentioned,** Hahn v. Moseley, 119-73. **Clerk liable on his bond for failure to docket and index promptly:** Shackleford v. Staton, 117-73; Redmond v. Staton, 116-140; Young v. Connelly, 112-646; Holman v. Miller, 103-118; see also sections 295 and 296. **Using initials of defendant instead of Christian name valid:** Valentine v. Britton, 127-57. **One cross-index insufficient for two judgments though appearing on same page and including same parties:** Valentine v. Britton, 127-57. **Judgments docketed during term in which rendered, or within ten days, deemed rendered and docketed first day of term:** Ferrell v. Hales, 119-212; Moore v. Jordan, 117-90; Fleming v. Graham, 110-375; Holman v. Miller, 103-120. **Duty of judgment creditor to see that judgment is properly docketed, and if clerk fails to properly docket, it is no incumbrance or lien affecting third parties:** Holman v. Miller, 103-118.

574. When, where and how docketed; lien. Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof a transcript of the original docket, and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which

the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, shall not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

Code, s. 435; C. C. P., s. 254. Statute of limitation does not run against judgment when homestead allotted, see section 685. As to lien of justice's judgment docketed in superior court, see section 1479. **The docketing of a judgment is not essential to its efficacy nor a precedent requisite to enforcement by final process:** Lytle v. Lytle, 94-686; Bernhardt v. Brown, 122-587. **The judgment is no lien without it is docketed:** Alsop v. Moseley, 104-60; Holman v. Miller, 103-118; Sawyers v. Sawyers, 93-321; Williams v. Weaver, 94-134. **Docketing in another county is only for the purpose of giving a lien:** Bernhardt v. Brown, 122-587. **Failure to include on docket all of the recovery is not cured by reference to minute docket:** Wilson v. Lumber Co., 131-166. **Docketed after suit but before appointment of receiver; effect:** Bank v. Bank, 127-432. **Tax list has the force of a docketed judgment:** Shelby v. Tiddy, 118-792. **Docketed judgment as a lien on remainders:** Stern v. Lee, 115-426. **The lien of the judgment is not extended by part payment:** Hughes v. Boone, 114-54. **Priorities between judgments and mortgages:** Bostic v. Young, 116-766; Gulley v. Thurston, 112-192; Cowen v. Withrow, 112-736; Vanstory v. Thornton, 112-196; Fleming v. Graham, 110-374; Johnson v. Lemond, 109-643. **Effect of taking a judgment on a judgment upon the priority of lien:** Springs v. Pharr, 131-193. **When land of homesteader worth only $1,000, but homesteader sells the timber trees, purchaser restrained from cutting:** Jones v. Britton, 102-166. **A docketed judgment appealed from ceases to be a lien on land when supersedeas filed:** Green v. Griffin, 95-54. **Docketed judgment has the effect of a statutory mortgage:** James v. Markham, 128-380; Gammon v. Johnson, 126-66; Gambrill v. Wilcox, 111-42; Perry v. Morris, 65-223. **Judgment lien lost by lapse of time:** Eller v. Church, 121-270; McCaskill v. McKinnon, 121-192; Pipkin v. Adams, 114-201; Brittain v. Dickson, 104-547; Cook v. Moore, 95-1; Lilly v. West, 97-276; Lytle v. Lytle, 94-683; Fox v. Kline, 85-173; Pasour v. Rhyne, 82-149. **As to judgment lien on land of intestate; duty of administrator:** Holden v. Strickland, 116-185; Pate v. Oliver, 104-458; Lee v. Eure, 93-9; Sawyers v. Sawyers, 93-321. **When one buys property subject to a judgment lien his title is free upon the expiration of ten years from the docketing:** McCaskill v. Graham, 121-190. **Where execution issued before lien expired but sale takes place after expiration,** see Pipkin v. Adams, 114-201; Spicer v. Gambill, 93-378; Lytle v. Lytle, 94-683. **Lien of judgment on land in which homestead has been allotted continues during continuance of homestead:** Bevan v. Ellis, 121-225; but see section 686, as to effect of sale of homestead, also section 685. **Creditors of a corporation must discharge judgment lien on its property attaching prior to title of corporation before they can subject it to payment of corporate debts:** Pelletier v. Lumber Co., 123-596.

1912-456

A judgment for purchase money has no higher lien than any other, except the homestead can not be claimed against a debt for its purchase: Draper v. Allen, 114-50; Peck v. Culberson, 104-425; Moore v. Ingram, 91-376. **After ten years, there is no lien until an actual levy has been made, and this lien dates, not from the teste of the execution, but from the levy itself:** Wilson v. Lumber Co., 131-167; Pipkin v. Adams, 114-201; Spicer v. Gambill, 93-378; Sawyers v. Sawyers, 93-321.

DOCKETED JUDGMENT A LIEN. It is a lien upon the lands of the judgment debtor in the county where docketed: Bryan v. Dunn, 120-36; Shelby v. Tiddy, 118-794; Gardner v. Batts, 114-503; Long v. Walker, 105-90; Johnston v. Lemond, 109-643; Adams v. Guy, 106-278; Sheppard v. Bland, 87-163; King v. Portis, 81-382—**but not on any particular parcel,** Bryan v. Dunn, 120-36—**and a purchaser under a junior docketed judgment acquires the estate subject to the lien of prior docketed judgments, he buying merely an equity of redemption,** Dysart v. Brandreth, 118-968; Gambrill v. Wilcox, 111-42; Sharpe v. Williams, 76-87; Cannon v. Parker, 81-322; Isler v. Colgrove, 75-334; Halyburton v. Greenlee, 72-316. **It is not a lien in a county where not docketed:** Bernhardt v. Brown, 122-587; Lowdermilk v. Corpening, 92-333. **It is not a lien on land purchased and paid for by a debtor when title is taken in the name of a third party:** Dixon v. Dixon, 81-323; Wall v. Fairley, 77-105. **The lien is created by the docketing of the judgment, not the issuing of the execution:** Williams v. Weaver, 94-134; Gambrill v. Wilcox, 111-44; Dewey v. Sugg, 109-328; Holman v. Miller, 103-118; Sawyers v. Sawyers, 93-321. **The docketed judgment is a lien on the debtor's whole interest, equitable as well as legal, but the equitable lien acquired can not be enforced by execution:** Mayo v. Staton, 137-680; Tuck v. Walker, 106-285; Trimble v. Hunter, 104-129; Hardin v. Ray, 94-456; Mannix v. Ihrie, 76-299; McKeithan v. Walker, 66-95; Sprinkle v. Martin, 66-55. **The lien of a judgment against a corporation for labor done or for tort has priority over a mortgage made before judgment rendered:** R. R. v. Burnett, 123-210. **Sufficient transcript for docketing in another county:** Wilson v. Patton, 87-318. **Junior and senior docketed judgments, question of priority of lien discussed:** Bernhardt v. Brown, 118-700; Dysart v. Brandreth, 118-968; Gulley v. Thurston, 112-192; Gambrill v. Wilcox, 111-42; Worsley v. Bryan, 86-343; Cannon v. Parker, 81-320; Isler v. Colgrove, 75-334; Halyburton v. Greenlee, 72-316; Hoppock v. Shober, 69-153. **The lien attaches to after-acquired land in the same county at the moment that the title vests in the judgment debtor, and all judgments share pro rata in the proceeds of a sale:** Moore v. Jordan, 117-86. **The lien is lost after ten years from docketing:** McCaskill v. McKinnon, 121-192; Pipkin v. Adams, 114-201; Lytle v. Lytle, 94-683; McDonald v. Dickson, 85-248; Fox v. Kline, 85-173; Pasour v. Rhyne, 82-149; but see section 685—**and the only provisions that extends the lien are those mentioned in the section,** Lilly v. West, 97-276. **The time from which the lien dates is the moment of the docketing:** Harris v. Ricks, 63-653; Hoppock v. Shober, 69-153—**unless docketed during the term at which taken, or within ten days after and then it refers back to the first day of the term,** Ferrell v. Hales, 119-199; Moore v. Jordan, 117-90; Fleming v. Graham, 110-375; Holman v. Miller, 103-120.

THE LIEN ITSELF. The lien does not vest any estate in the judgment creditor, but only secures to creditors the right to have it applied to the satisfaction of his judgment: Bruce v. Nicholson, 109-202; Baruch v. Long, 117-509; Bryan v. Dunn, 120-36; Dail v. Freeman, 92-351; Murchison v. Williams, 71-135—**nor is the land primarily liable for the debt,** Murchison v. Williams, 71-135.

575. Of supreme court docketed in superior court; lien; transcript. It shall be the duty of the clerk of the supreme court, on application of the party obtaining judgment in said court, directing in whole or in part the payment of money, or affectng the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of said judgment, setting forth the title of said court, the names of the parties thereto, the relief granted, that said judgment was so rendered by said court, the amount and date of said judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerks of the superior court of such counties as he may be directed; and the clerk of the superior court receiving the said certificate and transcript shall docket the same in like manner as judgment rolls of the superior court may be docketed. And when so docketed, the lien of said judgment shall be the same in all respects, be subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same may be applicable. The party desiring the certificate and transcript provided for in this section, may obtain the same at any time after such judgment has been rendered, unless the supreme court shall otherwise direct.

Code, s. 436; 1881, c. 75, ss. 1, 4. **Judgment of supreme court is no lien without being docketed:** Alsop v. Moseley, 104-60; Bernhardt v. Brown, 122-593.

576. Federal court judgments docketed; lien. Judgments and decrees rendered in the circuit and district courts of the United States within this state may be docketed on the judgment dockets of the superior courts in the several counties of this state for the purpose of creating liens of such judgments and decrees upon property within the county where the same may be so docketed in like manner as the judgments of said superior courts may be docketed, for the purpose of creating liens upon property, but in no other manner, extent or order than as contemplated, provided and intended by the act of Congress entitled "An act to regulate the liens of judgments and decrees of the courts of the United States," approved August first, one thousand eight hundred and eighty-eight. And it shall be the duty of the clerks of the said superior courts, when a judgment

roll of said circuit and district courts shall be filed with him, to docket the same as judgments of the said superior courts are required to be docketed.

1889, c. 439. **See** Alsop v. Moseley, 104-60.

577. Judgment paid to clerk; docket credited; transcript to other counties. The party against whom any judgment for the payment of money may be rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same may have been rendered, at any time thereafter, although no execution may have issued on such judgment; and such payment of money shall be good and available to the party making the same, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county, to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action.

Code, s. 438; R. C., c. 31, s. 127; 1823, c. 1212. Sugg v. Bernard, 122-156; Purvis v. Jackson, 69-474. **Debtor may make payment on judgment to clerk except while execution in sheriff's hands:** Bynum v. Barefoot, 75-576.

578. Clerk to pay money to party entitled. The clerk, to whom money shall be paid as aforesaid shall pay the same to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution.

Code, s. 439; R. C., c. 31, s. 128; 1823, c. 1212, s. 2. **See** Purvis v. Jackson, 69-474.

579. Credits upon judgments. Where any payment has been made on any judgment docketed in the office of the clerk of the superior court, and no entry thereof has been made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry thereof has been made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render his judgment; from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on such appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, transcript thereof shall be sent by the clerk of the su-

perior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification shall have been finally disposed of.

1903, c. 558. **For form of judgment for purchase-money of land, see subchapter Execution, section 627. For estoppel of judgment after amendment, see section 508.**

XXV. Judgment Confessed.

580. When and for what. A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this subchapter.

Code, s. 570; C. C. P., s. 325. **The confession of judgment by a corporation:** Howard v. Warehouse Co., 123-91; Hill v. Lumber Co., 113-173; Nimocks v. Shingle Co., 110-20; Sharp v. R. R., 106-308. **Judgment confessed by executor binds him individually:** Hall v. Craige, 65-51, 68-305. **Guardian of lunatic may confess for ward:** McAden v. Hooker, 74-24. **A judgment by confession without action founded on contract in the superior court for a sum not in excess of $200 is void for want of jurisdiction:** Slocumb v. Shingle Co., 110-24.

581. Debtor to make verified statement. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

The requirements of this section must be strictly complied with: Smith v. Smith, 117-348; Sharp v. R. R., 106-308; Hill v. Lumber Co., 113-180; Davidson v. Alexander, 84-621. **Statement verified by guardian of lunatic not irregular in absence of fraud:** McAden v. Hooker, 74-24.

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

See generally Smith v. Smith, 117-348; Martin v. Briscoe, 143-353. **The filing is sufficient as an authority for its entry and conforms to the statute:** Bank v. Cotton Mills, 115-507.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

Where affidavit stated that he was justly indebted in a certain amount but did not not embrace the account, which was filed, it was insufficient: Davenport v. Leary, 95-203. **Certain confessions as to facts out of which indebtedness arose held sufficient under circumstances related:** Martin v. Briscoe, 143-353; Bank v. Cotton Mills, 115-507; Uzzle v. Vinson, 111-138—

held insufficient, Davenport v. Leary, 95-203; Davidson v. Alexander, 84-621.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

A judgment confessed to provide security against contingent liability must be a lien for the full amount named until the actual loss is determined at a lesser sum: Darden v. Blount, 126-250. **The filing of confession equivalent to an express authority for its entry and fully conforms to the statute:** Bank v. Cotton Mills, 115-507. **Cases where judgment confessed under agreement between plaintiff and defendant as to certain matters not appearing in judgment:** Wood v. Bagley, 34-83; Molyneux v. Huey, 81-107.

Code, s. 571; C. C. P., s. 326.

582. Judgment; costs; execution; when due by instalments. The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in instalments, and the instalments are not all due, the execution may issue upon such judgment for the collection of such instalments as have become due, and shall be in the usual form, but shall have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the instalments thereafter to become due; and whenever any further instalment becomes due, execution may, in like manner, be issued for the collection and enforcement of the same.

Code, s. 572; C. C. P., s. 327. **Setting aside the judgment for cause appearing in record:** Nimocks v. Shingle Co., 110-20. **Amending irregularities, etc.:** Bank v. Cotton Mills, 115-507. **Confession of judgment is not vitiated because the evidence of indebtedness not filed, when confession sufficiently describes:** Banks v. Cotton Mills, 115-507—**or because confession stipulates that execution will not issue within a specified time,** Ibid—**or because confession is for a greater rate of interest than contract stipulates, when no fraud,** Ibid. **Judgment is void when court has no jurisdiction,** Smith v. Smith, 117-348; Slocumb v. Shingle Co., 110-24.

XXVI. Appeal.

583. Writs of error abolished. Writs of error in civil actions are abolished; and the only mode of reviewing a judgment, or order, in civil action, shall be that prescribed by this chapter.

Code, s. 544; C. C. P., s. 296. **Appeals by this section are substituted for writs of error:** Lynn v. Lowe, 88-478; White v. Morris, 107-100. **Appeals from inferior courts that the General Assembly establishes shall be to the superior court and thence only to the supreme court:** Rhyne v. Lipscombe, 122-650. **Statutory requisites as to appeals can not be dispensed with except with assent of counsel:** Sondley v. Asheville, 112-694.

584. Certiorari, recordari and supersedeas. Writs of certiorari, recordari and supersedeas are hereby authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed, or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where the execution is stayed.

Code, s. 545; 1874-5, c. 109. **For supersedeas bond, see section 598. For bond for costs see section 593.**

CERTIORARI. **The writ of certiorari is an extraordinary remedial writ to be granted or not in the sound discretion of the court where the petitioner has lost his only remedy without fault or neglect on his own part:** Ice Mfg. Co. v. R. R., 125-17. **Appellant is entitled to writ of certiorari where he has lost appeal by no neglect of his own or his agent but by neglect or error of the court or its officers:** Winborn v. Byrd, 92-7; Johnson v. Andrews, 132-380; Norwood v. Pratt, 124-745; McMillan v. McMillan, 122-410; Russell v. Hill, 122-772; Nicholls v. Dunning, 99-82; Comrs. v. Steamship Co., 98-165; Sparks v. Sparks, 92-359; Hodges v. Lassiter, 94-294; Pittman v. Kimberly, 92-562; Seay v. Yarborough, 94-291; Roulhac v. Miller, 89-190; Stell v. Barham, 86-727; Skinner v. Maxwell, 67-257; McConnell v. Caldwell, 51-469; Reade v. Hamlin, 62-128—**or by contrivance of appellee or his agent,** Winborn v. Byrd, 92-7; Briggs v. Jervis, 98-454; Wiley v. Lineberry, 88-68; Bledsoe v. Snow, 48-99; Lunceford v. McPherson, 48-174—**or by their acts or declarations reasonably calculated to mislead,** Winborn v. Byrd, 92-7; Willis v. R. R., 119-718; Graves v. Hines, 106-323; Williamson v. Boykin, 99-238; Comrs. v. Steamship Co., 98-163; Parker v. R. R., 84-118; Mott v. Ramsay, 91-249—**or by neglect of the appellee,** Comrs. v. Steamship Co., 98-165; Briggs v. Jervis, 98-454; Collins v. Faribault, 92-310; Mott v. Ramsay, 91-249; Syme v. Broughton, 84-114—**or where from some insurmountable obstacle appellant is prevented from perfecting his appeal,** Ice Co. v. R. R., 125-17; Mott v. Ramsay, 90-372; Howerton v. Henderson, 86-718; Sharpe v. McElwee, 53-115; Dyer v. Rich, 4-413—**or where there is an oral agreement, not denied, to waive time and it is broken by appellee,** Walton v.

Pearson, 82-464—**or where the judge below by letter makes known his desire or willingness to correct an error or omission which it appears was made through mistake or inadvertence,** Barber v. Justice, 138-20; Cameron v. Power Co., 137-104; Sherrill v. Tel. Co., 116-654; Riggan v. Sledge, 116-87; Bank v. Bridges, 114-107; Allen v. McLendon, 113-319; Broadwell v. Ray, 111-457; Boyer v. Teague, 106-571; Lowe v. Elliott, 107-718; Porter v. R. R., 97-63; State v. Sloan, 97-499; Mayo v. Leggett, 96-237; State v. Gay, 94-821; State v. Gooch, 94-982; Cheek v. Watson, 90-302; Ware v. Nesbit, 92-202; Currie v. Clark, 90-17. **As to negligence of counsel imputed to client, see** Vivian v. Mitchell, 144-476; Cozart v. Assurance Co., 142-522; Ice Mfg. Co. v. R. R., 125-17; Boyer v. Garner, 116-125; Boing v. R. R., 88-64; Bradford v. Coit, 77-72 **The writ can be used as a writ of error or false judgment:** Hartsfield v. Jones, 49-309; Young v. Rollins, 90-131; Barton, ex parte, 70-134; Biggs ex parte, 64-202; Walton v. Gatlin, 60-310; see also Williams v. Williams, 71-427; State v. Jefferson, 66-309. **The remedy to review a refusal of the judge to discharge a prisoner upon a mistrial is by certiorari:** State v. Locke, 86-647. **Certiorari not allowed in forma pauperis unless an order allowing appeal in forma pauperis was made by judge below:** Lindsay v. Moore, 83-444; Brittain v. Mull, 93-490; State v. Warren, 100-489; Britt v. Patterson, 31-197—**but where through no laches of his own he is prevented from applying in time his application may yet be heard,** Sanders v. Norris, 82-4; Simmons v. Dowd, 77-155; Skinner v. Maxwell, 67-257. **Where a criminal case is decided on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record:** State v. Marsh, 134-184.

Practice as to applying for certiorari when case on appeal not settled in time to bring case up: State v. Telfair, 139-555; Norwood v. Pratt, 124-745; Parker v. Rwy. Co., 121-501; Burrell v. Hughes, 120-277; Guano Co. v. Hicks, 120-29; Brown v. House, 119-622; Shober v. Wheeler, 119-471; Haynes v. Coward, 116-841; Causey v. Snow, 116-497; Heath v. Lancaster, 116-70; State v. Freeman, 114-872; Paine v. Cureton, 114-606; Graham v. Edwards, 114-228; Pipkin v. Green, 112-355; Porter v. R. R., 106-478; Stephens v. Koonce, 106-255; Pittman v. Kimberly, 92-562; Owens v. Phelps, 91-253—**and when by loss of papers or other good cause the transcript of no part of the record could be docketed in time,** Peebles v. Braswell, 107-68; Nichols v. Dunning, 91-4—**and when case on appeal not sent up because trial judge died pending making up the case,** Taylor v. Simmons, 116-70; Parker v. Coggins, 116-71.

Certiorari is the remedy by which matters adjudged, decreed or ordered by inferior tribunals may be brought up for revision where no appeal provided, inferred from Hillsboro v. Smith, 110-417; Smith v. Cheek, 50-213; Thompson v. Floyd, 47-313; Brooks v. Morgan, 27-481; Collins v. Haughton, 26-420; Matthews v. Matthews, 26-155; Dougan v. Arnold, 15-99; Allen v. Williams, 2-17. **Intimated that where there is a more appropriate remedy than certiorari it should be resorted to:** Watson v. Shields, 67-235; ex parte Daughtry, 28-155; Petty v. Jones, 23-408; Swain v. Fentress, 15-601; Street v. Clark, 1-109; but see McLeran v. Melvin, 56-198. **Certiorari to perfect record will lie as often as necessary until record is perfect:** State v. Reid, 18-382; Russell v. Hill, 122-773; Burrell v. Hughes,

120-277; State v. Beal, 119-809; State v. Preston, 104-733; State v. Randall, 87-571; State v. Munroe, 30-258; State v. Craton, 28-164; Smith v. Kelly, 7-507. **Effect of issuing writ of certiorari upon execution:** State v. Walters, 97-489. **Certiorari may be granted on facts apparent on the records of papers before the court that are uncontroverted:** Cherry v. Slade, 9-400. **One superior court can issue writ of certiorari to another to send over more perfect transcript:** State v. Reid, 18-377; State v. Collins, 14-117. **Writ issues only to the court that rendered judgment:** Williams v. Williams, 71-427.

CASES IN WHICH HELD THAT CERTIORARI WILL NOT LIE. Laches, or ignorance of requirements on part of applicant, or of some one on whom he depended: Cressler v. Asheville, 138-487; Barber v. Justice, 138-20; Cozart v. Assurance Co., 142-522; Wood v. Watson, 107-57; Stroud v. Tel. Co., 133-253; Haynes v. Coward, 116-840; Rothchild v. McNichol, 121-284; Finlayson v. Acc. Co., 109-196; Peebles v. Braswell, 107-68; Williamson v. Boykin, 99-238; Churchill v. Ins. Co., 92-485; Winborn v. Byrd, 92-7; Boing v. R. R., 88-62; Baker v. Halstead, 44-41; Cotten v. Clark, 23-353; Davis v. Marshall, 9-59; but see Ice Mfg. Co. v. R. R., 125-17. **Where application failed to assign error in judgment sought to be brought up for review, nor disclosed meritorious ground,** Short v. Sparrow, 96-348; In re Brittain, 93-587; March v. Thomas, 63-249; Lewis v. Foard, 112-402. **Where cost not paid for appeal upon demand:** Sanders v. Thompson, 114-282; Critz v. Sparger, 121-283; Brown v. House, 119-622; Broadwell v. Ray, 112-191; Fisher v. Mining Co., 105-125; Bailey v. Brown, 105-127; Smith v. Lynn, 84-837; Andrews v. Whisnant, 83-446—**or where undertaking for cost insufficient:** Bowen v. Fox, 99-127; Churchill v. Brooklyn Ins. Co., 92-485; Turner v. Quinn, 92-501; State v. Roper, 94-859; Chastain v. Chastain, 87-283; but see sections 593 and 594. **Where ignorance of requirements in perfecting an appeal bond:** Griffin v. Nelson, 106-235; Turner v. Powell, 93-341; Smith v. Abrams, 90-21; Elliott v. Holliday, 14-377—**Appellant depending upon liberal practice among members of the bar in preparing and serving case:** Wilson v. Hutchinson, 74-432; Smith v. Smith, 119-313; Willis v. R. R., 119-719; Cozart v. Assurance Co., 142-522. **Where originally there was no right of appeal;** Guilford v. Georgia Co., 109-310; Badger v. Daniel, 82-468. **Where agreements to waive the Code rule is oral, and terms of agreement not admitted nor can be ascertained from appellee's affidavits:** Scroggs v. Alexander, 88-64; Smith v. Smith, 119-311; Roberts v. Partridge, 118-355; Leduc v. Moore, 113-275; Graham v. Edwards, 114-228; Sondley v. Asheville, 112-694; Hemphill v. Morrison, 112-756; Graves v. Hines, 106-323; Holmes v. Holmes, 84-833; Rouse v. Quinn, 75-354. **Where matter of which affiant wished to take advantage occurred subsequent to trial:** Betts v. Franklin, 20-602. **Where appeal was not taken:** Howell v. Jones, 109-102. **Where it appears that matter which would be certified up in obedience to the writ is already substantially before the court:** Wood v. Rwy., 118-1056—**or where if certified up would not be relevant to the exception presented:** Bank v. Bridgers, 114-107; Porter v. R. R., 97-63; Riggan v. Sledge, 116-87.

THE APPLICATION FOR CERTIORARI. Cases of interest and use in drawing it up: Critz v. Sparger, 121-283; Brown v. House, 119-622;

Sanders v. Thompson, 114-282; State v. Warren, 100-489; Short v. Sparrow, 96-348; In re Brittain, 93-588; Howerton v. Henderson, 86-718; Weaver v. Mining Co., 89-198; McDaniel v. Pollock, 87-503; Williams v. Williams, 74-2; ex parte Barton, 70-134; Bledsoe v. Snow, 48-99; Lunceford v. McPherson, 48-174; March v. Thomas, 63-249; Brigman v. Jervis, 30-451; McMillan v. Smith, 4-173. **Ten days' notice required to be given adverse party of application:** Keerans v. Keerans, 109-101. **Application for certiorari must be made to the next term of the appellate court:** Burrell v. Hughes, 120-277; Causey v. Snow, 116-497; Graham v. Edwards, 114-228; Norman v. Snow, 94-431; Suiter v. Brittle, 92-53, 90-19; Cross v. Cross, 90-15; Andrews v. Whisnant, 83-446; Staples v. Mooring, 26-215; Brown v. Williams, 84-116; Erwin v. Erwin, 14-528—**and motion for its issuance must be at the call of the district:** Mitchell v. Baker, 129-63—**and before argument begun,** State v. Marsh, 134-195; State v. Harris, 114-830—**but sometimes may be made after argument but before case considered in conference;** Boyer v. Teague, 106-571. **Practice set out in application for certiorari** in Weaver v. Mining Co., 89-198.

RECORDARI. This writ is a substitute for an appeal from a judgment of a justice of the peace in order to have a new trial on the merits, and as a writ of false judgment to obtain a reversal of an erroneous decision: King v. R. R., 112-318; Clark v. Mfg. Co., 110-111; Swain v. Smith, 65-211; Caldwell v. Beatty, 69-365. **Recordari and not certiorari the proper remedy as a substitute for an appeal from a justice:** Ledbetter v. Osborne, 66-379. **Difference between recordari and certiorari:** See 2-469. **Superior court judge should find the facts when application made for writ:** Collins v. Gilbert, 65-135. **The practice as to writs of recordari discussed:** Weaver v. Mining Co., 89-198; King v. R. R., 112-318. **A void judgment can be examined into by recordari:** McKee v. Angel, 90-60. **As to whether recordari can be had when notice of appeal not given in time:** Marsh v. Cohen, 68-283; State v. Johnson, 109-852. **Even a delay of three months, if sufficiently accounted for, will not bar a recordari:** Koonce v. Pelletier, 82-236. **After the return of the writ, it is too late to object that it was not addressed to him:** Carmer v. Evers, 80-55.

Recordari will lie when defendant is deprived of his appeal by irregularity in justice's proceedings or error of justice: Critcher v. McCadden, 64-262; Marsh v. Cohen, 68-283; State v. Warren, 100-489—**when justice reasonably misled defendant as to time of trial:** Navassa Guano Co. v. Bridgers, 93-439—**when judgment by default taken after insufficient or no service of process:** Clark v. Mfg. Co., 110-111; Merrell v. McHone, 126-528—**when irregular and voidable judgments taken:** King v. R. R., 112-318; Gallop v. Allen, 113-24.

Where recordari ordered but not docketed, appellee can docket and have case dismissed at any succeeding term: Johnson v. Reformers, 135-385. **Where defendant asks for recordari he waives a lack of service of summons:** Johnson v. Reformers, 135-385. **Nonresident, learning of justice's judgment rendered against him, appealed, but justice refused to grant it, whereupon recordari issued:** Merrell v. McHone, 126-528.

APPLICATION FOR RECORDARI. Must be made at first term of

superior court which shall begin more than ten days after trial below: Davenport v. Grissom, 113-38; Pittman v. Kimberly, 92-562; Suiter v. Brittle, 92-53; Howerton v. Henderson, 86-720; Boing v. R. R., 88-62; Wilson v. Seagle, 84-110. **Undertaking must accompany application:** Steadman v. Jones, 65-388—**but writ may be granted in forma pauperis:** State v. Warren, 100-489.

Application must state that applicant took an appeal: Howell v. Jones, 109-102—**that he paid or offered to pay the justice's fees, though no one can take advantage of this except the justice:** Steadman v. Jones, 65-388; Carmer v. Evers, 80-55—**and applicant must show that he has been diligent:** Boing v. R. R., 88-62; Davenport v. Grissom, 113-40; Ballard v. Gay, 108-544. **Application must be accompanied by supersedeas bond:** Steadman v. Jones, 65-388. **Amendment to application is discretionary with judge:** Pritchard v. Sanderson, 92-41. **Application need not contain an averment of merits when appeal was lost by misconduct or neglect of justice:** State v. Warren, 100-489. **The decision of the judge upon a petition for recordari can only be reviewed by appeal or by application to vacate it for mistake, surprise or excusable neglect:** Barnes v. Easton, 98-116.

585. Who may appeal. Any party aggrieved may appeal in the cases prescribed in this chapter.

Code, s. 547; C. C. P., s. 298. **For cases in which appeal lies see under section 587. Parties to actions can appeal:** Houston v. Lumber Co., 136-328—**but a party appearing by counsel specially can not appeal,** Houston v. Lumber Co., 136-328; Clark v. Mfg. Co., 110-111—**though one not a party and taxed with the costs can appear specially and appeal,** Loven v. Parson, 127-301. **Surety on prosecution bond can appeal when he is made a party to a motion to retax costs:** Smith v. Arthur, 116-871—**but as to surety on stay bond to secure justice's judgment, quaere,** Simmons v. Andrews, 106-201. **The state may appeal, when,** see State v. R. R., 126-1073; State v. Robinson, 116-1046; and section 3276. **One not interested in the verdict and judgment can not appeal,** Faison v. Hardy, 118-142. **Intervenors can appeal, when:** Jones v. Asheville, 116-817; Rollins v. Rollins, 76-264; Clemmons v. Hampton, 70-534. **An applicant to be made a party can appeal from the court's refusal:** Jones v. Asheville, 116-820. **Where cases tried together for convenience, but not consolidated such as to become one action, and the verdict is substantially different as to each party, separate appeals should be taken,** Williams v. R. R., 144-498.

586. From clerk to judge. Appeals shall lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law. In case of such transfer or appeal neither party shall be required to give an undertaking for costs; and the clerk shall transmit, on such transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the

entry of the order or judgment of the clerk. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof.

Code, s. 116. **See sections 610-613.**

587. In what cases taken. An appeal may be taken from every judicial order or determination of a judge of a superior court upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

Code, s. 548; C. C. P., s. 299; 1818, c. 962, s. 4.

For appeal in creditors' proceeding against personal representative, see section 119.

147-437

APPEAL LIES WHEN. The appeal can only be taken from the judgment and it must first be entered: Taylor v. Bostic, 93-415; Thornton v. Lambeth, 103-86; Rosenthal v. Roberson, 114-594; Milling Co. v. Finlay, 110-411; Baum v. Shooting Club, 94-217; State v. Hazell, 95-623; State v. Lockyear, 95-641; State v. Smith, 95-680; Logan v. Harris, 90-7; but see Carter v. Elmore, 119-296. **An appeal lies from a nonsuit submitted to upon judge intimating an opinion or making a ruling that would materially affect the result:** Collins v. Swanson, 121-67; Asbury v. Fair, 111-251; Bain v. Bain, 106-239; Tiddy v. Harris, 101-589; Davis v. Ely, 100-283; Mobley v. Watts, 98-284; Springs v. Schenck, 99-551; Gibbs v. Lyon, 95-146; Gregory v. Forbes, 94-220 Hedrick v. Pratt, 94-101; Warner v. R. R., 94-250; Harper v. Dail, 92-394; Abernathy v. Stowe, 92-213; but see Midgett v. Mfg. Co., 140-361. **An appeal lies from an order setting aside the allotment of a homestead:** Beavans v. Goodrich, 98-217—**from an order vacating an order of arrest,** White v. Underwood, 125-28; Fertilizer Co. v. Grubbs, 114-470; Roulhac v. Brown, 87-4—**from the granting or refusal of an injunction,** Bank v. Jenkins, 64-719; but see French v. Wilmington, 75-387—**from judgment in bastardy proceeding,** State v. Edwards, 110-511; State v. Crouse, 86-617; State v. Wilkie, 85-513—**from denial of a motion on the ground of want of power,** Martin v. Bank, 131-121; Lassiter v. R. R., 136-89; Welch v. Kingsland, 89-180; State v. Fuller, 114-885; In re Smith, 105-167; Jarrett v. Gibbs, 107-303; Henderson v. Graham, 84-496—**from an order in a drainage proceeding directing matters which are properly for the determination of the commissioners to be referred to a jury,** Porter v. Armstrong, 134-447—**from an order granting alimony pendente lite,** Barker v. Barker, 136-316—**from an order overruling or sustaining a demurrer,** Pender v. Mallett, 122-163; Frisby v. Marshall, 119-570; Ramsay v. R. R., 91-419; Comrs. v. Magnin, 78-181; but see Burrell v. Hughes, 116-430; Joyner v. Roberts, 112-111; Sprague v. Bond, 111-425—**from a judgment alleged to be erroneous,** Becton v. Dunn, 142-172; Henderson v. Moore, 125-383—**from an order requiring**

a person to allow an inspection of paper writings, Sheek v. Sain, 127-266—**from the refusal of the court to correct or amend its judgment,** Beam v. Bridgers, 111-269; Brooks v. Stephens, 100-297—**from findings of fact by referee adopted by the judge, see section 525—from judgment in contempt proceedings, when,** Ex parte McCown, 139-95; Childs v. Wiseman, 119-497; Fertilizer Co. v. Taylor, 112-141; Murray v. Berry, 113-46; Bristol v. Pearson, 109-718; In re Deaton, 105-59; Young v. Rollins, 90-125; Cromartie v. Comrs., 85-211; Bond v. Bond, 69-97; In re Walker, 82-95; In re Davis, 81-72; Robbins ex parte, 63-309; but see Shooting Club v. Thomas, 120-334; Scott v. Fishblate, 117-265; In re Robinson, 117-533; Thompson v. Onley, 96-9; State v. Mott, 49-449—**from order setting aside judgment for mistake, inadvertance or excusable neglect, when the facts do not constitute such in law,** Norton v. McLaurin, 125-185; Weil v. Woodard, 104-94; Beck v. Bellamy, 93-129; see also cases under section 513—**from the refusal of judgment by default,** Timber Co. v. Butler, 134-50; Hall v. Hall, 131-185; Kruger v. Bank, 123-16; Griffin v. Light Co., 111-434—**from refusal of judgment by default and inquiry,** Investment Co. v. Kelly, 123-388; Kruger v. Bank, 123-16—**from refusal to dismiss or the dismissal of an attachment or order of arrest,** Judd v. Mining Co., 120-397; Fertilizer Co. v. Grubbs, 114-470; Sheldon v. Kivett, 110-408; White v. Underwood, 125-28—**from an order retaxing costs and construing former judgment,** Mills Co. v. Lytle, 118-837—**from a judgment as to costs when the question is as to whether item properly chargeable,** State v. Horne, 119-853; Blount v. Simmons, 120-19; Guilford v. Comrs., 120-23—**from an order taxing one who is not a party with costs,** Loven v. Parson, 127-301—**from the refusal of a judgment upon a verdict,** Oil Co. v. Grocery Co., 136-354—**from an order of a board of county commissioners that a court house be built,** Vaughn v. Comrs., 117-429—**from order granting or refusing a new trial as a matter of law,** Oil Co. v. Grocery Co., 136-354; Johnson v. Reformers, 135-385; Braid v. Lukins, 95-123; Winburne v. Bryan, 73-47; Johnson v. Bell, 74-355; Bryan v. Heck, 67-322; Clegg v. Soapstone Co., 67-302—**from findings of fact by the judge, in equity cases,** Baker v. Belvin, 122-190; Roberts v. Lewald, 107-305; Evans v. R. R., 96-45; Coates v. Wilkes, 92-376; Jones v. Boyd, 80-258—**from a refusal of a motion in the cause to amerce sheriff,** Swain v. Phelps, 125-44—**from removal of a cause or refusal to remove a cause when wrong venue suggested on motion,** Brown v. Cogdell, 136-32; Roberts v. Connor, 125-45; Connor v. Dillard, 129-50—**from an order taxing prosecutor with costs, without finding preliminary facts,** State v. Roberts, 106-662; State v. Jones, 117-768; State v. Morgan, 120-563—**from judgment as to location or discontinuance of public road, cartway or ferry,** Cook v. Vickers, 141-101; Robinson v. Lamb, 126-492; Warlick v. Lowman, 103-122, 101-548; McDowell v. Insane Asylum, 101-656; King v. Blackwell, 96-322; Ashcraft v. Lee, 81-135—**from order striking out a consent reference, after report in,** Stevenson v. Felton, 99-58; Smith v. Hicks, 108-248; Deaver v. Jones, 114-649—**from an order of reference when plea in bar has not been tried,** Duckworth v. Duckworth, 144-620; Kerr v. Hicks, 129-141; Bank v. Fidelity Co., 126-320; Clements v. Rogers, 95-248; but see Leak v. Covington, 87-501; Sloan v. McMahon, 85-296—**from the overruling or sus-**

taining of a plea in bar by the trial judge as a matter of law where reference contemplated, Jones v. Wooten, 137-421; Hahn v. Heath, 127-27; Royster v. Wright, 118-152—from an order setting aside a report of commissioners in partition, Skinner v. Carter, 108-106—from the refusal to allow certain important testimony, Comrs. v. Lemly, 85-341—from an order confirming report of commissioners to lay out a right of way, R. R. v. R. R., 83-449—from an interlocutory order affecting a substantial right which will work injury if not corrected before appeal from final judgment, Lane v. Richardson, 101-181; Martin v. Flippin, 101-452; Leak v. Covington, 95-193; Spencer, ex parte, 95-271; Merrill v. Merrill, 92-657—from an order allowing commissions, Bank v. Bank, 126-531.

APPEAL DOES NOT LIE. It does not lie from a judgment that adjudges nothing: Carter v. Elmore, 119-296—nor affects neither the actual nor legal merits of a controversy, Lutz v. Cline, 89-186; Childs v. Martin, 68-307—nor from the decision of a hypothetical proposition of law depending on a fact not yet decided, McGehee v. Tucker, 122-186—nor from a refusal to allow nonsuit after verdict and judgment, Brown v. King, 107-313; Kingsbury v. Hughes, 61-328—from a refusal to hold demurrer frivolous or strike out answer as frivolous, Morgan v. Harris, 141-358; Walters v. Starnes, 118-842; Abbott v. Hancock, 123-89—from an order extending time in which to file defense bond, Dunn v. Marks, 141-232—from a refusal of judge to require a prosecution bond, Christian v. R. R., 136-321—from a refusal to set aside verdict on the ground of excessive damages, Phillips v. Tel. Co., 130-513; Norton v. R. R., 122-910; Benton v. R. R., 122-1007—from a setting aside or refusal to set aside verdict on the ground of inadequacy of damages, Benton v. Collins, 125-83; Burns v. R. R., 125-304—from the setting aside of a judgment where facts show inadvertence, excusable neglect, etc., Norton v. McLaurin, 125-185; see also cases under section 513—from a pro forma judgment, Hines v. Hines, 84-122—from a confession of judgment, State v. Griffis, 117-709; Rush v. Steamboat Co., 67-47—from refusal to amend a record, State v. Griffis, 117-713; State v. Swepson, 83-584; Perry v. Adams, 83-266—from the refusal of or granting leave to file exceptions at a term of court subsequent to the one to which the report is submitted, Johnson v. Loftin, 111-319; McNeill v. Hodges, 105-52; Levenson v. Elson, 88-182; Long v. Gooch, 86-709; Whitkowsky v. Logan, 86-540; Long v. Logan, 86-535—from an order placing cause on civil issue docket, Goode v. Rogers, 126-62—from order consolidating cases, Morrison v. Baker, 81-76—from order making allowance to referee, Worthy v. Brower, 93-492—for allowing a leading question to be asked by a party of his own witness, Christmas v. Haywood, 119-130; Johnson v. Allen, 100-131; Bank v. Pinkers, 83-377—from order allowing additional exceptions filed to referee's report, R. R. v. King, 125-454—from order correcting records so as to speak the truth, State v. Warren, 95-674—from a judgment in habeas corpus proceedings, State v. Herndon, 107-934; State v. Miller, 97-451; Walton v. Gatlin, 60-310—from order allowing or refusing amendments to pleadings, Parker v. Harden, 122-111; Goodwin v. Fertilizer Works, 121-91; Allen v. R. R., 120-548; Elliott v. Tyson, 117-114; Sheldon v. Kivett, 110-408; Brendle v. Reese, 115-552; Conley v. R. R., 109-692; Moore v.

Garner, 109-157; McMillan v. Baker, 92-110; Warden v. McKinnon, 99-251; Roulhac v. Brown, 87-1; Wiggins v. McCoy, 87-499; Henry v. Cannon, 86-24; Smith v. Summerfield, 108-284; Best v. Clyde, 86-4; Turlington v. Williams, 84-125; Boddie v. Woodard, 83-2; Reese v. Jones, 84-597; Dobson v. Chambers, 78-334; Lippard v. Roseman, 72-427—**from an order substituting parties,** R. R. v. Tel. Co., 113-213; Maggett v. Roberts, 108-174; Reynolds v. Smathers, 87-24—**from an order making or refusing to make unnecessary but proper parties,** Gammon v. Johnson, 126-64; Aiken v. Mfg. Co., 141-339—**from a refusal of judgment on pleadings,** Duffy v. Meadows, 131-31—**from refusal of judge to grant a new trial for newly discovered evidence,** Faison v. Williams, 121-152; Black v. Black, 111-301; Flowers v. Alford, 111-248; State v. DeGraff, 113-688; State v. Starnes, 97-423; Munden v. Casey, 93-97; Carson v. Dellinger, 90-226; Vest v. Cooper, 68-131—**from the granting or refusing of new trial, when it is in court's discretion,** Slocumb v. Construction Co., 142-349; McCord v. R. R., 134-53; Bird v. Bradburn, 131-488; Edwards v. Phifer, 120-405; Spruill v. Ins. Co., 120-149; Jordan v. Farthing, 117-181; Whitehurst v. Pettipher, 105-40; McKinnon v. Morrison, 104-354; State v. Kiger, 115-746; Alpha Mills v. Engine Co., 116-797; Davenport v. Terrell, 103-53; Redmond v. Stepp, 100-212; Stanton v. Hughes, 97-318; Goodson v. Mullin, 92-211; Thomas v. Myers, 87-31; Dalton v. Webster, 82-279; Gay v. Nash, 84-333; Watts v. Bell, 71-405; Vest v. Cooper, 68-131; Jenkins v. Ore Co., 65-563; Boykin v. Perry, 49-325; McRae v. Lilly, 23-118; Brown v. Morris, 20-565; Long v. Gantley, 20-457; Armstrong v. Wright, 8-93; Alley v. Hampton, 13-11—**from findings of fact by the referee adopted by the judge, see section 525—from findings of fact by the judge, when,** Thornton v. McNeely, 144-622; Davison v. Land Co., 126-704; Baker v. Belvin, 122-190; State v. Morgan, 120-563; Crabtree v. Scheelky, 119-56; State v. Taylor, 118-1262; Blue v. R. R., 117-644; Smith v. Whitten, 117-389; Hinsdale v. Underwood, 116-593; Cureton v. Garrison, 115-550; Long v. Ins. Co., 114-465; Parker v. McPhail, 112-502; McAden v. Nutt, 113-439; State v. Fuller, 114-885; Johnson v. Loftin, 111-319; State v. Best, 111-643; State v. Crane, 110-537; Gillis v. R. R., 108-441; Davie v. Davis, 108-501; State v. Brady, 107-822; Travers v. Deaton, 107-500; Bonds v. Smith, 106-553; Springs v. Schenck, 106-153; Nissen v. Mining Co., 104-309; Avent v. Arrington, 105-377; Millhiser v. Balsley, 106-433; Hammond v. Schiff, 100-161; State v. Potts, 100-457; Leak v. Covington, 99-559; Foote v. Gooch, 96-271; Smith v. Kron, 96-392; State v. Cole, 94-958; Branton v. O'Briant, 93-99; Jones v. Call, 93-170; Trull v. Rice, 92-572; Barbee v. Green, 92-471; State v. Burgwyn, 87-572; State v. Efler, 85-585; State v. Sanders, 84-728; Hilton v. McDowell, 87-364; McPeters v Ray, 85-462; Carroll v. Haywood, 64-481; Barrett v. Henry, 85-321; Cardwell v. Cardwell, 64-621; Burke v. Turner, 85-500; but see Baker v. Belvin, 122-190; Delozier v. Bird, 125-493; Pearce v. Elwell, 116-595; Roberts v. Lewald, 107-305; Gillis v. R. R., 108-441; Holden v. Purefoy, 108-163; Gatewood v. Burns, 99-357; Scoggins v. Turner, 98-135; Evans v. R. R., 96-45; Coates v. Wilkes, 92-376—**from order making additional parties, where no substantial right denied,** Gammon v. Johnson, 126-64; Bennett v. Shelton, 117-103; Emry v. Parker, 111-261; Jarrett v. Gibbs,

107-303; Lane v. Richardson, 101-181; Lee v. Eure, 92-283; Merrill v. Merrill, 92-657—**from a judgment for costs of a case only,** Commissioners v. Gill, 126-86; Taylor v. Vann, 127-243; State v. Railroad, 74-287; State v. Horne, 119-853; Futrell v. Deanes, 116-38; Elliott v. Tyson, 116-184; Russell v. Campbell, 112-404; Pritchard v. Baxter, 108-129; State v. Byrd, 93-624; Hasty v. Funderburk, 89-93; State v. R. R., 74-287; Martin v. Sloan, 69-128; Osborne v. Henry, 66-354; but see Blount v. Simmons, 120-19; Mills Co. v. Lytle, 118-837; Hobson v. Buchanan, 96-444; May v. Darden, 83-237—**from the refusing or granting of a continuance,** State v. Sultan, 142-569; Lanier v. Ins. Co., 142-14; State v. Dewey, 139-556; Wagon Co. v. Bostic, 118-758; Bank v. Mfg. Co., 108-282; Dupree v. Ins. Co., 92-417; Jaffray v. Bear, 98-58; State v. Vann, 84-722; Isler v. Dewey, 79-1; Johnson v. Maxwell, 87-18; State v. Scott, 80-365; State v. Lindsey, 78-499; but see McQueen v. Bank, 111-509; Armstrong v. Wright, 8-93; Stratford v. Stratford, 92-297; McCurry v. McCurry, 82-296; Austin v. Clarke, 70-458; Bank v. Tiddy, 67-169—**from an order submitting issues,** Goode v. Rogers, 126-62—**from the refusal or intimation of a refusal to allow counterclaim to be pleaded,** Milling Co. v. Finlay, 110-411—**from interloctuory orders, when appellant is not seriously prejudiced by delay and deprived of no substantial right,** Navigation Co. v. Worrell, 133-93; Brown v. Nimocks, 126-808; Benton v. Collins, 121-66; Harding v. Hart, 118-839; Bruce v. Crabtree, 116-528; Sinclair v. R. R., 111-507; Hilliard v. Oram, 106-467; Warren v. Stancill, 117-112; Clement v. Foster, 99-255; Blackwell v. McCaine, 105-460; Hailey v. Gray, 93-195; Welch v. Kinsland, 93-281; Loftin v. Rouse, 94-508; Sneeden v. Harris, 107-311; Williams v. Walker, 107-334; Railroad v. Warren, 92-620; Leak v. Covington, 87-501; Comrs. v. Cook, 86-18; Hines v. Hines, 84-122; Telegraph Co. v. R. R., 83-420; Sutton v. Schonwald, 80-20—**from a partial judgment; court will not entertain fragmentary appeals,** Hinton v. Life Ins. Co., 116-22; McGehee v. Tucker, 122-186; Rodman v. Calloway, 117-13; Hicks v. Gooch, 93-112; Arrington v. Arrington, 91-301; Comrs. v. Satchwell, 88-1; Hines v. Hines, 84-122; White v. Utley, 94-511—**from an order striking out an irregular judgment at the term rendered,** Halyburton v. Carson, 80-16; Dick v. Dickson, 63-488—**from an order of judge to show cause why receiver should not be appointed,** Gray v. Gaither, 71-55—**from refusal of judge to accept bond tendered as security for prosecution,** Futrell v. Spivey, 63-526—**from decision as to sufficiency of indemnity bond executed in compliance with his order,** Sternberger v. Hawley, 85-141—**from decision as to sufficiency of undertakings,** Bynum v. Comrs., 101-412; Futrell v. Spivey, 63-526—**from refusal to pass upon competency of evidence before trial,** Wallington v. Montgomery, 74-372—**from an order setting aside a compulsory reference,** Bushee v. Surles, 79-51; see also section 519—**from refusal of judge to reopen a case for additional evidence,** Pain v. Pain, 80-322—**from refusal to hear affidavits upon a motion to confirm a report of commissioners,** Worthington v. Coward, 114-289; Hanes v. R. R., 109-490; Skinner v. Carter, 108-106—**from refusal to open bidding on an advance of ten per cent. before sale confirmed,** Crabtree v. Scheelky, 119-56; Trull v. Rice, 92-572—**from an order appointing commissioners in condemnation proceedings,** Hendrick v. R. R., 98-431; R. R. v. Warren,

92-620; Tel. Co. v. R. R., 83-420—**from a preliminary order settling the issues,** School Com. v. Kesler, 66-323—**from an order permitting amendment of return,** Mfg. Co. v. Buxton, 105-74—**from a failure to frame an issue not tendered,** Curtis v. Cash, 84-41; Kidder v. McIlhenny, 81-123—**from an order refusing to dismiss supplementary proceedings,** Turner v. Holden, 109-182—**from an order striking out counterclaim,** Bazemore v. Bridgers, 105-191; Knott v. Burwell, 96-272—**from an order for the docketing of a case brought up from a justice's court by recordari,** State v. Warren, 100-489—**from a judgment overruling exceptions to the report of processioners,** Martin v. Flippin, 101-452—**from an overruling of defendant's demurrer to indictment,** State v. McDowell, 84-798—**from order recommitting referee's report for correction,** Kerr v. Hicks, 122-409; Alexander v. Alexander, 120-472; Wallace v. Douglas, 105-42; Leak v. Covington, 95-193; Grant v. Reese, 90-3; Torrence v. Davidson, 90-2; Jones v. Call, 89-188; Lutz v. Cline, 89-186; Comrs. v. Magnin, 85-114—**from order for examination in supplementary proceedings,** Bruce v. Crabtree, 116-528—**from an order made or decision rendered in accordance with decision sent down by supreme court where same questions in same case sought to be reviewed,** Green v. Green, 143-406; Harris v. Quarry Co., 137-204; Setzer v. Setzer, 129-296; Howe v. Hall, 128-167; Pretzfelder v. Ins. Co., 123-164—**from an order granting removal of, or the refusal of a motion to remove a cause on account of local prejudice or convenience of witnesses,** State v. Turner, 143-641; Garrett v. Bear, 144-23; Lassiter v. R. R., 126-507; Albertson v. Terry, 109-8; State v. Johnson, 104-780; State v. Hall, 73-134; State v. Hill, 72-345; State v. Hildreth, 31-429; State v. Duncan, 28-98—**from a refusal to dismiss an action:** Johnson v. Reformers, 135-385; Meekins v. R. R., 131-1; Jester v. Steam Packet Co., 131-54; Clinard v. White, 129-250; Jones v. R. R., 127-188; Cooper v. Wyman, 122-784; Kellogg v. Mfg. Co., 112-191; Whitaker v. Dunn, 122-103; Burrell v. Hughes, 116-430; Joyner v. Roberts, 112-111; Sprague v. Bond, 111-425; Fertilizer Co. v. Marshburn, 122-411; Farris v. R. R., 115-600; Lowe v. Acc. Asso., 115-18; Luttrell v. Martin, 111-528; 112-593; Mullen v. Canal Co., 112-109; Sheldon v. Kivett, 110-408; Lambe v. Love, 109-305; Guilford v. Georgia, 109-310; Plemmons v. Imp. Co., 108-614; Allen v. Royster, 107-278; Spaugh v. Boner, 85-208; Wilson v. Lineberger, 82-412; Railroad v. Richardson, 82-343; Gay v. Brookshire, 82-409; Long v. Bank, 81-41; Capel v. Peebles, 80-90; McBryde v. Patterson, 78-412; Crawley v. Woodfin, 78-4; Foster v. Penry, 77-160; Perry v. Whitaker, 77-102; Mitchell v. Kilburn, 74-483; Mastin v. Marlow, 65-696; Garrett v. Trotter, 65-435; Smith v. Mitchell, 63-620—**from order to clerk directing him to send up to next term a transcript of proceedings supplemental to execution:** Bank v. Burns, 107-465; Turner v. Holden, 109-182—**from order allowing lost pleadings to be substituted:** Bray v. Creekmore, 109-49—**from order of state court to its clerk to certify record to federal court, after the latter court has ordered is removal:** Mayo v. Dockery, 127-1—**from an order instructing receivers to sue individual stockholders of a corporation for amount of stock unpaid, appeal by corporation:** Black v. Copper Co., 115-382—**from an order setting aside verdict as to one issue and ordering new trial upon that alone:** Jarrett v. Trunk Co., 144-299—

from a judgment in contempt proceedings, when: Ex parte McCown, 139-95—**from a refusal to grant motion for bill of particulars in embezzlement case:** State v. Dewey, 139-556.

588. From judge in special proceedings. Any party, within ten days after notice of such judgment, may appeal to the supreme court of the state from such judgment, upon any matter of law or legal inference therein, under the regulations provided for appeals in other cases. But execution shall not be suspended until the undertakings required by law shall have been given. If issues, both of law and of fact, or isues of fact only, are raised before the clerk of the superior court, he shall transfer the case to the civil issue docket for trial of the issues at the ensuing term of the superior court.

Code, s. 256; C. C. P., s. 115. **For practice as to appeals see other sections of this subchapter. For annotations as to issues transferred to civil issue docket for trial, see section 717.**

589. Interlocutory orders reviewed on appeal from judgment. Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

Code, s. 562; C. C. P., s. 313. **As to appeals from interlocutory orders, see section 587. Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause carry up for review only the ruling of the court upon that special point; the order or judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined:** Green v. Griffin, 95-50.

590. When taken; execution stayed, when. The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which shall be sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

Code, s. 549; 1889, c. 161; C. C. P., s. 300. **For undertaking to stay execution pending appeal, see section 598. For appeals taken from justices' courts, see sections 1489-1498a. Appeals from judgments rendered in term must be taken within ten days of rendition:** Howe v. Hall, 128-169; Mecke v. Mineral Co., 122-796; Marion v. Tilley, 119-474; Tucker v. Life Asso., 112-796; Simmons v. Allison, 119-556; Brantley v. Jordan, 90-26; Applewhite v. Fort, 85-596; Bryan v. Hubbs, 69-423—**and no intimation of intention to appeal need be made at the time of the trial where notice given as required:** Russell v. Hearne, 113-361—**but no notice necessary when appeal in open court:** Investment Co., v. Kelly, 123-389. **The ten days dates from the last day of the term which means when the judge leaves the bench; not from the constructive expiration**

of the term: Delafield v. Construction Co., 115-21; Davison v. Land Co., 120-259; Zell Guano Co. v. Hicks, 120-29. **When judgment appealed from states that appeal was taken, it must necessarily mean that it was taken in time:** Delozier v. Bird, 123-689; Atkinson v. R. R., 113-689.

591. Entered on docket; case on appeal, how stated and settled; penalty on judge failing to settle. Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which shall be sufficient. He shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved; if returned with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him; and the judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of such request; and at the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or if the attorneys be not present file a copy in the office of the clerk of the court. If the appellant shall delay longer than fifteen days after the appellee serves his counter case, or exceptions, to request the judge to settle the case on appeal and mail the case and counter case, or exceptions, to the judge, then the exception filed by the appellee shall be allowed, or the counter case served by him shall constitute the case on appeal; However, the time may be extended by agreement: Provided, that if the judge shall have left the district before the notice of disagreement, he may settle the case without returning to the district. In settling the case, the written instructions signed by the judge, and the written requests for instructions signed by the counsel, and the written exceptions shall be deemed conclusive as to what such instructions, requests and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days

thereafter file the same with the clerk, and in case he fails to do so, the respondent may file his copy. The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the district shall have ended, and if the judge in the meantime shall have gone out of office, he shall settle the case as if he were still in office, and any judge failing to comply with this section shall be liable to a penalty of five hundred dollars, for the use of any person who will sue for the same.

Code, s. 550; 1889, c. 161; C. C. P., s. 301; 1905, c. 448; 1907, c. 312. As to time and manner of taking exceptions, see section 554. As to transcript on appeal, see section 592. [A great number of cases under sections 554 and 584 inferentially pass upon most questions considered hereunder.]

Statute respecting preparation of appeals must be strictly complied with: Cozart v. Assur. Co., 142-522; Davis v. Wall, 142-450; Cook v. Vickers, 141-101; Sigman v. R. R., 135-181; Brinkley v. Smith, 130-226; Baker v. Hobgood, 126-152; Pretzfelder v. Ins. Co., 123-164; Lucas v. R. R., 121-508; Alexander v. Alexander, 120-472; Griffin v. Nelson, 106-235; Smith v. Abrams, 90-21; Hemphill v. Blackwelder, 90-14; Gregory v. Hobbs, 92-39; see also annotations under section 584. **Method of perfecting appeal touched upon in the following cases:** Lee v. Baird, 145-; Vivian v. Mitchell, 144-472; Laney v. Mackey, 144-630; Craddock v. Barnes, 140-427; Love v. Love, 139-363; Brown v. Plott, 129-272; Blair v. Coakley, 136-405; Atkinson v. Rwy., 113-586; Baden v. Pugh, 129-60; Packing Co. v. Williams, 122-406; Brafford v. Reed, 124-345; State v. Frizell, 111-724; Investment Co. v. Kelly, 123-388; State v. Telfair, 139-555; Howell v. Jones, 109-102; Avery v. Pritchard, 93-266; Coates v. Wilkes, 94-178; Wilson v. Seagle, 84-110; also see cases under paragraph "**Appellant's statement of case.**" **In cases where both parties appeal:** Mills v. Guaranty Co., 136-255; State v. Bost, 125-707; State v. Mallett, 125-718; Jones v. Hoggard, 107-349; Perry v. Adams, 96-347; Morrison v. Cornelius, 63-346—**the appeal of one will not bring up that of another:** Bank v. Bobbitt, 108-525. **The case on appeal is no part of the record proper, but a part of transcript:** State v. Matthews, 142-621. **A case on appeal embraces the exceptions taken and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to for review:** Cressler v. Asheville, 138-482.

APPELLANT'S STATEMENT OF CASE. Suggestions as to how it should be made up: Bernhardt v. Dutton, 146-; Gaither v. Carpenter, 143-240; Davis v. Wall, 142-450; Marable v. R. R., 142-564; Hicks v. Kenan, 139-337; Cressler v. Asheville, 138-482; Cameron v. Power Co., 137-101; Sigman v. R. R., 135-181; Hart v. Cannon, 133-10; Gwaltney v. Asso. Society, 132-925; Vanderbilt v. Pickelsimer, 128-556; State v. Kinsauls, 126-1095; Bradley v. R. R., 126-736; State v. Ridge, 125-657; Lucas v. R. R., 121-508; James v. R. R., 121-530; Bennett v. Tel. Co., 128-103; Mining Co. v. Smelting Co., 119-415; Watkins v. R. R., 116-961; State v. Cox, 110-503; McKinnon v. Morrison, 104-354; Anthony v. Estes, 99-598; State v. Sloan, 97-499; McGowan v. R. R., 95-417; State v. Alston, 94-930; Gre-

gory v. Forbes, 94-220; Strickland v. Draughan, 88-315; Surratt v. Crawford, 87-372; Turner v. Foard, 83-683; McNeill v. Chadbourn, 79-149; Sampson v. R. R., 70-404. **Case must contain assignments of error, such incidents of the trial as were duly excepted to:** Gaither v. Carpenter, 143-240; State v. Matthews, 142-621; Cressler v. Asheville, 138-482; Arnold v. Hardy, 131-113; Coley v. Statesville, 121-317; Falkner v. Thompson, 112-455; Everett v. Williamson, 107-204; Ferrell v. Thompson, 107-420; Boyer v. Teague, 106-571; Taylor v. Plummer, 105-56; Lindsey v. Sanderlin, 104-331; Rodman v. Harvey, 102-1; Calvert v. Miller, 94-600; Phipps v. Pierce, 94-514—**and such assignments of error must be specific and distinct:** Brumble v. Brown, 71-513; In re Murray's Will, 141-588; Carson v. R. R., 128-95; Pierce v. R. R., 124-99; Falkner v. Thompson, 112-455; Greensboro v. McAdoo, 110-430; Watts v. Warren, 108-517; Clements v. Rogers, 95-248; Wiley v. Logan, 95-358; Arrington v. Goodrich, 95-462; Baum v. Shooting Club, 94-217; Summer v. Candler, 92-684; State v. Keath, 83-626; Straus v. Beardsley, 79-59; Williamson v. Canal Co., 78-161; Bridgers v. Bridgers, 69-451; Bland v. O'Hagan, 64-471; Stout v. Woody, 63-37; Whitesides v. Twitty, 30-431; Sutliff v. Lunsford, 30-318; see also, as to manner and time of excepting, section 554—**and must be briefly and clearly stated and numbered:** Sigman v. R. R., 135-181—**yet sometimes, as in this case, they must be presented with such fullness of statement as will enable court to determine the real merits:** Boyer v. Teague, 106-571—**and if there is no "case settled," or if case does not assign error specifically enough to be definite and understood by the court, the judgment below will be affirmed or, under some circumstances, case will be remanded, unless error apparent upon the record:** State v. Lewis, 145-585; Gaither v. Carpenter, 143-241; Cressler v. Asheville, 138-482; Trimmer v. Gorman, 129-161; Felmet v. Exp. Co., 123-499; Hicks v. Westbrook, 121-131; Barrus v. R. R., 121-504; Cunningham v. Cunningham, 121-413; Smith v. Smith, 119-311; Roberts v. Partridge, 118-355; Collins v. Young, 118-265; McCrimmen v. Parish, 116-614; Delafield v. Const. Co., 115-21; Fertilizer Co. v. Black, 114-591; Rosenthal v. Roberson, 114-594; Maggett v. Roberts, 114-227; Forte v. Boone, 114-176; State v. Carter, 113-639; Cummings v. Hoffman, 113-267; Marshall v. Stine, 112-697; State v. Whitmire, 112-895; Hamilton v. Icard, 112-589; State v. Green, 111-646; State v. Foster, 110-510; Lovic v. Ins. Co., 109-302; Howell v. Jones, 109-102; Peebles v. Braswell, 107-68; State v. Brown, 106-645; Taylor v. Plummer, 105-56; State v. Henry, 104-914; State v. Bell, 103-438; Currie v. Clark, 101-329; Thornton v. Brady, 100-38; Patton v. Gash, 99-280; Brendle v. Herren, 98-539; Wilson v. Shepherd, 98-154; Carroll v. Barden, 97-191; Dupree v. Tuten, 97-94; Justice v. R. R., 96-412; Pleasants v. R. R., 95-195; Denning v. Gainey, 95-528; Rencher v. Anderson, 95-208; Baum v. Shooting Club, 94-217; State v. Gardner, 94-953; Williams v. Johnston, 94-633; State v. Powell, 94-920; State v. Freeman, 93-558; Green v. Dawson, 92-61; McDaniel v. Pollock, 87-503; Mott v. Ramsay, 90-29; Royster v. Burwell, 90-25; Neal v. Mace, 89-171; State v. Sheppard, 87-574; Swepson v. Summey, 74-551; King v. Page, 86-725. **But no assignment of error is necessary where the record presents the exceptions:** Cressler v. Asheville, 138-482; Railroad

v. Stewart, 132-248; Clark v. Peebles, 120-31; Wilson v. Lumber Co., 131-163; Brooks v. Austin, 94-222; State v. Byrd, 93-624; State v. Crook, 91-536—**nor where case tried in court below upon a case agreed:** Greensboro v. McAdoo, 112-359; Chamblee v. Baker, 95-98; Davenport v. Leary, 95-203—**nor where case tried on demurrer:** Chamblee v. Baker, 95-98—**nor when exception only taken to judgment and an appeal is itself an exception thereto:** Wilson v. Lumber Co., 131-163; Railroad v. Stewart, 132-248; Robeson v. Hodges, 105-49; Murray v. Southerland, 125-175; Delozier v. Bird, 123-689; Reade v. Street, 122-301. **Stenographic notes of the evidence should not be dumped into the case, but a concise statement of the evidence in a narrative form should be prepared,** Cressler v. Asheville, 138-482; Durham v. R. R., 108-399.

Exceptions to the charge may for the first time be set out by appellant in his case on appeal: Bank v. Sumner, 119-591; Lowe v. Elliott, 107-718; also see under section 554, subsection 3.

Where counsel agreed that all papers should form the case on appeal, case remanded for assignment of error: Holly v. Holly, 94-639.

Where the record proper differs from case on appeal the former controls: Ladd v. Teague, 126-544; State v. Truesdale, 125-696; Sutton v. Phillips, 117-230; Threadgill v. Comrs., 116-616; McDaniel v. Scurlock, 115-295; State v. Ramsour, 113-642; State v. Carlton, 107-956; Bowen v. Fox, 99-127; McCanless v. Flinchum, 98-358; McNeill v. Lawton, 97-16; Adrian v. Shaw, 84-832; State v. Keeter, 80-472; Farmer v. Williard, 75-401; but see Walton v. McKesson, 101-428. **Case on appeal can not be varied or amended by affidavit to supreme court:** Covington v. Newberger, 99-523.

SERVICE OF APPELLANT'S CASE. A dispute as to whether service was made in time should be settled by court below: Barrus v. R. R., 121-505; Westbrook v. Hicks, 121-132; Cummings v. Hoffman, 113-267; McDaniel v. Scurlock, 115-297; Walker v. Scott, 102-487. **Where nothing to show service on appellee in time and case sent up signed only by appellant, it will not be considered:** Mfg. Co. v. Simmons, 97-89; McNeill v. R. R., 117-642; State v. Perry, 122-1019; Hicks v. Westbrook, 121-131; Guano Co. v. Hicks, 120-30; Smith v. Smith, 119-311; Rosenthal v. Roberson, 114-594; Cummings v. Hoffman, 113-268; Hamilton v. Icard, 112-592; Peebles v. Braswell, 107-68. **When not served in time, judge strikes appellant's case from the files:** Hicks v. Westbrook, 121-131. **Service must be made by an officer, unless service accepted:** Smith v. Smith, 119-314; Herbin v. Wagoner, 118-656; Allen v. Strickland, 100-225; State v. Johnson, 109-852—**but not by a town constable:** Forte v. Boone, 114-176—**nor by counsel:** Roberts v. Partridge, 118-355—**and should be made by copy:** Watkins v. R. R., 116-961; State v. Price, 110-599—**but if original served instead of copy, appellee can not complain:** McDaniel v. Scurlock, 115-295. **Time of service should be computed: how:** Houston v. Lumber Co., 136-328; Mecke v. Mineral Co., 122-796; Davison v. Land Co., 120-259; Guano Co. v. Hicks, 120-29; Simmons v. Allison, 119-556; Rosenthal v. Roberson, 114-594; Delafield v. Construction Co., 115-21; Walker v. Scott, 104-481; Chamblee v. Baker, 95-98; Turrentine v. R. R., 92-642; Worthy v. Brady, 91-265—**unless appellant**

takes the ten days allowed from adjournment in which to appeal, when he has ten days more in which to serve case on appeal: Meeke v. Mineral Co., 122-796. Settlement of case by judge does not cure failure to serve in time: Barber v. Justice, 138-22; Barrus v. R. R., 121-504; McNeill v. R. R., 117-642; Forte v. Boone, 114-176. Legal mode of service not waived by appellee's agreeing that appellant is "to serve case" by certain time: Smith v. Smith, 119-311. Defective service cured by appellee's acceptance and his filing exceptions without objecting to service: Woodworking Co. v. Southwick, 119-611. Statutory time can not be extended without consent of parties: Cozart v. Ass. Co., 142-522; Barber v. Justice, 138-20; Pipkin v. McArtan, 122-194; Hemphill v. Morrison, 112-756; Sondley v. Asheville, 112-694—but consent presumed if order is of record: Woodworking Co. v. Southwick, 119-611; Henry v. Hilliard, 120-479. Where several parties on same side, how case served: Shober v. Wheeler, 119-471. Where appellant mailed case and fees to sheriff in ample time, but sheriff did not receive them: Arrington v. Arrington, 114-113. Statute regulating manner of service of notices is applicable to service of case on appeal and exception thereto: State v. Price, 110-599. As to whether, upon counsel tendering case to opposing counsel, who treated it as a service and began preparing counter case, it is sufficient service, see Ice Mfg. Co. v. R. R., 125-21; see also Roberts v. Partridge, 118-355.

APPELLEE'S RETURN TO APPELLANT'S CASE. Appellee may file specific exceptions or may put them in the form of a counter case: State v. King, 119-910; McDaniel v. Scurlock, 115-295; Harris v. Carrington, 115-187; Horne v. Smith, 105-322.

TIME WITHIN WHICH APPELLEE MUST MAKE RETURN. Where exceptions not served in time because sheriff did not get his mail containing them: Arrington v. Arrington, 114-115.

Where appellant wired that he would accept service of exceptions upon his return and does so, he is estopped to insist that it was filed too late: Watkins v. R. R., 116-961.

Where agreement that appellant may have thirty days to file his case and appellee thirty days thereafter, appellee has thirty days from service of appellant's case: Mitchell v. Haggard, 105-173.

Appellant can not complain that his case was not returned in time when appellee's exceptions thereto were filed in time: McDaniel v. Scurlock, 115-295.

Counter case served by whom: Herbin v. Waggoner, 118-656; and cases cited under paragraph headed "Service of appellant's case."

If appellee does not return with exceptions or counter case, appellant's case becomes case on appeal: Barber v. Justice, 138-20; State v. Freeman, 127-544; State v. Price, 110-599; State v. Carlton, 107-956; Booth v. Ratcliffe, 107-6; Russell v. Davis, 99-115; Isler v. Haddock, 72-119.

PROCEDURE LOOKING TO SETTLEMENT OF CASE. Appellant must promptly apply for a date to settle case: Stroud v. Tel. Co., 133-253; Stevens v. Smathers, 123-497; Simmons v. Andrews, 106-201; Kirkman v. Dixon, 66-406—and if he sends papers to judge without request-

ing a day for settlement, etc., the judge need not give notice required: State v. Williams, 109-846; Walker v. Scott, 106-56. **Judge sets time and place and gives notice:** Slocumb v. Const. Co., 142-353. **Mandatory that place appointed by judge to settle case be in judicial district wherein tried:** Cameron v. Power Co., 137-99; but see Whitesides v. Williams, 66-143.

THE SETTLEMENT OF THE CASE. **In settling a case on appeal the judge does not merely adjust the differences between the two cases but may disregard both cases and should do so if he finds that the facts of the trial were different:** Slocumb v. Const. Co., 142-353; State v. Gooch, 94-985. **Where judge sustains appellee's exceptions and orders case redrafted and presented for his signature, but appellant just sends up the papers; effect:** Gaither v. Carpenter, 143-240; Mitchell v. Tedder, 107-358; Hinton v. Greenleaf, 115-5. **Where appellant simply sends up his case and appellee's exceptions, without judge settling case, appellant is deemed to have accepted exceptions:** Stevens v. Smathers, 123-497; Roberts v. Partridge, 118-357; Lyman v. Ramseur, 113-503; Jones v. Call, 93-170; Owens v. Phelps, 92-231. **Appellant sending to judge appellee's exceptions drawn in irregular manner thereby waives their irregularity:** Byrd v. Bazemore, 122-115. **Where judge fails to settle case, and makes return that his notes are lost and his recollection not clear, new trial will be granted only when appellant guilty of no laches:** State v. Huggins, 126-1055; McGowan v. Harris, 120-139; Ritter v. Grimm, 114-373; Clemmons v. Archbell, 107-653; Owens v. Paxton, 106-480; Comrs. v. Steamship Co., 98-163; Burton v. Greene, 94-215; Sanders v. Norris, 82-243; Isler v. Haddock, 72-119; State v. Powers, 10-376. **Judge may settle the case even after subjecting himself to penalty for delay:** State v. Williams, 109-846. **Where judge added to the case on appeal that he didn't remember distinctly what occurred, remanded that he may settle case again:** Simmons v. Andrews, 104-127. **Counsel can agree on case without judge:** Slocumb v. Construction Co., 142-349; State v. Chaffin, 125-660; State v. Gooch, 94-982.

The statement of the case on appeal imports absolute verity and certiorari will not issue to force judge to make up new case and insert matters alleged to have been omitted: State v. Gay, 94-821; Cameron v. Power Co., 137-101; State v. Journigan, 120-568; Paper Co. v. Chronicle, 115-147; State v. Hart, 116-977; Allen v. McLendon, 113-319; State v. Debnam, 98-712; State v. Gooch, 94-982; State v. Miller, 94-902. **The practice of interpolating "Here clerk will copy judge's notes:"** Wood v. R. R., 118-1056. **The case as "settled" by the judge, counsel not agreeing, is the only case that should come up or which can be considered:** Gaither v. Carpenter, 143-240; State v. Dewey, 139-563. **Admonition to counsel as to their duty when judge settles case on appeal:** Cameron v. Power Co., 137-102. **Where case returned to judge for a settlement, counsel should be present:** Ibid. **Remedy of appellant when judge does not send up case setting forth the exceptions properly is by certiorari, provided judge makes known his willingness to correct them:** Allen v. McLendon, 113-319; Broadwell v. Ray, 111-457; McDaniel v. King, 89-29; see cases under section 584. **Where no case on appeal appears to have**

been served by appellant, the case sent up as settled by the judge is presumed to have been by consent: State v. Crook, 91-536. Where in judge's statement of case it says counsel agreed that judge should make out statement, it will be taken as true even though appellee makes affidavit otherwise: McCoy v. Lassiter, 94-131.

Instances of where, for various inadvertent acts or where parties misled, case was remanded for judge to settle again: Arrington v. Arrington, 114-113; Mitchell v. Haggard, 105-173; Walker v. Scott, 104-481; Simmons v. Andrews, 104-127; Russell v. Koonce, 102-485; Ware v. Nesbit, 92-202; see also later cases under section 584, paragraph "Certiorari." Having "settled" case at time and place appointed, the judge is functus officio, unless by agreement of parties or by certiorari he resettles it: Slocumb v. Const. Co., 142-349—the court having no power to order him to change it: Ibid.

WAIVER OF TIME BY PARTIES. The parties may waive matter of time in the perfecting of appeals, but such waiver must appear of record or by the affidavits of appellee or by agreement in writing: Wade v. Newbern, 72-498; Pipkin v. McArtan, 122-194; Sondley v. Asheville, 122-694; Hemphill v. Morrison, 112-756; Graves v. Hines, 106-323; Mfg. Co. v. Simmons, 97-89; Short v. Sparrow, 96-348; McCanless v. Reynolds, 91-244; Officers v. Bland, 91-1; Scroggs v. Alexander, 88-64; Holmes v Holmes, 84-833; Hutchinson v. Rumfelt, 83-441; Pennington v. Pennington, 75-355; Walton v. Pearson, 82-464; Sever v. McLaughlin, 82-332; Taylor v. Brower, 78-8; Rouse v. Quinn, 75-354; Adams v. Reeves, 74 106.

WHERE JUDGE DIES OR IS OUT OF DISTRICT. Where judge dies before settling case and appellant guiltless of laches, new trial awarded: State v. Parks, 107-821; Brendle v. Reese, 115-552; Heath v. Lancaster, 116-70; Parker v. Coggins, 116-71; Taylor v. Simmons, 116-70—but if appellant guilty of inexcusable laches, judgment affirmed: Heath v. Lancaster, 116-69; Simmons v. Andrews, 106-201. Where judge dies before case settled the appellant can withdraw his case and have appeal heard on counter case: Ridley v. R. R., 116-923—or appellee can withdraw his case and have it heard upon appellant's case: Drake v. Connelly, 107-463. It was formerly (before enactment of present provision in above section) held that new trial would be granted where judge's term expired before settling the case: State v. Robinson, 143-625.

592. Clerk to prepare transcript. The clerk on receiving a copy of the case settled, as required in the preceding section, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified to the clerk of the supreme court. The clerk, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the supreme court until the appellant shall have given the undertaking on appeal or made the deposit required.

Code, s. 551; 1889, c. 135; C. C. P., s. 302. Ordinarily hereafter motions to dismiss appeals will be allowed upon a failure to comply with

the rules of the court as to making up the case and the record: Davis v. Wall, 142-450. **Clerk's duties under this section are ministerial and he has no authority to pass upon the question whether the appeal has been perfected:** Russell v. Davis, 99-115. **If no case on appeal accompanies record and appellant is not guilty of laches, he is entitled to a certiorari:** Haynes v. Coward, 116-841; also see paragraph "Certiorari" under section 584. **Notice of appeal, though in the record, is no part of it:** Ferrell v. Thompson, 107-420. **Where clerk copied prayers for instructions in the wrong place and then in the right place referred to them, read as if at right place:** Drake v. Connelly, 107-463. **Indorsement on back of indictment no part of record:** State v. Sheppard, 97-401. **Where both parties appeal, two complete transcripts must be sent up; and counsel can not waive this requirement:** Mills v. Guaranty Co., 136-255; Bank v. Bobbitt, 108-525; Jones v. Hoggard, 107-349; Perry v. Adams, 96-347; Morrison v. Cornelius, 63-346. **Appellant's duty to see that requirements of appeal are complied with:** Sigman v. R. R., 135-183; State v. Freeman, 114-872; State v. Frizell, 111-724—**and he has the right to have so much of record sent up as he thinks proper:** Smith v. Fite, 98-517; Sudderth v. McCombs, 67-353. **This section is directory; it does not mean that if no "case settled" a transcript is not to be sent up:** Russell v. Davis, 99-115. **Conflict between record and case on appeal, record prevails:** McNeill v. Lawton, 97-16; see under section 591. **For certiorari to perfect the record, see under section 584. Where record defective, certiorari may be granted to perfect it:** State v. Reid, 18-382; State v. Jackson, 112-849; see section 584—**or it may in some cases be remanded:** State v. Farrar, 103-411.

MAKING UP THE TRANSCRIPT. **The rule of the supreme court numbered 19 as to preparing transcript must be followed or it will become necessary hereafter to dismiss appeal:** Davis v. Wall, 142-450; Sigman v. R. R., 135-182; Brinkley v. Smith, 130-226; Baker v. Hobgood, 126-152; Pretzfelder v. Ins. Co., 123-168; Lucas v. R. R., 121-508; Alexander v. Alexander, 120-472. **Eaton's Forms recommended to clerks as a guide:** State v. Butts, 91-526; approved in State v. Daniel, 121-574. **The transcript in civil cases should contain the summons, pleadings, judgment and case on appeal:** Cressler v. Asheville, 138-482; Rice v. Guthrie, 114-589; Allen v. Hammond, 122-754; see Supreme Court Rules, 19, 20, 27, 140-660, 661, 662—**the order in an arbitration, the award, exceptions thereto, the action of the court thereupon and the appeal:** Wyatt v. R. R., 109-306; see also Murray v. Barden, 132-136—**exhibits that are made part of pleadings:** Hicks v. Royal, 122-405—**plats referred to, in same number as are required in case of briefs, etc.:** Stephens v. McDonald, 132-135; Whichard v. R. R., 117-614—**facts which induced judge to grant or refuse a new trial:** Braid v. Lukins, 95-123—**undertaking for the prosecution of the appeal:** Office v. Huffsteller, 67-449; Whitehead v. Smith, 53-351—**and the transcript should not require reference to the record of another case:** Branch v. R. R., 88-573. **There should be an index of the entire record on the front page:** Davis v Wall, 142-450; Sigman v. R. R., 135-181; Pretzfelder v. Ins. Co., 123-167; Alexander v. Alexander, 120-472—**marginal references:** Sigman v. R. R.,

135-181; Brinkley v. Smith, 130-224; Alexander v. Alexander, 120-472—**a grouping of exceptions relied upon, briefly and clearly stated and numbered at the end of the case on appeal:** Davis v. Wall, 142-450; Hicks v. Kenan, 139-337; Sigman v. R. R., 135-181; Brinkley v. Smith, 130-224.

The transcript must show that a court was held at proper time and place and by proper judge: Jones v. Hoggard, 107-349; Sneeden v. Harris, 107-311; State v. Farrar, 103-411; High v. R. R., 112-385; State v. Daniel, 121-574; State v. Preston, 104-733; State v. Johnston, 93-559; Bethea v. Byrd, 93-141; State v. Butts, 91-525; State v. McDowell, 93-541; Broadfoot v. McKeithan, 92-561—**that case was properly constituted, jurisdiction of parties being properly obtained:** Sigman v. R. R., 135-181; Wyatt v. R. R., 109-306; Markham v. Hicks, 90-1; Jones v. Hoggard, 107-350; Daniel v. Rogers, 95-134; Rowland v. Mitchell, 90-649—**that issues were proposed and submitted:** Tiddy v. Harris, 101-589—**that appeal was duly taken:** Mfg. Co. v. Simmons, 97-89—**that (in criminal appeals) a grand jury was drawn, sworn and charged and presented the indictment:** State v. Cameron, 122-1074; State v. Daniel, 121-574; State v. Weaver, 104-758; State v. Farrar, 103-411; State v. Johnston, 93-559; State v. McDowell, 93-541; but see State v. Jimmerson, 118-1173.

Appellant's statement of the case must not be sent up to contradict "case settled:" State v. Dewey, 139-556; see Gaither v. Carpenter, 143-240—**and if case sent up that should not be, party objecting should apply to court below to have it stricken out:** Walker v. Scott, 102-487.

Stenographic notes of trial are no part of record on appeal: Cressler v. Asheville, 138-482—**nor is the evidence:** Ibid; also State v. Godwin, 27-403. **Irrelevant matter should not be included:** Sigman v. R. R., 135-182; Hancock v. R. R., 124-228; Mining Co. v. Smelting Co., 119-415; Durham v. R. R., 108-399; Hilton v. McDowell, 87-364.

Where trial judge orders clerk to put certain thing in the record and same is omitted by direction of appellant, appeal dismissed: Finch v. Strickland, 130-44.

The transcript should not be a set of loose, disconnected papers: State v. Jones, 82-691; Goff v. Pope, 82-696; State v. Guilford, 49-83—**and imperfect:** State v. May, 118-1204; State v. Farrar, 103-411; Spence v. Tapscott, 92-576; Weil v. Everett, 83-685. **Where both parties appeal their cases must be docketed separately:** Mills v. Guaranty Co., 136-255.

CLERK'S RIGHT TO DEMAND UNDERTAKING FOR COSTS OR A DEPOSIT IN CIVIL CASES: Caldwell v. Wilson, 121-424; Brown v. House, 119-622; Sanders v. Thompson, 114-282; Broadwell v. Ray, 112-191; Bailey v. Brown, 105-127; Morris v. Morris, 92-142; Andrews v. Whisnant, 83-446; but see State v. Cameron, 122-1074; Jacobs v. Burgwyn, 63-197.

AS TO PRINTING THE RECORD AND PRINTING AND FILING OF BRIEFS: Vivian v. Mitchell, 144-475; Brinkley v. Smith, 130-224; Mills v. Guaranty Co., 136-255; Stroud v. Tel. Co., 133-253; Baker v. Hobgood, 126-152; Hicks v. Royal, 122-405; Packing Co. v. Williams, 122-406; Poston v. Jones, 122-541; Rawlings v. Neal, 122-173; Fleming

v. McPhail, 121-183; Alexander v. Alexander, 120-472; Lucas v. R. R., 121-506; Barbee v. Scoggins, 121-135; Smith v. Montague, 121-92; Barnes v. Crawford, 119-127; Thurber v. Loan Asso., 118-129; Wiley v. Mining Co., 117-489; Stainback v. Harris, 119-107; Dunn v. Underwood, 116-525; Parker v. Coggins, 116-71; Edwards v. Henderson, 109-83; Durham v. R. R., 108-399; Hunt v. R. R., 107-447; Walker v. Scott, 102-489; see Supreme Court Rule, 28-32, 140-663. **As to costs of record, where unnecessary matter sent up:** Land Co. v. Jennett, 128-3; Gray v. Little, 127-304; Baker v. Hobgood, 126-152; Hancock v. Rwy., 124-222.

TRANSMITTED TO SUPREME COURT AND DOCKETED. Clerk's duty to transmit the transcript in twenty days: Fain v. Rwy., 130-30; Caldwell v. Wilson, 121-423; State v. Deyton, 119-880; State v. Nash, 109-822; Walker v. Scott, 104-482; Bryan v. Moring, 99-16—**and if he fail, semble he is liable to indictment:** State v. Deyton, 119-880—**still in this case where mail delayed transcript, appellant held without laches:** Walker v. Scott, 104-482. **Appeal deemed docketed when transcript received by clerk; it then becomes a record of the court, not subject to control of parties or counsel:** Brafford v. Reed, 124-345; see also Caldwell v. Wilson, 121-423. **Time in which appeals must be docketed:** Laney v. Mackey, 144-630; Clegg v. R. R., 132-292; Norwood v. Pratt, 124-745; Rothchild v. McNichol, 121-284; Parker v. Rwy., 121-501; Burrell v. Hughes, 120-277; Haynes v. Coward, 116-840; Graham v. Edwards, 114-228; State v. Freeman, 114-872; Avery v. Pritchard, 106-347; Bailey v. Brown, 105-127; Collins v. Faribault, 92-310; Pittman v. Kimberly, 92-562.

593. Undertaking on appeal; filed in supreme court, when. To render an appeal effectual for any purpose in any civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not to exceed the sum of two hundred and fifty dollars, to the effect that the appellant will pay all costs which may be awarded against him on the appeal; or such sum as may be ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal; such undertakng or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the supreme court on the ground that the undertaking on appeal was not filed earlier or the deposit made earlier, if the undertaking shall be filed or such deposit made before the record of the case is transmitted by the clerk of the superior court to the supreme court. And when no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the supreme court, the supreme court shall, upon good cause being shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit.

151-659

Code, s. 552; 1889, c. 135, s. 2; C. C. P., s. 303; 1871-2, c. 31. **The giving of the undertaking is no part of the duty of an attorney such as**

to relieve client of negligence in not giving: Boyer v. Garner, 116-125; Griffin v. Nelson, 106-238; Winborn v. Byrd, 92-7; Churchill v. Ins. Co., 92-485—**or in giving defective bond:** Turner v. Powell, 93-341. **The same causes that would entitle one to certiorari for failing to perfect appeal will apply to a failure to file undertaking:** Graves v. Hines, 106-327. **Where case remanded to court below, that court can order appeal bond filed to perfect appeal:** Spence v. Tapscott, 93-250.

THE UNDERTAKING. Sufficiency of contents discussed: Allison v. Whittier, 101-490; Lackey v. Pearson, 101-651; Chamblee v. Baker, 95-98; Dorsey v. R. R., 91-201; Walker v. Williams, 88-7. **The undertaking is to secure the payment of appellee's cost and the surety is not liable for appellant's cost if judgment reversed:** Morris v. Morris, 92-142; Office v. Huffsteller, 67-449. **When insufficient, supreme court can allow another to be substituted:** Robeson v. Lewis, 64-734.

TIME OF FILING. It must be filed within ten days after adjournment of court: Walker v. Scott, 104-481; Chamblee v. Baker, 95-98; Boyden v. Williams, 92-546; Worthy v. Brady, 91-265—**but no appeal dismissed if filed before transcript sent up:** In re Snow's Will, 128-102; Howerton v. Sexton, 104-75—**and undertaking may be filed in the supreme court, but only where a reasonable excuse for not filing in time prescribed is shown:** Vivian v. Mitchell, 144-474; Jones v. Asheville, 114-620; Harrison v. Hoff, 102-25; Jones v. Wilson, 103-13; Churchill v. Ins. Co., 92-485; Winborn v. Byrd, 92-7. **The undertaking presumed to have been filed when justification made:** Harmon v. Herndon, 99-477; Boyden v. Williams, 92-546.

DEPOSIT IN LIEU OF UNDERTAKING. It is the only thing a clerk can accept: Eshon v. Comrs., 95-75; see also Graves v. Hines, 106-323.

WAIVER OF UNDERTAKING. This section mandatory and can only be dispensed with by written waiver on the part of appellee: State v. Wagner, 91-521; Harshaw v. McDowell, 89-181. **Failure to justify appeal bond waived by appellee when, after bond filed, he signs appellant's case on appeal:** Howerton v. Henderson, 86-720.

SECTION MERELY CITED. Harrison v. Hoff, 102-26; Allison v. Whittier, 101-492; Warren v. Harvey, 92-140.

594. Justification of sureties. An undertaking upon an appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties within ten days after the notice of the appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

Code, s. 560; C. C. P., s. 310; 1887, c. 121. Chastain v. Chastain, 87-283. **Clerk simply endorsing undertaking "the within bond is good" is not a compliance with this section:** Bryson v. Lucas, 85-397.

One of the sureties must justify; yet a failure to justify can be waived: Becton v. Dunn, 137-563; Harshaw v. McDowell, 89-181—**and he must**

do so personally: Morphew v. Tatem, 89-183—**for, if he does not, appeal will be dismissed:** State v. Wagner, 91-521; Bailey v. Rutjes, 91-420; Harshaw v. McDowell, 89-181—**but not until after twenty days' notice:** Jones v. Slaughter, 96-541; McGee v. Fox, 107-766; Rollins v. Love, 97-210. **This section must be strictly observed:** Hemphill v. Blackwelder, 90-14; Lytle v. Lytle, 90-647; Smith v. Abrams, 90-21; Harshaw v. McDowell, 89-181. **Bond in application for certiorari must likewise be justified:** Chastain v. Chastain, 87-283. **Sufficient when surety makes his mark and then justifies:** State v. Byrd, 93-624. **The requirement that "he is worth double the amount specified" does not mean above his homestead and exemptions and liabilities:** Witt v. Long, 93-388. **Appeal dismissed when surety only justifies in the amount and not double the amount:** State v. Roper, 94-859; Turner v. Quinn, 92-501; McCanless v. Reynolds, 91-244; Anthony v. Carter, 91-229; State v. Wagner, 91-521. **Summary judgment may be entered upon undertaking in supreme court:** Office v. Huffsteller, 67-449. **Waiver of justification by appellee:** Moring v. Little, 95-87; Mfg. Co. v. Barrett, 94-219; Gruber v. R. R., 92-1; Greenlee v. McCelvey, 92-530; McCanless v. Reynolds, 91-244; Lytle v. Lytle, 90-647; McMillan v. Nye, 90-11; Jones v. Potter, 89-220; Harshaw v. McDowell, 89-181; Hancock v. Bramlett, 85-393.

595. Undertaking to be filed with clerk. The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered. This chapter, as to the security to be given upon appeals and as to the stay of proceedings, shall apply to all appeals taken to the supreme court.

Code, s. 561; C. C. P., s. 312.

596. Notice of motion to dismiss for irregularity; new bond or deposit. Before the appellee shall be permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal, or for failure of the sureties to justify, he shall give written notice to the appellant of such motion to dismiss at least twenty days before the district from which the cause is sent up is called, which shall state the grounds upon which the motion is based. In all such cases at least five days before the district from which the cause is sent up is called, the appellant may file with the clerk of the supreme court a new bond justified according to law. The penalty in the new bond shall be the same in amount as the penalty in the original bond, or in lieu of filing such new bond the appellant may deposit with the clerk of the supreme court a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause shall stand as if the bond had been duly given or deposit duly made in the court below.

1887, c. 121. **This section only applies where appeal bonds are filed, but are irregular or not justified:** Jones v. Asheville, 114-620; see also Harmon v. Herndon, 99-477; Bowen v. Fox, 98-396. **Twenty days' notice**

of motion hereunder required: Lackey v. Pearson, 101-653; Jones v. Slaughter, 96-541; McGee v. Fox, 107-766; Rollins v. Love, 97-210.

597. Appeals in forma pauperis; clerk cannot demand fees for transcript. When any party to a civil action tried and determined in the superior court shall, at the time of trial, desire an appeal from the judgment rendered in said action to the supreme court, and shall be unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from said judgment to the supreme court as in other cases of appeal, without giving security therefor: Provided, that the party desiring to appeal from said judgment shall within five days make affidavit that he is unable by reason of his poverty to give the security required by law for said appeal, and that said party is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action: Provided further, that said affidavit shall be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and that he is of opinion that the decision of the superior court, in said action, is contrary to law: Provided, that the appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court. The clerk of the superior court shall not be allowed to demand his fees of such person appealing in forma pauperis for the transcript of the record for the supreme court: Provided such appellant shall furnish to the clerk of the superior court two true and correct typewritten copies of such records on appeal: and provided further, that nothing in this section shall be construed to deprive the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases.

Code, s. 553; 1889, c. 161.; 1873-4, c. 60; 1907, c. 878. **The order to appeal in forma pauperis does not stay proceedings upon the judgment appealed from:** Leach v. Jones, 86-404. **Affidavit to secure order to appeal in forma pauperis in a criminal action must state that it is made in good faith:** State v. Bramble, 121-603; State v. Harris, 114-830; State v. Jackson, 112-849; State v. Rhodes, 112-856; State v. Wylde, 110-500; State v. Payne, 93-612; State v. Morgan, 77-510; State v. Tow, 103-350. **Application may be made after term of court:** Russell v. Hearne, 113-363. **This right to appeal in forma pauperis is given administrators, parties to the record, prosecuting or defending:** Christian v. R. R., 136-322; Hamlin v. Neighbors, 75-66; Mason v. Osgood, 71-212. **Supreme court clerk can claim his fees:** Speller v. Speller, 119-356; Bailey v. Brown, 105-127; Martin v. Chasteen, 75-96.

181-652

598. Undertaking to stay proceedings, money demand; perishable property sold. If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment unless a written undertaking be executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it shall be satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In any case where, by this section, the money is to be deposited with an officer, a judge of the court at any time, upon the application of either party, may, before such deposit is made, order it to be deposited in court instead of with such officer; and a deposit made, pursuant to such order, shall be of the same effect as if made with such officer. The perfecting of an appeal by giving the undertaking mentioned in this section shall stay proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

Code, s. 554; C. C. P., ss. 304, 311. **As to whether bond sent up is a bond for costs or supersedeas bond, supreme court will send down issue to be passed upon:** Burnett v. Nicholson, 86-728. **No special form for supersedeas bond:** Oakley v. Van Noppen, 100-287. **An instance of a bond held sufficient:** McMinn v. Patton, 92-371. **Where bond for costs and for supersedeas both in one instrument, with insolvent surety, appeal dismissed:** Alderman v. Rivenbark, 96-134—**but where two separate bonds sent up insolvency of supersedeas bond does not subject appeal to dismissal, cost bond being good: Ibid. A supersedeas bond being the act of a party is not allowable to continue a dissolved injunction:** James v. Markham, 125-145. **Citing section:** Adams v. Guy, 106-278.

599. Property deposited in court to stay proceedings, when. If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Code, s. 555; C. C. P., s. 305. **Section merely cited in** Adams v. Guy, 106-278; Hannon v. Comrs., 89-124; Hancock v. Bramlett, 85-394.

600. Conveyance executed to stay proceedings, when. If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

Code, s. 556; C. C. P., s. 306. **Merely cited** in Hannon v. Comrs., 89-124; Hancock v. Bramlett, 85-394; Bryan v. Hubbs, 69-431; Tate v. Powe, 64-647.

601. Proceedings stayed in possessory action and foreclosure, how. If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with one or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

Code, s. 557; C. C. P., s. 307. **Merely cited** in Hancock v. Bramlett, 85-394; Bryan v. Hubbs, 69-431; Cox v. Hamilton, 69-31; Tate v. Powe, 64-647.

602. Extent of stay; security limited for fiduciaries. Whenever an appeal is perfected as provided by this chapter it stays all further proceedings in the court below upon the judgment appealed

from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum.

Code, s. 558; C. C. P., s. 308. **Court below has no further jurisdiction of matters involved when appeal is perfected:** Green v. Griffin, 95-50; Pasour v. Lineberger, 90-159; McRae v. Comrs., 74-415; Isler v. Brown, 69-125—**but may make orders to provide for safe-keeping of funds pending appeal:** Hinson v. Adrian, 91-372—**and may proceed on any other matter included in the action, and may hear motions and grant orders,** Herring v. Pugh, 126-852; Guilford v. Georgia, 109-310; Penniman v. Daniel, 91-431; Carleton v. Byers, 71-335. **Clerk's duty to notify sheriff when supersedeas bond perfected:** Bryan v. Hubbs, 69-423. **Cases merely referring to section:** Herring v. Pugh, 125-439; Hancock v. Bramlett, 85-394.

603. Undertaking in one instrument or serveral; served on appellee. The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made, and notice thereof given.

Code, s. 559; C. C. P., s. 309. **Where undertaking for costs and supersedeas are both in one instrument, if surety insolvent appeal is dismissed:** Alderman v. Rivenbark, 96-134. **Copy of undertaking, with names and residences of sureties, should be served on appellee:** Roberson v. Lewis, 64-736.

604. Judgment not vacated by stay of proceedings. The stay of proceedings provided for in this chapter shall not be construed to vacate the judgment appealed from, but in all cases said judgment shall remain in full force and effect, and the lien of said judgment shall remain unimpaired notwithstanding the giving of the undertaking or making the deposit required in this chapter until the judgment appealed from is reversed or modified by the supreme court.

1887, c. 192. **See** Bernhardt v. Brown, 118-710; Black v. Black, 111-300; Stephens v. Koonce, 106-222; In re Griffin, 98-227.

605. Judgment on appeal and on undertakings; restitution. Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed

from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment shall be rendered against the appellant or person prosecuting said writ.

Code, s. 563; C. C. P., s. 314; R. C., c. 4, s. 10; 1785, c. 233, s. 2; 1810, c. 793; 1831, c. 46, s. 2. **For power of supreme court to reverse, affirm or modify judgments and orders and to grant new trials, see section 1539**

For duty of court to pronounce judgment upon the whole record, see section 1542.

See also sections 554, 584, 591, 592.

For order of restitution when tenant evicted in summary ejectment, see section 2009.

Where judgment affirmed, appellant entitled to judgment, upon motion, on stay bond: Oakley v. Van Noppen, 100-287. **Prosecution bonds and undertakings on appeal are part of the record:** Office v. Huffsteller, 67-449—**and can not be questioned by plea and proof at the instance of sureties,** Whitehead v. Smith, 53-351—**and summary judgment can be taken upon them as before the adoption of the code of civil procedure,** Office v. Huffsteller, 67-449. **When a judgment is reversed or party put out of possession by a process of law declared void, the appellant should be restored to all that he has lost:** Railroad v. Railroad, 108-304; Powell v. Allen, 103-46; Lytle v. Lytle, 94-522; Noville v. Dew, 94-43; Boyett v. Vaughan, 86-725; Rollins v. Henry, 77-467; Perry v. Tupper, 71-385, 70-538—**but he can not be given possession when he has not been turned out of possession,** Robinson v. McDowell, 125-344—**and the order for restitution should be part of the judgment:** Meroney v. Wright, 84-336; Perry v. Tupper, 70-538; see also Caudle v. Moran, 119-432. **One can not claim, after judgment for plaintiff, that he is landlord of plaintiff so as to be allowed a writ of restitution; he must bring ejectment:** Edwards v. Phillips, 91-355. **The writ of restitution will never be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation and not by virtue of any process or judgment therein:** Railroad v. Railroad, 108-304; see Robinson v. McDowell, 125-344.

606. Plaintiff's cost bond on appeal from justice. When any defendant shall appeal from the judgment of a justice of the peace to the superior court, or when the judgment of such justice shall be removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of such appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff

to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect.

Code, s. 564; R. C., c. 31, s. 104; 1831, c. 29. **For annotations on writ of recordari, see section 584. As to whether bond will be required is discretionary with presiding judge:** Smith v. R. R., 72-62; Lea v. Brooks, 49-424.

607. Appeal from justice heard de novo; judgment by default, when; appeal dismissed. When an appeal shall be taken from the judgment of a justice of the peace to a superior court, the same shall be reheard by the court; whereupon an issue shall be made up and tried by a jury at the first term to which it is returned, unless continued; and judgment shall be given therein against the party cast and his sureties. And when the defendant shall make default, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury: Provided, that if the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant accordingly, and for the costs of appeal and against his sureties upon the undertaking, if there be any, according to the conditions thereof: Provided further, that nothing herein shall be construed to prevent the granting the writ of recordari in cases now allowed by law.

Code, s. 565; 1889, c. 443; R. C., c. 31, s. 105; 1777, c. 115, s. 63; 1794, c. 414.

149-35

THE APPEAL ITSELF. See as to taking and perfecting appeal, sections 1489-1494; as to docketing, section 608; as to recordari as a substitute, section 584. If appeal not docketed at the ensuing term, the appellee may have it docketed at the next term thereafter and justice's judgment may, upon his motion, be affirmed: Pants Co. v. Smith, 125-588; Davenport v. Grissom, 113-38; State v. Johnson, 109-852; see Ballard v. Gay, 108-545—but this is a personal privilege of appellee and appellant can draw no argument from his failure to use it, Davenport v. Grissom, 113-38. The court can only dismiss an appeal when there is some irregularity in the method of taking or docketing it: Barnes v. Rwy., 133-131.

TRIAL IN SUPERIOR COURT. De novo: Barnes v. Rwy., 133-130; Ballard v. Gay, 108-544; Navassa Guano Co. v. Bridgers, 93-441; Wells v. Sluder, 68-156. Where return to notice of appeal does not contain the pleas, the court may allow any pleas to which parties may be entitled: Moore v. Garner, 109-157. Leave to plead at trial term discre-

tionary with court: Forbes v. McGuire, 116-449. Where judge refused to allow plea as to the jurisdiction to be entered in superior court, not being entered in court of justice, and nothing in the record to show lack of jurisdiction no error: Forbes v. McGuire, 116-449; see Fertilizer Co. v. Marshburn, 122-411. Summary judgment on appeal bond: McMinn v. Patton, 92-371; Walker v. Williams, 88-7; Brown v. Brittain, 84-552. As to issues submitted by court, where two causes of action set out in warrant before justice (treated as complaint) judge, on appeal, properly submitted issue upon cause of action sustained by evidence: Smith v. Newberry, 140-385.

AMENDMENTS OF PROCESS AND PLEADINGS. See sections 507, 505, and 515. Pleadings may be amended in the superior court in the discretion of the judge, upon such terms as he may deem just, and he may allow new plea upon payment of accrued cost: Moore v. Garner, 109-157; Starke v. Cotten, 115-81; Beville v. Cox, 109-267; Johnson v. Rowland, 80-1; Thomas v. Simpson, 80-4; Faison v. Johnson, 78-78; Hinton v. Deans, 75-18—and this is so even though justice refused to allow such, Lane v. Morton, 78-7; Heyer v. Beatty, 76-32. The power to amend pleadings, process, etc., in cases originating in justices' courts is unrestricted: State v. Norman, 110-484. In criminal cases both the warrant and affidavit may be amended in the court's discretion: State v. Davis, 111-732, and cases there cited—and warrant may be amended after verdict, State v. Baker, 106-759; State v. Werwag, 116-1063; State v. Gillikin, 114-834; State v. Norman, 110-487. A defect in affidavit in attachment may be cured in the superior court: Cook v. Mining Co., 114-617; Sheldon v. Kivett, 110-408—also a defect in affidavit in claim and delivery, Cox v. Grisham, 113-279—also defect in summons, Whitaker v. Dunn, 122-103. As to interpleaders and new parties made and amendment of pleadings and process accordingly, see Finch v. Gregg, 126-176. Leave to plead the statute of limitations where not pleaded below, is in court's discretion: Poston v. Rose, 87-279. Leave to plead at trial term of superior court is discretionary: Forbes v. McGuire, 116-449.

The jurisdiction of superior court in appeals from a justice is entirely derivative, and if the justice had no jurisdiction in the action as it was before him, the superior court can derive none by amendment: Ijames v. McClamrock, 92-362; Robeson v. Hodges, 105-51; Allen v. Jackson, 86-321; Boyette v. Vaughan, 85-363. The defense that cause of action is not of such a kind as to be "split up" so as to bring it within the jurisdiction of a justice, must be made before the justice otherwise it can not be made in the superior court on appeal, unless defendant is permitted to amend: Cotton Mills v. Cotton Mills, 115-475; Blackwell v. Dibbrell, 103-270; Jarrett v. Self, 90-478.

EFFECT OF PARTIES FAILING TO APPEAR. Plaintiff, failing to appear, can be called out and nonsuited: Barnes v. Rwy., 133-131—but not so with defendant, for no judgment can be entered against him if he has answered and raised a material issue, without a trial, Barnes v. Rwy., 133-130—for in such a case there must be a verdict before there can be a judgment, Barnes v. Rwy., 133-131—yet there are cases in which judgment by default can be taken and in others by default and inquiry,

Ballard v. Gay, 108-545; but see Hartsfield v. Jones, 49-309; Williams v. Beasley, 35-112; Ramsour v. Harshaw, 30-480.

608. Clerk to docket appeal from justice for trial de novo. When the return is made the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court.

Code, s. 880; C. C. P., s. 539; 1876-7, c. 251, s. 8. **Appellant should docket at the next term:** Barnes v. Rwy., 133-131; Sondley v. Asheville, 110-89; Ballard v. Gay, 108-544. **The "next term" means that term beginning next after the expiration of the ten days allowed for service of notice of appeal:** Sondley v. Asheville, 110-84; Pants Co. v. Smith, 125-588; Davenport v. Grissom, 113-38—**and in counting the ten days exclude the first and include the last,** Barcroft v. Roberts, 92-249; also Walker v. Scott, 104-483; Sondley v. Asheville, 110-89. **As to whether "ensuing term" means a criminal term or civil term or either:** Lentz v. Hinson, 145-; Blair v. Coakley, 136-408; Johnson v. Andrews, 132-376. **Effect of failure of defendant to appear after having answered in court below and raised material issue:** Barnes v. Rwy. Co., 133-130. **Where an appelleant pays the fees for the return and docketing of an appeal it will not be dismissed because clerk fails to docket:** Johnson v. Andrews, 132-376—**and clerk must demand fees, otherwise no laches can be imputed to appellant for failure to tender same:** West v. Reynolds, 94-333. **Court has no power to permit docketing at a subsequent term to the one to which it should have been returned:** Davenport v. Grissom, 113-38. **Attorneys can waive time by agreement:** Jerman v. Gulledge, 129-242. **As to judgment when appeal not docketed in time, see section 607.**

609. Appeal from justice heard on original papers. The appeal shall, in all cases, be heard on the original papers, and no copy thereof need be furnished for the use of the appellate court.

Code, s. 881; C. C. P., s. 540.

610. Appeal from the clerk. Any party may appeal from any decision of the clerk of the superior court on an issue of law or legal inference to the judge without undertaking.

Code, s. 252; C. C. P., s. 109. **It is only from clerk's decision on question of law that appeal may be taken:** Powell v. Morisey, 98-426; see also Bank v. Burns, 107-467; also cases as to "findings of fact" under section 613.

An appeal will lie to the judge in allotment of dower: Welfare v. Welfare, 108-272—**in proceedings to remove administrators, etc.,** Edwards v. Cobb, 95-10—**in the setting aside of a sale and ordering resale,** Lovinier v. Pearce, 70-167—**upon clerk's refusal to issue execution against the person of a judgment debtor,** Huntley v. Hasty, 132-279—**in the denial to ward of a demand that guardian be made to file an annual state of the manner and nature of his investments,** Moore v. Askew, 85-199—**in attachment, where clerk refuses to allow amendment of affidavit and dis-**

charges attachment, Cushing v. Styron, 104-339; Palmer v. Bosher, 71-291—**in special proceedings, when,** Brittain v. Mull, 91-501.

No appeal in proceedings to condemn land for railroad until clerk passes upon exceptions to report; and then appeal is to court in term time: Railroad v. Newton, 133-136—**and not to judge at chambers,** Railroad v. Stewart, 132-248.

Questions of fact decided by clerk are reviewable by the judge hereunder: Beckwith, ex parte, 124-111; Ledbetter v. Pinner, 120-455; McMillan v. McMillan, 123-577; Edwards v. Cobb, 95-10. **The appeal may be without undertaking:** Adams v. Guy, 106-278.

611. When taken; who may take. An appeal must be taken within ten days after the entry of the order or judgment of the court; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who being entitled to be heard thereon, had no notice or opportunity to be heard; which fact may be shown by affidavit or other proof. 149-84

Code, s. 253; C. C. P., s. 492.

612. Duty of clerk on appeal prayed. On such appeal the clerk, within three days thereafter, shall prepare a statement of the case, of his decision and of the appeal and shall sign the same; he shall, within the time aforesaid, exhibit such statement to the parties or their attorneys on request; if such statement is satisfactory, the parties or their attorneys shall sign the same; if either party object to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach such writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision.

Code, s. 254; C. C. P., s. 110. **Practice in sending up papers to judge:** Cushing v. Styron, 104-339. **Practice in regard to appeals in those cases within jurisdiction of clerk, neither as and for the court nor as in special proceedings, but in his capacity as clerk, such as auditing accounts of executors, etc.,** see Spencer ex parte, 95-271. **Practice where clerk fails to submit statement to parties before sending to judge:** Cushing v. Styron, 104-340. 149-84

Clerk has no power to allow or disallow appeal; if he refuses to send up statement, the judge may order him to do so: Bank v. Burns, 107-467.

When demurrer filed in proceeding to sell real estate of decedent, issue of law raised should be certified to the judge at chambers: Jones v. Hemphill, 77-42. **If issues of both law and fact raised, he should transfer both to the civil issue docket for trial:** Spencer v. Credle, 102-68; Jones v. Hemphill, 77-42. **Such issues of law appealed must be sent to the judge of the district or judge who has exchanged with him and is riding the**

district for the term: Henry v. Hilliard, 120-479; Benbow v. Moore, 114-263; Myers v. Hamilton, 65-567. **Such appeals can be heard outside of the county where proceeding pending:** Ledbetter v. Pinner, 120-455; McCaskill v. McKinnon, 121-192. **For the statement of the case which clerk must send up:** see Brooks v. Austin, 94-222.

613. Duty of judge on appeal. It shall be the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he shall have been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for such hearing, and give the attorneys of both parties reasonable notice thereof. He shall transmit his decision in writing, endorsed on, or attached to, the record to the clerk of the court, who shall immediately acknowledge the receipt thereof, and within three days after such receipt, notify the attorneys of the parties of the decision and on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law.

Code, s. 255; C. C. P., s. 113. **See section 614. Judge must determine questions of law and fact:** Spencer ex parte, 95-271; see also cases below as to "findings of fact." **Where on appeal from an order or judgment of clerk, the judge finds error, clerk should enter the proper judgment without formal order for him to do so:** Patterson v. Wadsworth, 94-538. **Within the discretion of the judge to hear the appeal at term time or in vacation:** Rowland v. Thompson, 64-714. **The judge, upon appeal sent up to him, has the power to allow amendments:** Sudderth v. McCombs, 67-353—**and review the findings of fact by the clerk:** Beckwith ex parte, 124-111; Turner v. Holden, 109-186; Spencer ex parte, 95-271; McAden v. Banister, 63-479—**and if evidence accompanying papers is not satisfactory he can require other evidence,** Spencer ex parte, 95-271. **Judge's interlocutory orders made on appeal to him in condemnation proceedings not appealable:** Railroad v. Newton, 133-137. **Duty of judge to transmit decision to clerk, who will then proceed according to law:** Jones v. Desern, 94-32; Tillett v. Aydlett, 93-15; Jones v. Hemphill, 77-42; Patterson v. Wadsworth, 94-538; Brittain v. Mull, 91-498. **Where in record in supreme court there is nothing to indicate that an attorney demanded a hearing before the judge as allowed by law, it will be presumed that the proceeding was regullarly conducted:** Ledbetter v. Pinner, 120-455. **Clerk must send case by mail or otherwise to judge:** Ibid. **Judge can not demand of clerk who has gone out of office that he file, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk:** Spencer ex parte, 95-271. **Section merely cited:** Allred v. Smith, 135-554.

614. Judge determines entire controversy; may recommit. Whenever any civil action or special proceeding begun before the clerk

of any superior court shall be for any ground whatever sent to the superior court before the judge, the judge shall have jurisdiction; and it shall be his duty, upon the request of either party, to proceed to hear and determine all matters in controversy, in such action, unless it shall appear to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so.

1887, c. 276. **This section was enacted to cure the inconveniences caused by Brittain v. Mull, 91-498:** Roseman v. Roseman, 127-497. **It applies only to cases commenced before the clerk:** Baker v. Carter, 127-92. **Procedure before and since enactment of this section distinguished:** Foreman v. Hough, 98-386.

Under this section, the judge to whom a cause is sent by appeal or otherwise from the clerk, has the full jurisdiction to hear and fully determine the cause, or to make orders therein and send it back to the clerk to be proceeded with by him: Oldham v. Rieger, 145-254; In re Wittkowsky's Land, 143-248; Martin v. Briscoe, 143-353; Settle v. Settle, 141-569; Faison v. Williams, 121-152; Smith v. Gudger, 133-627; Robinson v. McDowell, 133-186; In re Anderson, 132-243; Railroad v. Stroud, 132-416; Harrington v. Hatton, 129-146; Ury v. Brown, 129-270; Howland v. Marshall, 127-430; Roseman v. Roseman, 127-494; Ledbetter v. Pinner, 120-455; Elliott v. Tyson, 117-114; Godwin v. Early, 114-11; Lictie v. Chappell, 111-347; Ashby v. Page, 108-6; Cushing v. Styron, 104-338; McMillan v. Reeves, 102-550; but see In re Hybart's estate, 129-131—**and this is so even though proceeding originally before clerk is a nullity,** In re Anderson, 132-243. **When proceeding gets before judge it is as much before him as if originally returned before him:** Railroad v. Stroud, 132-416—**the judge may make amendments, and may even make them to give effectual jurisdiction:** Ewbank v. Turner, 134-81; Springs v. Scott, 132-551; Piercy v. Watson, 118-976; Elliott v. Tyson, 117-116; and cases cited; McLean v. Breece, 113-390; but see Robeson v. Hodges, 105-49.

XXVII. Execution.

615. Judgment enforced by. Where a judgment requires the payment of money or the delivery of real or personal property the same may be enforced in those respects by execution, as provided in this subchapter. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer, who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

Code, s. 441; C. C. P., s. 257. **The process of execution the creditor may have from time to time while judgment continues in force until it shall be discharged:** Vegelahn v. Smith, 95-255—**but not so in the case of the death of the debtor, for creditor must then collect his debt in the regular**

course of administration: Holden v. Strickland, 116-185; Tuck v. Walker, 106-285; Sawyers v. Sawyers, 93-321—**and if personal assets insufficient, can have his judgment satisfied out of proceeeds of land to which the lien adheres:** Lilly v. West, 97-278; Murchison v. Williams, 71-135; Mauney v. Holmes, 87-430; Sawyers v. Sawyers, 93-325; see also section 104. **Remedy where clerk refuses to issue:** Electric Co. v. Engineering Co., 128-201; Gooch v. Gregory, 65-142. **Necessity of purchaser under execution being able to show judgment and execution:** King v. Featherston, 20-259—**and that judgment under which he purchases was docketed in county where land lies,** Rollins v. Henry, 78-342; King v. Portis, 77-25; but see Bernhardt v. Brown, 122-593 and cases cited. **Certain judgments where sales under execution do not give purchaser title:** Halso v. Cole, 82-161; Dudley v. Cole, 21-429; Barrow v. Arrenton, 23-223. **Order taxing costs is a judgment upon which execution can issue:** Sheppard v. Bland, 87-163. **Execution issued upon an erroneous or irregular judgment not reversed is valid:** Carter v. Spencer, 29-14. **Execution issued upon dormant judgment held voidable, not void:** Ripley v. Arledge, 94-467; Jacobs v. Burgwyn, 63-193; Brown v. Long, 36-190; Dawson v. Shepherd, 15-497; but see Williams v. Williams, 85-386. **Justice's judgments duly docketed are the subject of execution upon same property and within same limitation as superior court judgments:** Broyles v. Young, 81-315. **Execution for owelty of partition can not be issued until report of commissioners confirmed:** In re Ausborn, 122-42. **Where execution regular on its face, sheriff not liable for seizure and sale of judgment debtor's property although judgment invalid:** O'Briant v. Wilkerson, 122-304. **Execution does not issue against a county; remedy is by mandamus:** Hughes v. Comrs., 107-598; Gooch v. Gregory, 65-142.

616. Kinds of; signed by clerk; sealed, when. There shall be three kinds of execution, one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court.

Code, s. 442; C. C. P., s. 258. **See for forms of the different kinds of execution, section 627. For execution against the person, see sections 625 and 627. The clerk and not the judge is the proper officer to issue execution:** McKethan v. McNeill, 74-663—**and deputy clerk can issue in the name of clerk,** Miller v. Miller, 89-402. **As of what date execution should bear teste:** Williams v. Weaver, 94-134; Bryan v. Hubbs, 69-423; Bernhardt v. Brown, 122-594. **When execution runs out of county it should bear seal of the court:** Taylor v. Taylor, 83-116. **Section merely cited:** Burgwyn v. Hall, 108-492; Patton v. Gash, 99-284; Kinney v. Laughenour, 97-325.

617. Against married woman. An execution may issue against a married woman, and it shall direct the levy and collection of the

amount of the judgment against her from her separate property, and not otherwise.

Code, s. 443; C. C. P., s. 259. **See generally:** Dougherty v. Sprinkle, 88-300; Vann v. Edwards 128-425. **Section partially construed:** Harvey v. Johnson, 133-356; McLeod v. Williams, 122-462—**and referred** to in dissenting opinion of Clark, J., in Moore v. Wolfe, 122-716. **Duty of sheriff on receiving execution:** Harvey v. Johnson, 133-356; Bank v. Ireland, 127-238; Bailey v. Barron, 112-54.

618. Clerk to issue, in six weeks; alias; penalty. The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff therein, within six weeks of the rendition of the judgment, and shall endorse upon the record the date of such issue; and if the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks shall issue alias executions, within six weeks thereafter, unless otherwise instructed as aforesaid. And every clerk who shall fail to comply with the requirements of this section shall be liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and shall be further liable to the party injured by suit upon his bond.

Code, s. 470; R. C., c. 45, s. 29; 1850, c. 17, ss. 1, 2, 3. **Execution is not issued until the clerk hands it to the sheriff, or to the party, or to his agent:** State v. McLeod, 50-321. **Fees of clerk must be paid or tendered him, else a failure on his part to issue execution hereunder will not subject him to amercement:** Bank v. Bobbitt, 111-194. **Clerk must endorse date of issuance upon the record; endorsing it upon the execution is not sufficient:** Bank v. Stafford, 47-98. **Deputy clerk can issue:** Miller v. Miller, 89-402; Jackson v. Buchanan, 89-74; see also Shepherd v. Lane, 13-148; Coltrain v. McCain, 14-308; Suddereth v. Smyth, 35-452. **Execution not allowable to enforce owelty of partition until commissioner's report confirmed:** In re Ausborn, 122-42. **Remedy against clerk for refusing to issue is by a rule of the court or action on his bond:** Gooch v. Gregory, 65-142, approved by Electric Co. v. Engineering Co., 128-201—**or by amercement under this section by party aggrieved:** Williamson v. Kerr, 88-10; Simpson v. Simpson, 63-534; see sections 295 and 2817. **As to executions issued after death of judgment debtor:** Sawyers v. Sawyers, 93-321; Williams v. Weaver, 94-134; Cowles v. Hall, 113-359. **Where entry of judgment states that execution shall not issue until a certain time, but is issued before that time, stranger can not avoid, but party might:** Cody v. Quinn, 28-191; Wood v. Bagley, 34-83; Shelton v. Fels, 61-178. **As to counting Sundays in the time allotted:** Davis & Hooks v. R. R., 145-207.

619. Within three years as of course. The party in whose favor judgment has been heretofore or shall hereafter be given, and in case of his death, his personal representatives duly appointed,

may at any time within three years after the entry of judgment proceed to enforce the same, by execution, as provided in this subchapter.

149-95

Code, s. 437; C. C. P., s. 255. **For leave to issue execution after three years, see section 620. Execution to enforce payment of owelty of partition not to issue against minors until their coming of age:** Turpin v. Kelly, 85-399. **No execution against an estate of deceased debtor:** Sawyers v. Sawyers, 93-321; Williams v. Weaver, 94-134; see also section 615. **Where execution issued within three years, the judgment does not become dormant:** Perkins v. Berry, 103-131; Williams v. Mullis, 87-159; see also Heyer v. Rivenbark, 128-272. **This section applies to judgments existing at the time of its adoption:** Harris v. Ricks, 63-653. **No execution against a county:** Gooch v. Gregory, 65-142—**mandamus, or in some cases, a bill in equity, being the remedy,** Hughes v. Comrs., 107-598; Lutterloh v. Comrs., 65-403; Pegram v. Comrs., 64-557; Winslow v. Comrs., 64-218; see also Martin v. Clark, 135-170 and cases cited.

620. After three years, by leave obtained after notice. After the lapse of three years from the entry of judgment on the judgment docket, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or nonresident, or can not be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or by other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part.

147-594
149-95

Code, s. 440; C. C. P., s. 256. **Execution can issue after the lapse of three years since the issuance of the last execution by complying with this section:** Williams v. Williams, 85-385. **Where motion made and refused, and no appeal taken, it can not be renewed:** Sanderson v. Dailey, 83-67.

The clerk and not the judge the proper person, to whom to make application: Adams v. Guy, 106-278; McKethan v. McNeill, 74-663. **Requisites of the affidavit of applicant:** Hinton v. Roach, 95-106. **Giving notice of application:** Surratt v. Crawford, 87-372; Rush v. Steamboat Co., 84-702; Isler v. Murphy, 71-436. **Affidavit of applicant sufficient evidence, when:** Hinton v. Roach, 95-106.

Issues of fact arising, clerk transfers to superior court for trial: Goode v. Rogers, 126-62. **Where judgment debtor dead, his heirs should be made parties defendant if such judgment is a lien upon lands:** Isler v. Murphy, 71-436, but see Cowles v. Hall, 113-359. **Plaintiff is competent witness against personal representative of deceased debtor in motion hereunder:** Latham v. Dixon, 82-55—**and judgment debtor is likewise competent as**

against personal representative of deceased creditor, Pate v. Oliver, 104-458.

Defense to the motion to issue execution: Balk v. Harris, 130-384 and cases cited; Bank v. Swink, 129-255; McLeod v. Williams, 122-451; Pate v. Oliver, 104-458; Lytle v. Lytle, 94-683—**a discharge in bankruptcy sufficient,** Spicer v. Gambill, 93-382 and cases cited; Dawson v. Hartsfield, 79-334; Withers v. Stinson, 79-341 but see Sanderson v. Daily, 83-67; Bell v. Cunningham, 81-83—**the statute of limitations,** when, Ex parte Smith, 134-495; Heyer v. Rivenbark, 128-272; Farrar v. Harper, 133-74; Lilly v. West, 97-276; Williams v. Mullis, 87-159; McDonald v. Dickson, 85-248. **This section applies to justice's judgments docketed in superior court:** Broyles v. Young, 81-315—**and leave to issue execution on such can be granted after the lapse of ten years, if the judgment is kept alive, but lien only continues ten years:** Heyer v. Rivenbark, 128-272; Adams v. Guy, 106-275; Lilly v. West, 97-279; Lytle v. Lytle, 94-683; Broyles v. Young, 81-315; see Pipkin v. Adams, 114-202. **Where several judgment debtors, plaintiff may select as to which of the defendants he shall revive it:** Patterson v. Walton, 119-500. **When execution regularly issued within less interval than three years the judgment does not become dormant:** Heyer v. Rivenbark, 128-272; Perkins v. Berry, 103-131; Williams v. Mullis, 87-159; see McCaskill v. McKinnon, 121-195 cited below with other cases—**and a justice's judgment does not become dormant for the failure to issue execution thereon pending an appeal from the judgment when bond has been given to stay execution,** Dysart v. Brandreth, 118-968—**nor does it become dormant, when docketed, where motion for leave to issue execution was made within ten years from the docketing but appeal on clerk's decision not adjudicated until after ten years,** Adams v. Guy, 106-275. **An innocent purchaser at a sale of land under execution issued on a dormant judgment is protected:** Cowen v. Withrow, 114-559; Lytle v. Lytle, 94-683; Barnes v. Hyatt, 87-315; Sheppard v. Bland, 87-163.

An appeal from the clerk for refusal to issue execution may be heard by the resident or presiding judge at chambers in another county: McCaskill v. McKinnon, 121-192—**and he may remand case to clerk with directions or may himself grant leave to issue,** Martin v. Briscoe, 143-353. **Leave to issue execution may be granted when judgment not fully satisfied and it is not barred by the statute:** Johnston v. Jones, 87-393. **Upon motion to revive judgment defendant can not show aliunde that no service of process had been originally made upon him; the presumption that he was properly a party is conclusive until removed by a correction of the record itself in a direct proceeding for that purpose:** Smathers v. Sprouse, 144-637.

Execution may issue after ten years if the application is made within three years from the last issuance: Williams v. Mullis, 87-159; Heyer v. Rivenbark, 128-272; McCaskill v. McKinnon, 121-195; Pipkin v. Adams, 114-201; Harrington v. Hatton, 130-89; Lytle v. Lytle, 94-683; Adams v. Guy, 106-275; but see Berry v. Corpening, 90-395—**but judgment is only a lien from the time of levy,** Wilson v. Lumber Co., 131-167; Heyer v. Rivenbark, 128-272 and cases cited.

That another judgment has been rendered for the same debt is no de-

fense to a motion to revive: McLean v. McLean, 90-530. **Case merely citing section:** Coward v. Chastain, 99-444.

621. Stay of, pending appeal. Whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution shall issue upon such judgment during the pendency of the appeal.

Code, s. 435; 1887, c. 192; C. C. P., s. 254. **This section contemplates a bond upon which summary judgment may be rendered in the supreme court upon affirmation of judgment below:** Alderman v. Rivenbark, 96-134.

622. To what counties issued; land sold where; title passed. When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. No execution shall issue from the superior court upon any judgment until such judgment shall be docketed in the county to which the execution shall be issued. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

Code, s. 443; C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; 1905, c. 412. **See section 623. This section does not apply to foreclosure sales:** Kidder v. McIlhenny, 81-123; Mebane v. Mebane, 80-34. **Sale under execution of land in county where judgment not docketed void as against purchaser for value from defendant:** Rollins v. Henry, 78-342. **Seal of the clerk of county from which execution issues must be attached therto:** Taylor v. Taylor, 83-116. **Justice's execution should be addressed to "any constable or other lawful officer:"** McGloughan v. Mitchell, 126-681. **Levy on land in another county may be made without docketing transcript: Evans v.** Alridge, 133-378 and cases cited. **Executions may be issued at the same time to different counties:** Vegelahn v. Smith, 95-256.

THE PURCHASER'S TITLE. Purchaser of land at execution sale has prima facie title, Allison v. Snider, 118-952. **The recital of execution and sale in sheriff's deed is prima facie evidence thereof:** Wainwright v.

Bobbitt, 127-274; Miller v. Miller, 89-402; Wilson v. Taylor, 98-280; Rollins v. Henry; 78-342; Curlee v. Smith, 91-172—**and this is so notwithstanding the return upon the execution may be imperfect,** Miller v. Miller, 89-402. **Purchaser at sale made after death of debtor under execution issued before his death acquires good title:** Benners v. Rhinehart, 107-705. **A sale under execution issued upon a judgment which is a lien on all the debtor's property vests in the purchaser only the debtor's interest at time lien attaches:** Bristol v. Halyburton, 93-384; Dail v. Freeman, 92-351; see also Electric Co. v. Engineering Co., 128-199; but see Gentry v. Callahan, 98-448. **The sheriff's deed to purchaser operates from day of sale and not from date of deed:** Cowles v. Coffey, 88-340. **Certain judgments where sales under execution do not give purchaser title:** McCauley v. Williams, 122-295; Halso v. Cole, 82-161; Cowen v. Withrow, 114-558; Dudley v. Cole, 21-429; Barrow v. Arrenton, 23-223. **Necessity of purchaser being able to show judgment and execution;** King v. Feathertson, 20-259. **Purchaser acquires no title if court does not have jurisdiction:** McCauley v. Williams, 122-295. **Where sheriff has execution on senior judgment in hand and sale is under junior judgment, purchaser's title good:** Bernhardt v. Brown, 118-702; Dysart v. Brandreth, 118-969. **Sale under execution levied upon realty carries good title, even though judgment not docketed or lien of docketing expired:** Bernhardt v. Brown, 122-593; Sawyers v. Sawyers, 93-324.

Possession of judgment debtor, after sale and deed made to purchaser, is adverse, and his original deed is not color: Wilson v. Brown, 134-400. **A purchaser of land at execution sale has a prima facie title, and a defendant in an action of ejectment who seeks to avoid such title on the ground of homestead rights must specifically plead the facts upon which such rights depend:** Marshburn v. Lashlie, 122-240; Allison v. Snider, 118-952; Fulton v. Roberts, 113-421; Dickens v. Long, 109-165.

Where execution issued on irregular judgment, a stranger purchasing gets a good title: Hinton v. Roach, 95-106—**also he gets good title even if sheriff fail to advertise and give notice of sale as required, if he does not know it:** Burton v. Spiers, 95-503; Dula v. Seagle, 98-458. **Deed made to purchaser at void sale conveys no title:** Pemberton v. McRae, 75-500; Owen v. Barksdale, 30-81; McCauley v. Williams, 122-293. **Where sheriff's deed recites a sale prior to acquisition of title by judgment debtor, purchaser acquires no title:** Gentry v. Callahan, 98-448; Dail v. Freeman, 92-351; Frey v. Ransom, 66-466; Badham v. Cox, 33-456; Flynn v. Williams, 23-509. **A fraudulent deed by judgment debtor is color of title as against purchaser at a subsequent execution sale:** Hoke v. Henderson, 14-12. **Sheriff's deed under execution against vendee of mortgagee conveys no title:** Johnston v. Case, 131-491. **Sale under junior judgment passes title encumbered with prior liens:** Gambrill v. Wilcox, 111-42—**but passes clear title when executions under prior liens are in hands of sheriff,** Bernhardt v. Brown, 118-700; Dysart v. Brandreth, 118-969.

623. Issued from and returned to court of rendition. Executions and other process for the enforcement of judgments, shall issue only from the court in which the judgment for the enforce-

ment of such execution, other final process, or any of them may issue, was rendered; and the returns of executions or other final process shall be made to the court of the county from which the same issued.

Code, s. 444; 1871-2, c. 74; 1881, c. 75. **For amercement of sheriff for failing to make proper return, see section 2817. Seal of clerk of court must be attached to executions to other counties:** Taylor v. Taylor, 83-116. **The sheriff must make return to the superior court of the county in which judgment was obtained:** Watson v. Mitchell, 108-364. **Sheriff bound to make return and, if he has not obeyed the process, must show some lawful excuse for not doing so:** Smith v. McMillan, 84-593; Bryan v. Hubbs, 69-423; see section 2817—**and if he make an erroneous return through honest mistake, the court may allow him to amend it,** Swain v. Burden, 124-16; Stealman v. Greenwood, 113-355; Luttrell v. Martin, 112-593; Williams v. Weaver, 101-1; Walters v. Moore, 90-41; Williams v. Sharpe, 70-582; Peebles v. Newsom, 74-475.

624. When tested; to what term returnable. Executions shall be tested as of the term next before the day on which they were issued, and shall be returnable to the next term of the court beginning not less than forty days after the issuing thereof, and no execution against property shall issue until the end of the term during which the judgment was rendered.

Code, s. 449; 1903, c. 544; 1870-1, c. 42, s. 7; 1873-4, c. 7. **Executions shall be tested as of the term next before the day on which they are issued:** Williams v. Weaver, 94-134—**but this requirement is only directory and its omission does not vitiate the process:** Bernhardt v. Brown, 122-594; Bryan v. Hubbs, 69-423. **Execution issued before death of judgment debtor and sale made thereunder after his death passes good title:** Benners v. Rhinehart, 107-705—**but if issued after his death, the sale is void, even though the execution tested before death,** Williams v. Weaver, 94-134; Sawyers v. Sawyers, 93-321. **Executions are returnable to the term next after that from which they bear teste:** Turner v. Page, 111-292—**but unless ruled to do so earlier, sheriff has entire term in which to make return,** Ledbetter v. Arledge, 53-475; Turner v. Page, 111-291; Boyd v. Teague, 111-246; Person v. Newsom, 87-142—**and if he fails to make such return or makes improper return he is liable to amercement,** Boyd v. Teague, 111-246; Turner v. Page, 111-291; see also section 2817.

625. Against the person, when. If the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the subchapter "Arrest and Bail," or unless the complaint contains a statement of facts showing one or more of

the causes of arrest required by law, whether such statement of facts be necessary to the cause of action or not.

Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 26. **See section 727. This section fully discussed** in Ledford v. Emerson, 143-527; Huntley v. Hasty, 132-279; Carroll v. Montgomery, 128-278; Kinney v. Laughenour, 97-325; Peebles v. Foote, 83-102; Houston v. Walsh, 79-37. **Difference between arrest hereunder and arrest under ancillary order pointed out:** Ledford v. Emerson, 143-530.

WHEN EXECUTION CAN AND CAN NOT ISSUE. Can issue when fraud is found by jury upon proper issue based upon proper allegation, and judgment rendered thereon: Ledford v. Emerson, 143-527; but see Peebles v. Foote, 83-102; Huntley v. Hasty, 132-280; Kinney v. Laughenour, 97-326.

Can not issue simply on a judgment for debt on a note, no fraud being found: Stewart v. Bryan, 121-46; Priess v. Cohen, 117-54; Houston v. Walsh, 79-36; Clafin v. Underwood, 75-485; McAden v. Banister, 63-479—**nor on a judgment that does not state that fraud was found by a jury upon a proper issue based upon allegations in the pleadings,** Ledford v. Emerson, 143-527.

THE EXECUTION. It must be warranted by the judgment and not exceed it, otherwise it is invalid: Ledford v. Emerson, 143-531—**and the judgment as docketed must be the guide,** McAden v. Banister, 63-479. **It must command the sheriff to arrest the defendant and commit him to the jail of the county from which it is issued until he shall pay the judgment or be discharged according to law:** Kinney v. Laughenour, 97-325. **Clerk's duty to issue the order upon application in proper cases:** Patton v. Gash, 99-284; Kinney v. Laughenour, 97-325; see also McAden v. Banister, 63-479—**and his refusal to do so is appealable to resident judge,** Huntley v. Hasty, 132-279.

How person arrested can be discharged: Fertilizer Co. v. Grubbs, 114-470; Burgwyn v. Hall, 108-489; see also sections 1920-1929.

626. Defendant dying in execution; new execution against property. Parties, at whose suit the body of any person shall be taken in execution for any judgment recovered, their executors or administrators, may, after the death of the person so taken and dying in execution, have new execution against the property of the person deceased, as they might have had if such person had never been in execution.

Code, s. 469; R. C., c. 45, s. 28; 21 James I., s. 24.

627. Form of execution. The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time

of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Sheriff not liable to judgment debtor for seizure and sale of property when he acts upon execution regular in form and issued from proper court: O'Briant v. Wilkerson, 122-304. **Execution must conform to the judgment:** Cureton v. Garrison, 115-550. **Variances between execution and judgment that are not deemed fatal:** Marshburn v. Lashlie, 122-237; Hinton v. Roach, 95-106. **Executions must bear teste as of the term next before day issued, but this is only directory:** Bryan v. Hubbs, 69-423; see also section 624.

Against property—no lien on personal property until levy. If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor; and if sufficient personal property can not be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor shall be a lien on the personal property of such debtor, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Execution is a lien on personalty only from the moment of levy: Weisenfield v. McLean, 96-248; see also Shelby v. Tiddy, 118-792—**but it is a lien on realty without levy, the lien attaching upon the docketing of the judgment,** Harris v. Ricks, 63-653; see also section 574—**unless issued after ten years, and then it is a lien on both personalty and realty from levy only:** Wilson v. Lumber Co., 131-167; Heyer v. Rivenbark, 128-272; Bernhardt v. Brown, 122-593; Lytle v. Lytle, 94-683; Sawyers v. Sawyers, 93-321; Spicer v. Gambill, 93-378. **Levy upon personal property must be made by seizing it; but if the property is of such a nature as makes actual seizure impossible, some act as nearly equivalent to seizure must be substituted for it:** Sawyer v. Bray, 102-79; Perry v. Hardison, 99-21; Long v. Hall, 97-286. **Constructive levy on personalty discussed:** Penland v. Leatherwood, 101-509; and cases cited. **Where levy made, but sheriff either allows property to remain with debtor, or debtor recaptures it against sheriff's will; held no satisfaction of execution:** Aldridge v. Loftin, 104-122; Binford v. Alston, 15-351. **Where sheriff makes levy by taking goods into his possession and refusing to sell them, it is a constructive payment:** Aldridge v. Loftin, 104-126; In re King, 13-341. **Sale of real estate under execution issued on a judgment which is a lien thereon is valid without a levy:** Farrior v. Houston, 100-369. **This subsection does not alter former law as to what is and what is not a levy; it only relates to period when lien attaches:** Sawyer v. Bray, 102-79.

Against property in hands of personal representative. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees

it shall require the officer to satisfy the judgment out of such property.

Execution issued before death of judgment debtor, and sale made thereunder after death, passes good title: Benners v. Rhinehart, 107-705; Aycock v. Harrison, 65-8; but see Halso v. Cole, 82-161—**but if issued after his death, the sale is void even though execution tested before death,** Williams v. Weaver, 94-134; Sawyers v. Sawyers, 93-321.

Against the person. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment or be discharged according to law.

For contents of execution; see Kinney v. Laughenour, 97-325; also sections 625 and 626.

For delivery of specific property. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof can not be had; and if sufficient personal property can not be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

How writs of possession of land are executed: Ferguson v. Wright, 115-568; Davis v. Higgins, 87-298; Johnson v. Nevill, 65-677. **Cases as to writs of assistance to put persons in possession of land who have bought same at a sale under decree of court and party in possession refuses to yield:** Exum v. Baker, 115-242; Marcom v. Wyatt, 117-129; Coor v. Smith, 107-430; Knight v. Houghtalling, 94-408. **For judgment and execution in claim and delivery of personal property, see section 570.**

For purchase money of land. If the answer in an action for the recovery of a debt contracted for the purchase of land does not deny that the debt was so contracted, or if the jury should find that the debt was so contracted, it should be the duty of the court to have embodied in the judgment that the debt sued on was one contracted for the purchase money of said land, describing it briefly; and it shall also be the duty of the clerk to set forth in the execution that the said debt was one contracted for the purchase of said land, the description of which shall be set out briefly as in the complaint.

A judgment reciting that the debt was contracted for the purchase of land is conclusive: Durham v. Wilson, 104-595. **This subsection does not apply where a deed has not been made to the vendee:** Lewis v. McDowell, 88-261. **Sale by a sheriff of the homestead, even though execution does not specify that the debt is for the purchase money of land, will be valid:** Durham v. Bostick, 72-353. **Sale of land under execution for purchase money is valid without allotment of homestead:** Durham v. Wilson, 104-595. **Homestead can not be claimed as against judgment for purchase money,** Toms v. Fite, 93-274; also see under section 685.

Code, ss. 234, 235, 236, 448; C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217.

628. Variance between judgment and execution. Whenever property may have been sold by an officer by virtue of any execution or other process commanding the sale thereof, no variance between the execution and the judgment whereon the same was issued in the sum due, in the manner in which it is due or in the time when it is due, shall invalidate or affect the title of the purchaser of such property.

Code, s. 1347; R. C., c. 44, s. 13; 1848, c. 53. **Section directly supported** by Hinton v. Roach, 95-106. **A variance merely technical will be disregarded:** Marshburn v. Lashlie, 122-237. **This section liberally construed:** Wilson v. Taylor, 98-280, and cases cited.

629. What may be sold under. The property, estate and effects of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

1. The goods, chattels, houses, lands, tenements and other hereditaments, and real estate belonging to him.

For statute forbidding sale of tenant's crop under execution, see sec. 1998.

PROPERTY SUBJECT TO LEVY AND SALE. Matured crops; but when land is purchased at execution sale the growing crops go to tenant in possession: Kesler v. Cornelison, 98-383; Dail v. Freeman, 92-351; Walton v. Jordan, 65-172; Walston v. Bryan, 64-764. **Vested remainders:** Bristol v. Hallyburton, 93-384; Bruce v. Nicholson, 109-206; Stern v. Lee, 115-426. **Land, the deed for which is unrecorded:** Ray v. Wilcoxon, 107-514. **The interest of a tenant by the courtesy consummate:** McCaskill v. McCormack, 99-548.

PROPERTY NOT SUBJECT TO LEVY AND SALE. Contingent remainders: Bristol v. Hallyburton, 93-384; Bruce v. Nicholson, 109-202. **Property owned by county:** Vaughn v. Comrs., 118-639; Hughes v. Comrs., 107-598; Gooch v. Gregory, 65-142. **A purely mental conception, such as the conception of a formula for the manufacture of cigarettes:** Markham v. Whitehurst, 109-307. **Property in custodia legis,** Pelletier v. Lumber Co., 123-596—**though leave may be granted by the court in some cases that it be sold,** Pelletier v. Lumber Co., 123-596; Skinner v. Max-

well, 68-404. **Property already sold under this section can not be resold under subsequent execution on same judgment:** Peebles v. Pate, 86-438.

2. All leasehold estates of three years' duration or more, owned by him.

3. The equity of redemption, and legal right of redemption in lands, tenements, rents or other hereditaments, pledged or mortgaged by him.

See generally, Hutchison v. Symons, 67-156; Mayo v. Staton, 137-670.

PROPERTY SUBJECT TO LEVY AND SALE. Equity of redemption in an express mortgage and also equitable interest under securities given in the nature of a mortgage: Davis v. Evans, 27-525. **An interest in Cherokee boundary land purchaser being entitled to grant upon payment of fees:** Wilson v. Deweese, 114-653. **Equity of redemption, whether created by mortgage deed made to creditor or to a third person, with or without power of sale:** Mayo v. Staton, 137-670.

PROPERTY NOT SUBJECT TO LEVY AND SALE. Equity of redemption, when judgment upon which execution issues is for the mortgage debt: Simpson v. Simpson, 93-373. **Vendor's interest in land contracted to be conveyed on receipt of purchase money:** Tally v. Reid, 72-336; Mayo v. Staton, 137-681 and cases cited. **Vendee's interest under contract of purchase of land where he has not paid the purchase money in full:** McPeters v. English, 141-491; Gorrell v. Alspaugh, 120-362 and cases therein cited; Rollins v. Henry, 86-714; Tally v. Reed, 74-463; Hinsdale v. Thornton, 75-381, 74-167; Jennings v. Hardin, 45-275; Frost v. Reynolds, 39-494; Badham v. Cox, 33-456.

4. Any lands, tenements, rents and hereditaments or any goods and chattels of which any person shall be seized or possessed in trust for him.

See generally, Mayo v. Staton, 137-670.

PROPERTY SUBJECT TO LEVY AND SALE. Trusts that can be enforced between trustee and cestui que trust: Page v. Goodman, 43-16—**such as would entitle cestui que trust to call for legal estate without further condition,** Hinsdale v. Thornton, 75-381, referred to in Gorrell v. Alspaugh, 120-367. **Equitable estates as distinguished from equitable rights,** Nelson v. Hughes, 55-33. **Only trust estates held in trust for the defendant solely:** Harrison v. Battle, 16-537; but see section 2489.

PROPERTY NOT SUBJECT TO LEVY AND SALE. Fraudulent trusts: Page v. Goodman, 43-16; see Sherrod v. Dixon, 120-60; Guthrie v. Bacon, 107-337; Everett v. Raby, 104-479; Jimmerson v. Duncan, 48-537. **Interest of cestui que trust where court can not decree a conveyance of the legal title at the suit of the cestui que trust:** Battle v. Petway, 27-576. **Trust estate for several tenants in common, where one is judgment debtor,** McLeran v. McKethan, 42-70. **A mixed trust:** Williams v. Williams, 41-20; see also Gorrell v. Alspaugh, 120-367 and cases there cited. **Equitable rights as distinguished from equitable estates,** Nelson v. Hughes, 55-33.

A resulting trust in a deed of trust for creditors: Sprinkle v. Martin, 66-56; see also Hardin v. Ray, 94-456; McRary v. Fries, 57-234; Thompson v. Ford, 29-418; Battle v. Petway, 27-576; Barham v. Massey, 27-192;

Burgin v. Burgin, 23-160; Harrison v. Battle, 16-541; Mordecai v. Parker, 14-425; Brown v. Graves, 11-342—**but may be reached in manner pointed out** in McKeithan v. Walker, 66-95; Hutchison v. Symons, 67-156.

Code, s. 450; R. C., c. 45, ss. 1-5; 5 Geo. II., c. 7, s. 4; 1777, c. 115, s. 29; 1812, c. 830, ss. 1, 2; 1822, c. 1172.

630. Sale of trust estates; purchaser's title. Upon the sale under execution of the estates mentioned in subdivision four of the preceding section the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the person so seized or possessed in trust as aforesaid.

Code, s. 452; R. C., c. 45, s. 4; 1812, c. 830. See Mayo v. Staton, 137-684.

631. Sheriff's deed on sale of equity of redemption. The sheriff selling the equity of redemption and legal right of redemption, as set forth in section six hundred and twenty-nine, subdivision three, shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale.

Code, s. 451; R. C., c. 45, s. 5; 1812, c. 830, s. 2; 1822, c. 1172. **The provisions of this section are not mandatory:** Mayo v. Staton, 137-687, citing Thorpe v. Ricks, 21-619.

632. Growing crops exempted from. No execution shall be levied on growing crops until the same are matured.

Code, s. 453; R. C., c. 45, s. 11; 1844, c. 35. **Growing crops at common law were subject to levy and sale:** Smith v. Tritt, 18-241—**but under the statute they are not, and can not be until they are matured,** Kesler v. Cornelison, 98-382, and cases there cited; Dail v. Freeman, 92-351; Shannon v. Jones, 34-206.

633. Forthcoming bond for personal property. If any sheriff or other officer who may have levied an execution or other process upon personal property, shall permit the same to remain with the possessor, such officer may take a bond for the forthcoming thereof to answer the said execution or process, which bond shall be attested by a credible witness; but the officer shall nevertheless, in all respects, remain liable as heretofore to the plaintiff's claim.

Code, s. 463; R. C., c. 45, s. 21; 1807, c. 731, s. 3; 1828, c. 12, s. 2. **The bond is simply to secure the redelivery of the property to the officer—not to secure the debt:** Gray v. Bowls, 18-437; Grady v. Threadgill, 35-228—**and the property must be peaceably and quietly redelivered in strict accordance therewith or bond is forfeited:** Poteet v. Bryson, 29-337. **As to form of bond** see Grady v. Threadgill, 35-228.

634. Surety furnished list of property; possession his; sale in thirty days. When such bond shall be taken the officer shall specify therein the property levied upon, and shall furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale; and the property so levied upon shall be deemed in the custody of the surety, as the bailee of the officer; and all other executions thereafter levied on said property shall create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of said property; but the officer thereafter levying shall not take the property out of the custody of the surety: Provided, that in all such cases, sales of chattels shall take place within thirty days after the first levy; and, if sale shall not be made within the time aforesaid, any other officer who may have levied upon the property may seize and sell the same.

Code, s. 464; R. C., c. 45, s. 22; 1844, c. 34; 1846, c. 50.

635. Summary remedy on forthcoming bond. If the condition of such bond be broken, the sheriff or other officer, on giving ten days' previous notice, in writing, to any obligor therein, may, on motion, have judgment against him in a summary manner, before the superior court, or before a justice of the peace as the case may be, of the county in which such officer may reside, for all such damages as said officer may have sustained, or be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice.

Code, s. 465; R. C., c. 45, s. 23; 1822, c. 1141.

636. Returns of, entered on judgment docket; penalty for clerk's failure. When any execution shall be returned, the return of the sheriff or other officer shall be noted by the clerk on the judgment docket; and when the same shall be returned satisfied, or partially satisfied, it shall be the duty of the clerk of the court to which the same is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, whose duty it shall be to note such copy in his judgment docket, opposite said judgment, and to file said copy with the transcript of the docket of said judgment in his office. Any clerk failing to send a copy of the payments on said execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and any clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nisi for said failure, and said conditional judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county.

Code, s. 445; 1871-2, c. 74, s. 2; 1881, c. 75. **The return as evidence, establishing its truthfulness, prima facie merely:** Perry v. Hardison, 99-21; Peebles v. Pate, 90-348—**and where execution lost, the entry of the execution and its return on the minute docket is admissable as secondary evidence,** Curlee v. Smith, 91-172. **The word "executed" as a return of process ex vi termini means full performance:** Isley v. Boon, 113-249; McDonald v. Carson, 94-497. **Where judgment debtor turns over collateral to judgment creditor and he collects same, it is the same as a payment on judgment and should be entered:** Moore v. Garner, 101-374. **As to application of surplus of proceeds of execution sale under senior judgment; to the payment of junior judgments,** see Gambrill v. Wilcox, 111-42. **An execution returned into court with an entry of satisfaction indorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case:** Walters v. Moore, 90-41.

637. Cost of keeping horses, etc. The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property, the keeping of which may be chargeable to them, taken into their custody under legal process; and such allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold.

Code, s. 466; R. C., c. 45, s. 25; 1807, c. 731. **Section referred to:** Railway Co. v. Main, 132-459.

638. Verified account of expenses of keeping filed. Every such officer shall make out his account and if required shall give the debtor or his agent a copy thereof, signed by his own hand, and shall return the account with the execution or other process, under which the property has been seized or sold, to the justice or the court to whom the execution or process is returnable, and shall swear to the correctness of the several items therein set forth; otherwise he shall not be permitted to retain the same.

Code, s. 467; R. C., c. 45, s. 26; 1807, c. 731, s. 2.

639. Purchaser of defective title; remedy against defendant. Where property, real or personal, shall be sold on any execution or decree, by any officer authorized to make the sale, and the sale is legally and in good faith made, and such property be not the property of the person against whose estate such execution or decree may have issued, by reason of which the purchaser may have been deprived of the same property, or may have been compelled to pay damages in lieu thereof to the owner; in every such case the purchaser, his executors or administrators, may sue the person against whom such execution or decree may have issued, or the person legally representing him, in a civil action, and recover such sum as

he may have paid for the property, with interest from the time of payment: Provided, that such property, if the same is personal property, be present at the sale, and actually delivered to the purchaser.

Code, s. 468; R. C., c. 45, s. 27; 1807, c. 723. **Cases directly sustaining this section:** Johnson v Gooch, 114-62; Wall v. Fairley, 77-105. **Cases referring to section:** Brown v. Smith, 53-332; McDougald v. McLean, 60-120. **As to whether purchaser of defective title is subrogated to rights of execution creditor,** see Pemberton v. McRae, 75-497; Laws v. Thompson, 49-104. **Where at a sale of land not belonging to execution debtor, plaintiff purchased for enough to pay off the judgment, it is satisfied; then plaintiff's remedy is under this section:** Halcombe v. Loudermilk, 48-491.

640. Costs on execution paid to clerk; penalty. The sheriff or other officer shall pay the costs on all executions which shall be satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court; and any such officer making default herein shall forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs.

Code, s. 472; R. S., c. 76, s. 5; 1822, c. 1149.

XXVIII. Execution Sales.

641. How advertised; cost of newspaper publication. No real property shall be sold under execution, deed in trust, mortgage, or other contract hereafter executed, until notice of said sale shall be posted at the courthouse door and three other public places in the county for thirty days immediately preceding such sale, and also published for four weeks in some newspaper published in the county, if a paper is published in the county: Provided, the cost of such newspaper publication shall not exceed three dollars, to be taxed as cost in the action, special proceeding or proceeding to sell.

Code, s. 456; 1885, c. 38; 1905, c. 147; 1868-9, c. 237, s. 10; R. C., c. 45, s. 16; 1881, c. 278. **See also section 1042.**

Notice that under section 1042 the number of days mentioned for advertising mortgages and other contracts is stated at 20.

An advertisement of sale of land to the highest bidder is a proposition by the advertiser to sell at the highest bid, and the last and highest bidder accepts the offer, completing the contract: Procter v. Finley, 119-536.

Requirements of advertising execution sale only directory: Shaffer v. Bledsoe, 118-279; see Dula v. Seagle, 98-458; Burton v. Spiers, 92-503—**but requirements as to time and place of sale are mandatory,** Wortham v. Basket, 99-70. **True test as to effect of sheriff's failure to comply with**

requirements held directory: Hays v. Hunt, 85-303; Dula v. Seagle, 98-458; Skinner v. Warren, 81-377.

The real object of advertising set forth in Burton v. Spiers, 92-508. **It is presumed that proper advertising was done:** Cawfield v. Owen, 129-288. **As to advertising sale of land for taxes,** see Hays v. Hunt, 85-303; also section 2890. **Case where sheriff was sued for penalty for insufficiently advertising in which question was raised whether property was real or personal:** Freeman v. Leonard, 99-274. **Case where advertisement proper but date changed by request of defendant in execution and with knowledge of purchaser; held purchaser could not call for conveyance:** Skinner v. Warren, 81-373. **Sheriff's duty to advertise and sell to best advantage of creditors:** Ibid. **For penalty on sheriff for selling without advertising properly, see section 649. In the absence of fraud, selling without due advertisement does not vitiate the sale:** Woodley v. Gilliam, 67-239 and cases cited; Dula v. Seagle, 98-458; Shaffer v. Bledsoe, 118-279 and cases cited—**the true test being whether or not purchaser had knowledge of the defects,** Dula v. Seagle, 98-458; Hays v. Hunt, 85-303; Skinner v. Warren, 81-377; Avery v. Rose, 15-554.

As to advertising mortgage sales, the mortgage is a contract and the manner and time of advertising may be specified therein: McIver v. Smith, 118-75; see also section 1042. **As to advertising sales under contracts other than those mentioned in this section, see section 1042.**

642. Notice of, served on defendant; on governor, when. In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally, if he be found in the county, or on his agent, if he have a known agent therein, or if he can not be found within the county, and has no known agent therein, but his address be known, by mail to such address; and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address: Provided, that in case of the sale under execution, or under the order of any court, of any property, real or personal, in which the state shall be interested as a stockholder or otherwise, notice in writing shall be served upon the governor and attorney-general, at least thirty days before the sale, of the said time and place of sale, and under what process the sale is made, otherwise said sale shall be invalid.

Code, s. 457; 1868-9, c. 237, s. 11; 1876-7, c. 224. **The requirement of serving notice upon a person, defendant in execution, is directory only, an innocent purchaser getting a good title:** Shaffer v. Bledsoe, 118-279; Cowles v. Hardin, 101-388; Burton v. Spiers, 92-503. **Section referred to** in Freeman v. Leonard, 99-279.

643. Sale days under, or by order of court. All real property sold under execution, or by order of court, shall be sold at the

courthouse door of the county in which the property or some part thereof is situate, on the first Monday in any month, or during the first three days of any term of the superior court of said county, unless in the order directing the sale some other place and time is designated; and then it shall be sold as directed in such order, on any day except Sunday or holidays, after advertising the same as required by law.

Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2. **Sale at improper time and place is void:** Lowdermilk v. Corpening, 101-649; Wortham v. Basket, 99-70; Dula v. Seagle, 98-458; Mayers v. Carter, 87-146 (see Mordecai v. Speight, 14-429)—**unless sale assented to by defendant in execution, who waives a compliance with statutory requirements,** Wortham v. Basket, 99-70; Biggs v. Brickell, 68-239. **Sales made on Tuesday or Wednesday valid:** Mayers v. Carter, 87-148; Brooks v. Ratcliff, 33-321—**on Friday valid,** Wade v. Saunders, 70-270—**unless there is an irregularity known to the purchaser,** Hays v. Hunt, 85-303.

644. Sales between ten and four o'clock. No sale under an execution or decree shall commence before ten o'clock in the morning, or continue after four o'clock in the evening, of the day on which the sale is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until the hour of ten o'clock, p. m.

Code, s. 459; R. C., c. 45, s. 17; 1794, c. 41.

645. Postponed from day to day. The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the same from day to day, but not for more than six days in all, and upon such postponement he shall post a notice thereof on the courthouse door of his county.

Code, s. 455; 1868-9, c. 237, s. 9. **Sale advertised to take place Monday, but postponed from day to day, can take place on Friday:** Wade v. Saunders, 70-270. **Effect of sale on day other than statute requires discussed:** Mordecai v. Speight, 14-428; see also Hays v. Hunt, 85-303.

646. Postponed more than six days validated. All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby.

1901, c. 742.

647. Private acts regulating land sales repealed. All private acts, by which lands in particular counties are required or allowed to be sold at places, or at times, other than those hereinafter prescribed are hereby repealed.

Code, s. 458; 1868-9, c. 237, s. 12.

648. Advertisement of sale of personal property. No sale of personal property under execution shall be made until the same has been advertised for ten days at the door of the courthouse of the county in which the same is to be sold, and at three other public places in said county, and the advertisement shall designate the place and the time of said sale.

Code, s. 460; R. C., c. 45, s. 16; 1808, c. 753; 1820, c. 1066. **See Freeman v. Leonard, 99-274.**

649. Penalty for selling contrary to law. Any sheriff or other officer, who shall make any sale contrary to the true intent and meaning of this subchapter, shall forfeit and pay two hundred dollars to any person suing for the same, one-half for his own use and the other half to the use of the county where the offense is committed.

Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3. **For liability of sheriff on his bond, see section 298. Sheriff liable hereunder for wrongly advertising or not advertising sale:** Mayers v. Carter, 87-148; Burton v. Spiers, 92-507; Freeman v. Leonard, 99-274.

650. No sale for want of bidders; officer's return; penalty. Whenever a sheriff or other officer shall return upon any execution that he has made no sale for want of bidders, he shall state in his return the several places at which he has advertised the sale of the property levied on, and the places at which he hath offered the same for sale; and any officer failing to make such specification, shall on motion be subject to a fine of forty dollars; and every constable, for a like omission of duty, shall be subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which the execution shall be returned; or, in the case of a justice's execution, by any justice to whom the execution shall be returned: Provided, that nothing in this section, nor any recovery under the same, shall be a bar to any action for a false return against the sheriff or other officer.

Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887. **For penalty for false return, etc., see section 2817.**

651. Officer to prepare deeds for property sold. Sheriffs or other officers selling lands by authority of any execution or process,

shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased: Provided, that the purchaser of land shall furnish the officer with a description of the land.

Code, s. 471; R. C., c. 45, s. 30; 1848, c. 39. **As to the title of purchaser, see annotations headed "The Purchaser's Title" under section 622. A motion in the cause is the proper means of compelling sheriff to execute deed:** Fox v. Kline, 85-173; Skinner v. Warren, 81-376 and cases cited; Patrick v. Carr, 60-633. **Purchaser not paying, sheriff can tender deed and sue:** Skinner v. Warren, 81-376; McKee v. Lineberger, 69-217; but see Maynard v. Moore, 76-161. **Sheriff can give purchaser time in which to pay purchase money if neither party objects:** Maynard v. Moore, 76-158. **Purchaser implicated in sheriff's dereliction in selling can not call for deed:** Skinner v. Warren, 81-373. **The deed must bear the seal of the sheriff,** Fisher v. Owens, 132-686; Strain v. Fitzgerald, 128-396; Patterson v. Galliher, 122-511. **Where copy of the registration of a sheriff's deed says "Given under my hand and seal," no presumption that original bore a seal:** Strain v. Fitzgerald, 128-396. **The deed is presumptive evidence of the facts stated therein:** Neal v. Nelson, 117-401—**of the execution, levy and sale and all the acts of the sheriff recited,** Wainwright v. Bobbitt, 127-274; Wilson v. Taylor, 98-275; Farrior v. Houston, 100-369; Curlee v. Smith, 91-172; Miller v. Miller, 89-402; McKee v. Lineberger, 87-181; Rollins v. Henry, 78-342; Hardin v. Cheek, 48-135—**and this is so even though the return is imperfect,** Miller v. Miller, 89-402.

XXIX. Betterments.

652. Petition by claimant; execution suspended; issues found. Any defendant against whom a judgment shall be rendered for land, may, at any time before the execution of such judgment, present a petition to the court rendering the same, stating that he, or those under whom he claims, while holding the premises under a color of title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of such judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements: Provided, that in any such action, such inquiry and assessment may be made upon the trial of the cause.

Code, s. 473; 1871-2, c. 147.

GENERAL OBSERVATIONS. This section is constitutional: Barker v. Owen, 93-198. **Some history of the section:** Condry v. Cheshire, 88-378. **Effect of Connor act upon claims for bettterments pointed out:** Wood v. Tinsley, 138-507. **This section is confined to cases where persons are in bona fide possession under color of title:** Bryan v. Alexander, 111-142;

see also annotations under section 382—and has nothing to do with claims of tenant against landlord for improvements, Dunn v. Bagby, 88-91—nor with claims for betterments as between tenants in common, Holt v. Couch, 125-456. Defendant entitled to compensation for improvements whether plaintiff's claim be legal or equitable: Barker v. Owen, 93-198.

PLEADINGS AND PROCEDURE. As to when and where to set up the claim for betterments, see Wood v. Tinsley, 138-507; Fortescue v. Crawford, 105-29; Casey v. Cooper, 99-395. Petition must be filed before the judgment is executed, Boyer v. Garner, 116-125—and judgment is deemed executed within this section, when. Ibid. The court must find probable truth in the allegations of petition, before empanelling jury: Hallyburton v. Slagle, 132-957. A claim for betterments set up in answer is no counterclaim such as to prevent plaintiff taking nonsuit: Rumbough v. Young, 119-567. Claim for betterments under this statute can not be set up on trial to defeat plaintiff's recovery, but by petition after judgment declaring plaintiff owner of land: Wood v. Tinsley, 138-507; but see Casey v. Cooper, 99-395. When claim for betterments set up in pleadings it must be found as an issue on trial or it is lost: Casey v. Cooper, 99-395. In ejectment a writ of ouster should not issue until judgment for betterments paid: Bond v. Wilson, 129-325.

AS TO DEFENDANT'S GOOD FAITH. No betterments allowed unless defendant shows his good faith in holding the land: Hallyburton v. Slagle, 132-957; see also Johnston v. Pate, 95-68; Merritt v. Scott, 81-385—and his good faith means not only that he believed, but that he had good reason to believe his title good, R. R. v. McCaskill, 98-526—and as to the reasonableness of his belief the jury is the judge, Ibid. The defendant can testify as to his belief in the validity of his title, Ibid. The notice which bars one's right to betterments is the existence of such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title: R. R. v. McCaskill, 98-526. Cases where held petitioner had no reasonable ground of belief: Wood v. Tinsley, 138-507; Finch v. Strickland, 132-103; Bird v. Gilliam, 125-76; Browne v. Davis, 109-23; Gudger v. R. R., 106-481; Scott v. Battle, 85-184; Wharton v. Moore, 84-479. Cases where held petitioner had reasonable ground: Justice v. Baxter, 93-405, but see Wood v. Tinsley, 138-507; Railroad v. McCaskill, 98-526. Cases where parties have entered into possession and made improvements under void or voidable contracts to convey, or under void deeds or on account of promises to give the land in which equity would not allow vendor to recover without repaying purchase money and paying for betterments: Kelly v. Johnson, 135-647; Taylor v. Brinkley, 131-8; Bond v. Wilson, 129-325; Luton v. Badham, 127-96; Pass v. Brooks, 125-129; Andrews v. Andrews, 122-352; Field v. Moody, 111-353; Vann v. Newsom, 110-122; Rumbough v. Young, 119-567; Pitt v. Moore, 99-85; Hedgepeth v. Rose, 95-41; Casey v. Cooper, 99-395; Tucker v. Markland, 101-422; Reed v. Exum, 84-430; Scott v. Battle, 85-184; Smith v. Stewart, 83-406; Daniel v. Crumpler, 75-184; Love v. Neilson, 54-339; Thomas v. Kyles, 54-302; Chambers v. Massey, 42-286; Albea v. Griffin, 22-9—but since equity follows the law, as to such contracts subsequent to passage of Connor act it is held betterments not allowed under this statute against

purchaser from vendor who has registered his deed, Wood v. Tinsley, 138-507. **Other cases of minor importance:** Harrington v. Rawls, 136-66; Smith v. Ingram, 132-959.

653. Annual value of land and waste charged against defendant. The jury, in assessing such damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession thereof, exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims, and also the damages for waste, or other injury, to the premises committed by the defendant.

Code, s. 474; 1871-2, c. 147, s. 2. **Section directly supported** by Barker v. Owen, 93-198. **See also** Johnson v. Armfield, 130-575; Bond v. Wilson, 129-325; Pass v. Brooks, 125-129; Jones v. Coffey, 109-519; Wetherell v. Gorman, 74-603; Reed v. Exum, 84-430; Smith v. Stewart, 83-406.

654. Damages and rental value limited to three years, when. The defendant shall not be liable for such annual value for any longer time than three years before the suit, or for damages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid.

Code, s. 475; 1871-2, c. 147, s. 3. **Cases directly upholding section:** Jones v. Coffey, 109-515; Sherrill v. Connor, 107-630; Barker v. Owen, 93-198. **In actions to establish a trust and for an accounting, rents and profits are chargeable for more than three years:** King v. Bynum, 137-491. **Other cases of interest:** Bond v. Wilson, 129-325; Browne v. Davis, 112-227; Morisey v. Swinson, 104-555; Reed v. Exum, 84-430.

655. Value of improvements estimated. If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the said premises, permanent and valuable improvements, they shall estimate in his favor, the value of such improvements as were so made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment.

Code, s. 476; 1871-2, c. 147, s. 4. **For annotations as to bona fide belief as to title, see section 652. The valuation should be based, not upon the cost of improvement, but upon the enhancement of the value of the land thereby:** Johnson v. Armfield, 130-576; Railroad v. McCaskill, 98-526; Reed v. Exum, 84-430; White v. Jones, 88-181; Smith v. Stewart, 83-406; Hill v. Brower, 76-126—**and this without reference to whether betterments are of any value to true owner,** Railroad v. McCaskill, 98-526. **The notice prescribed by the statute as a bar to compensation for improvements is defined** in Railroad v. McCaskill, 98-526.

656. Improvements to balance rents. If the sum estimated for the improvements exceed the damages estimated by the jury against the defendant as aforesaid, they shall then estimate against him for any time before the said three years, the rents and profits accrued against, or damages for waste or other injury done by him, or those under whom he claims, so far as may be necessary to balance his claim for improvements; but in such case he shall not be liable for the excess, if any, of such rents, profit, or damages beyond the value of improvements.

Code, s. 477; 1871-2, c. 147, s. 5. **This section directly supported by** Barker v. Owen, 93-198, and Sherrill v. Connor, 107-630.

657. Verdict and judgment to be for difference. After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for the improvements, if any, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict.

Code, s. 478; 1871-2, c. 147, s. 6. **Section merely referred to** in Railroad v. McCaskill, 98-538.

658. Balance due defendant a lien. Any such balance due to the defendant shall constitute a lien upon the land recovered by the plaintiff until the same shall be paid.

Code, s. 479; 1871-2, c. 147, s. 7. **The sum adjudged to the defendant for the improvements as a lien on the land:** Barker v. Owen, 93-198. **Whether judgment can be a lien on the right of way of a railroad, discussed in** Railroad v. McCaskill, 98-538. **As to improvements being an equitable lien,** see Vann v. Newsom, 110-129 and cases cited under section 652.

659. Recovery by plaintiff from remainderman, betterments paid. If the plaintiff claim only an estate for life in the land recovered and pay any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and shall have a lien therefor on the premises in like manner as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it be paid.

Code, s. 480; 1871-2, c. 147, s. 8.

660. Not applicable to suit by mortgagee. Nothing herein shall extend or apply to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises.

Code, s. 481; 1871-2, c. 147, s. 9. **Improvements placed upon land by mortgagor become additional security for the debt and he can set up no claim for betterments:** Wharton v. Moore, 84-479.

661. Value of premises without improvements, when. When the defendant shall claim allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained.

Code, s. 482; 1871-2, c. 147, s. 10.

662. How estimated. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made on the premises by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements.

Code, s. 483; 1871-2, c. 147, s. 11.

663. Plaintiff's election that defendant take premises. The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit: Provided, he pay therefor the said value with interest in the manner in which the court may order it to be paid.

Code, s. 484; 1871-2, c. 147, s. 12. **Plaintiff can elect to take value of his interest unimproved by defendant:** Barker v. Owen, 93-198.

Section referred to in Carter v. Long, 114-187.

664. Payment made to court; land sold on default. The payments shall be made to the plaintiff, or into court for his use, and the land shall be bound therefor, and if the defendant fail to make the said payments within or at the times limited therefor respectively, the court may order the land to be sold and the proceeds applied to the payment of said value and interest, and the surplus, if any, to be paid to the defendant; but if the said net proceeds be insufficient to satisfy the said value and interest, the defendant shall not be bound for the deficiency.

Code, s. 485; 1871-2, c. 147, s. 13. **Section referred to:** Barker v. Owen, 93-202.

665. If plaintiff is feme covert, minor or insane. If the party by or for whom the land is claimed in the suit be a feme covert, minor, or insane, such value shall be deemed to be real estate, and be disposed of as the court may consider proper for the benefit of the persons interested therein.

Code, s. 486; 1871-2, c. 147, s. 14.

666. Defendant evicted, recovery of plaintiff. If the defendant, his heirs, or assigns shall, after the premises are so relinquished to him, be evicted thereof by force of any better title than that of the original plaintiff, the person so evicted may recover from such plaintiff or his representatives the amount so paid for the premises, as so much money had and received by such plaintiff in his lifetime for the use of such persons, with lawful interest thereon from the time of such payment.

Code, s. 487; 1871-2, c. 147, s. 15.

XXX. Supplemental Proceedings.

667. Execution returned unsatisfied, order within three years for debtor to answer. When an execution against property of the judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he do not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned unsatisfied, in whole or in part, the judgment creditor at any time after such return made, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned, or from the judge thereof, requiring such debtor to appear and answer concerning his property, before such court or judge, at a time and place specified in the order, within the county to which the execution was issued.

Code, s. 488, subsec, 1; C. C. P., s. 264; 1868-9, c. 95, s. 2.

Proceedings supplemental to execution are in the nature of an equitable execution: Vegelahn v. Smith, 95-254; see also Coates v. Wilkes, 92-376—**and may also be regarded in the nature of a creditor's bill:** Munds v. Cassidey, 98-558; Bronson v. Ins. Co., 85-413; Rand v. Rand, 78-12; Carson v. Oates, 64-115. **Such proceedings can not be had in the supreme court:** Phillips v. Trezevant, 70-176. **Where, pending proceedings, judgment becomes barred by the statute, no bar to proceeding:** Coates v. Wilkes, 94-174. **Effect of death of judgment debtor upon supplementary proceedings:** Rankin v. Minor, 72-424; Carson v. Oates, 64-115. **A judgment, whether just or unjust, can be enforced by execution and supplementary proceedings:** Heggie v. B. & L. Asso., 107-581—**and not collaterally attacked:** Ibid.

This section confers upon the clerk authority to hear and allow or disallow the motion of the plaintiff for an order requiring defendants to "appear and answer:" Bank v. Burns, 107-466.

The fact that sheriff has alias executions in his hands unreturned issued on same judgment is no bar to supplementary proceedings thereon: Vegelahn v. Smith, 95-254.

Supplementary proceedings lie against private corporations: La Fountain v. Underwriters, 79-514—**against a lunatic where debt contracted prior to**

his lunacy, Blake v. Respass, 77-193—**but where against municipalities, quaere,** Winslow v. Comrs., 64-218.

When clerk informed that similar proceedings pending before judge, he should refuse to proceed, and, failing to do so, the judge has power to order that he desist: Ledford v. Emerson, 143-527.

Only the judgment creditors instituting the proceedings are entitled to the order: Righton v. Pruden, 73-61; La Fountain v. Underwriters, 79-514—**and they get priority of lien,** Parks v. Sprinkle, 64-637. **Joint debtors can be examined hereunder:** Weiller v. Lawrence, 81-65; see section 669—**also assignees,** Brure v. Crabtree, 116-528.

PROCEDURE. No demand necessary before making application for order: Weiller v. Lawrence, 81-65. **Proceedings should be brought where judgment rendered:** Hutchinson v. Symons, 67-156; Hasty v. Simpson, 77-69—**but place designated where defendant shall appear shall be within defendant's county,** Ibid. **Notice must be given debtor:** Hinsdale v. Underwood, 116-593; Wright v. R. R., 141-168; Turner v. Holden, 109-182. **Notice may be served, how:** Turner v. Holden, 109-182. **As to time given by notice to appear,** see Weiller v. Lawrence, 81-65. **General appearance waives notice:** Hinsdale v. Underwood, 116-593.

The evidence should be taken down in writing: Coates v. Wilkes, 92-376. **No appeal lies to supreme court from order requiring debtor to appear made hereunder:** Bruce v. Crabtree, 116-528; but see Ledford v. Emerson, 143-537—**but does lie to the judge of superior court from the clerk,** Bank v. Burns, 107-465.

See generally: Rand v. Rand, 78-12; Hinsdale v. Sinclair, 83-338; Magruder v. Shelton, 98-545; Munds v. Cassidey, 98-558; Coates v. Wilkes, 92-376.

THE AFFIDAVIT HEREUNDER. Question of whether affidavit necessary discussed in Hinsdale v. Sinclair, 83-341. **The affidavit should state that the execution is returned unsatisfied and that the defendant has property and choses in action which ought to be subjected to the payment of the judgment:** Hutchinson v. Symons, 67-156; Hinsdale v. Sinclair, 83-338.

Section merely referred to in Walston v. Bryan, 64-764.

668. Execution not returned, order on affidavit; proceedings. After the issuing of an execution against property, and upon proof by affidavit, of a party, his agent or attorney, to the satisfaction of the court, or a judge thereof, that any judgment debtor residing in the judicial district where such judge or officer resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution and the judgment creditor shall be entitled to the order of examination under this and under the preceding

section, although the judgment debtor may have an equitable estate in land subject to the lien of the judgment, or may have choses in action, or other things of value unaffected by the lien of the judgment, and incapable of levy.

Code, s. 488, subsec. 2; C. C. P., s. 264; 1868-9, c. 95, s. 2.

As to procedure hereunder, see under section 667. The purpose of supplemental proceedings is to give the creditor a remedy only in case debtor has no known property liable to execution or to what is in the nature of an execution, proceedings to enforce its sale: Hutchinson v. Symons, 67-156—**and to give him a substitute for the method of granting relief in equity when remedy by execution exhausted:** Coates v. Wilkes, 92-376; see also Munds v. Cassidey, 98-558; Hinsdale v. Sinclair, 83-338; McKeithan v. Walker, 66-95. **Supplementary proceedings may be commenced before sale of the property levied on:** McKeithan v. Walker, 66-95.

THE AFFIDAVIT HEREUNDER. Must state that debtor has no known property liable to execution, and that he has property or choses in action which he unjustly refuses to apply to the satisfaction of the judgment: Hutchinson v. Symons, 67-156; Bank v. Burns, 109-105; Hackney v. Arrington, 99-110; Hinsdale v. Sinclair, 83-338—**and need not state or aver the nonexistence of an equitable estate within the lien of the judgment or the existence of property, choses in action and things of value unaffected by any lien and incapable of levy:** Hackney v. Arrington, 99-110; Bank v. Burns, 109-105; **rendering obsolete as to these points** Magruder v. Shelton, 98-545; Hinsdale v. Sinclair, 83-338; Weiller v. Lawrence, 81-65.

For affidavits that are approved, see Bank v. Burns, 109-105.

As to verification of affidavit, see Young v. Rollins, 85-485.

669. Proceedings against joint debtors. Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all preceedings and actions pending and to those terminated by final decree or judgment.

Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245. **For procedure hereunder, see under section 667.**

Section merely referred to in Wright v. R. R., 141-168; Mayo v. Staton, 137-679; Coates v. Wilkes, 94-180.

670. Either party may examine witnesses. On such examination either party may examine witnesses in his behalf, and the judg-

ment debtor may be examined in the same manner as a witness; and witnesses may be required to appear and testify on any proceedings under this chapter in the same manner as upon the trial of an issue.

Code, ss. 488 (subsec. 3), 491; C. C. P., ss. 264, 267; 1868-9, c. 95, s. 2. **Where judgment debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him:** Coates v. Wilkes, 92-376.

671. Debtor leaving state, or concealing himself, arrested; held to bond. Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor leaving the state, or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such court or judge. Upon being brought before the court or judge, he may be examined on oath, and, if it then appears that there is danger of the debtor leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt.

Code, s. 488, subsec. 4; 1868-9, c. 148, s. 4; 1868-9, c. 277, s. 8.

672. Incriminating answers, no privilege; not used in criminal prosecutions. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a crime; but his answer shall not be used as evidence against him in any criminal proceedings or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Code, s. 488, subsec. 5; C. C. P., s. 264; 1868-9, c. 95, s. 2. **Witness can not excuse himself from answering on the ground that his answer may incriminate him:** LaFountaine v. Underwriters, 83-132; referred to in concurring opinion of Walker, J., in In re Briggs, 135-144. **Facts developed on examination in supplementary proceedings are forbidden to be used in evidence in criminal prosecution:** State v. Mallett, 125-718.

Section merely referred to: Harper v. Pinkston, 112-302.

673. Disposition of property forbidden. The court or judge may, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, or any interference therewith.

Code, ss. 488 (subsec. 6), 494; C. C. P., s. 264; 1868-9, c. 95, s. 2. **See generally:** Coates Bros. v. Wilkes, 92-376; Rose v. Baker, 99-323; Ross v. Ross, 119-109; Phillips v. Trezevant, 70-176; Hogan v. Kirkland, 64-250.

674. Debtors of judgment debtor may pay off execution. After the issuing of execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Code, s. 489; C. C. P., s. 265. **The sheriff is not hereby invested with power to apply the proceeds of one execution in satisfaction of another:** Smith v. McMillan, 84-593. **As to applying funds to payment of costs,** see Clerk's Office v. Bank, 66-214.

Section referred to in Parks v. Adams, 113-477.

675. Debtors, and persons having property, of judgment debtor, summoned. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by an order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him or it proper.

Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245. **The issuance of notice to judgment debtor hereunder is in court's discretion:** Wilmington v. Sprunt, 114-310. **Procedure under this section partially outlined** in Rice v. Jones, 103-226. **Assignee of judgment debtor can be examined hereunder:** Bruce v. Crabtree, 116-528—**also joint debtors,** Weiller v. Lawrence, 81-65. **From an order for the examination of a person hereunder there is no appeal:** Bruce v. Crabtree, 116-528. **Persons summoned hereunder who claim an interest in the property themselves may so suggest:** Bank v. Burns, 109-109. **Nature of indebtedness to defendant that can be subjected to satisfaction of execution:** In re Davis, 81-72; Sutton v. Askew, 66-178; Rice v. Jones, 103-226. **Creditors can not compel parties for whom debtor has rendered gratuitous services to pay for such services:** Osborne v. Wilkes, 108-651; approved in Markham v. Whitehurst, 109-309.

Section referred to in Mayo v. Staton, 137-679; Bank v. Burns, 109-109.

676. Party or witness examined under oath; certified; answer by corporation. The party or witness may be required to attend before the court or judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

Code, s. 492; C. C. P., s. 268; 1871-2, c. 245. **The party and witness must appear before referee when so required:** Hasty v. Simpson, 77-69. **The evidence should be taken down in writing:** Coates v. Wilkes, 92-376. **Where party or witness refuses to answer questions the court, and not the referee acting alone, should punish for contempt:** Fertilizer Co. v. Taylor, 112-141; LaFontaine v. Underwriters, 83-132, see section 684.

677. Where proceedings instituted and defendant examined. Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant shall appear and answer must be within the county where such defendant resides.

Rev. 1905. **This section enacted in accordance with** Hasty v. Simpson, 77-69. **See also** Hutchinson v. Symons, 67-156.

678. Debtor's property ordered sold; exceptions. The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands either of himself or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, can not be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his labor.

Code, s. 493; C. C. P., s. 269; 1870-1, c. 245. **The exemption of earnings for sixty days does not apply to enforcement of payment of taxes:** Wilmington v. Sprunt, 114-310. **The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure:** Goodwin v. Claytor, 137-224. **As to allowing interpleader as to the real ownership of funds:** Wilson v. Chichester, 107-386—**and as to the ownership of debts,** Williams v. Green, 68-183.

Section merely referred to: Wierse v. Thomas, 145-; Wright v. R. R., 141-168; Rice v. Jones, 103-231.

679. Receiver appointed; creditors notified. The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this chapter, of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of such receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver shall relate back to the service of the restraining order, hereinbefore and hereinafter provided for.

Code, s. 494; C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51. **For statutes and annotations concerning receivers generally, see sections 846-849 and 1219-1232.**

Motion for receiver may be made before the judge while appeal from clerk on other questions pending: Coates v. Wilkes, 92-376. **Receiver appointed by whom:** Corbin v. Berry, 83-27; Parks v. Sprinkle, 64-637, **(but notice effect of amendment adding words "court or");** see also Bank v. Burns, 107-465, and cases cited under section 846—**appointed, when,** Rodman v. Harvey, 102-1, citing Coates v. Wilkes, 92-376. **Only one receiver appointed:** Corbin v. Berry, 83-31.

Where upon examination clerk finds a specific fund in defendant's hands which belongs to plaintiff, and his finding is approved by the judge, no receiver should be appointed: Ross v. Ross, 119-109. **As between several receivers hereunder, semble the one who was first applied for takes precedence:** Parks v. Sprinkle, 64-637. **Where it is ascertained that there are several proceedings pending against the debtor to subject his property to the payment of debts, the court should, in proper cases, consolidate them, preserving the priorities acquired:** Monroe v. Lewald, 107-655. **Duty of receiver hereunder the same as receivers under the general law:** Weill v. Bank, 106-10; Coates v. Wilkes, 92-376; see sections 846-849 and 1219-1232. **Legal effect upon the property of the debtor when receiver appointed:** Wilson v. Chichester, 107-386; Rose v. Baker, 99-323; Turner v. Holden, 94-70; Rankin v. Minor, 72-424. **Where fund was adjudged in supplementary proceedings to be the plaintiff's and it was paid into court, when another claimed it, the clerk should not have appointed a receiver but allowed other claimant to interplead in the proceeding:** Wilson v. Chichester, 107-386. **Failure of judge to ascertain as to whether other proceedings pending does not require reversal of his appointment:** Corbin v. Berry, 83-27.

680. Order of appointment filed and recorded; property vests when; receiver under control of court. Whenever the court or a

judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders, appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order shall have been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded.

Code, s. 495; C. C. P., s. 270; 1870-1, c. 245. **For appointment, and duties and powers of receivers generally, see sections 679, 846-849 and 1219-1232.**

The effect of granting a restraining order or appointing a receiver is to vest the receiver with the property and effects of debtor from time of the filing of the order: Rose v. Baker, 99-323; Turner v. Holden, 94-70; Wilson v. Chichester, 107-386. **Effect of death of judgment debtor before appointment of receiver or the filing of appointment according to this section:** Rankin v. Minor, 72-424. **Effect of payment of plaintiff creditor before receiver files bond,** Righton v. Pruden, 73-61.

681. Order of appointment recorded in county in which land lies and debtor resides. But before the receiver shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the clerk of the superior court of the county in which such judgment debtor resides.

Code, s. 496; C. C. P., s. 270. **Effect of death of judgment debtor before the filing hereunder:** Rankin v. Minor, 72-424.

682. Receiver to sue, debt denied, property claimed adversely; disposition forbidden. If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver

to commence the action, and prosecute the same to judgment and execution, but such order may be modified or dissolved by the court or judge having jurisdiction, at any time, on such security as he shall direct.

Code, s. 497; C. C. P., s. 271; 1870-1, c. 245. **Receiver can bring action without special leave of court:** Weill v. Bank, 106-1. **Under this section when a third party claims an interest in the property or denies the debt which is sought by plaintiff to be applied to his judgment, the court may restrain the transfer of such property till receiver can bring action to recover it:** Ross v. Ross, 119-112; Bank v. Burns, 109-109—**but such action is brought by receiver as agent for the court and is a different matter from restraining a conveyance until plaintiff can bring independent action:** Ross v. Ross, 119-112. **Where the property or money has been turned over to the clerk, after having been adjudged to belong to plaintiff, a third party claiming it should interplead and no receiver should be appointed:** Wilson v. Chichester, 107-386; Munds v. Cassidey, 98-558. **Restraining order hereunder can not be issued unless person restrained has been made a party in some way:** Coates v. Wilkes, 94-174.

683. Reference, when. The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Code, s. 498; C. C. P., s. 272. **See sections 520-525 as to referees generally; also section 576.**

684. Disobedience of orders, contempt; punishment. If any person, party or witness, disobey an order of the court or judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. And in all cases of commitment under this subchapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as may be just.

Code, s. 500; C. C. P., s. 274; 1869-70, c. 79, s. 3. **See also sections 939-944. Cases where contempt hereunder is discussed:** LaFontaine v. Underwriters, 83-132; Fertilizer Co. v. Taylor, 112-141; Ross v. Ross, 119-109; In re Davis, 81-72; Bond v. Bond, 69-97. **Party offering affidavits to show his inability to comply with court's order and asking discharge from liability for contempt, judge should have heard and passed upon the affidavits:** Childs v. Wiseman, 119-497.

XXXI. Property Exempt from Execution; Allotment.

685. When debt contracted or cause of action arose. There shall be exempt from sale under execution or other final process issued

for the collection of any debt upon all judgments heretofore, or which may be hereafter, rendered, such property as the judgment debtor may have been entitled to have set apart and allotted to him at the time the debt was contracted, or cause of action accrued, as follows:

Upon debts contracted prior to February twenty-fifth, one thousand eight hundred and sixty-seven.

The wearing apparel, working tools, arms for muster, one wheel and two pairs of cards, one loom, one Bible and Testament, one hymn-book, one prayer-book, and all necessary school books, the property of the defendant, shall be exempt from seizure under execution, and in addition to the foregoing articles there shall be, in favor of every housekeeper complying with this chapter, exempt from execution on debts contracted since the first day of July, one thousand eight hundred and forty-five, and prior to February twenty-fifth, one thousand eight hundred and sixty-seven, the following property, provided the same shall have been set apart before seizure, to-wit: One cow and calf, ten bushels of corn or wheat, fifty pounds of bacon, beef, or pork, or one barrel of fish, all necessary farming tools for one laborer, one bed, bedstead, and covering for every two members of the family, and such other property as the freeholders appointed for that purpose may deem necessary for the comfort and support of such debtor's family; such other property not to exceed in value the sum of fifty dollars at cash valuation: Provided, that this section shall not be extended to any person against whom judgment is obtained and execution awarded for liability incurred for failure or neglect to work on the public roads, or to muster, or pay his poll tax.

Debts contracted since February twenty-fifth, one thousand eight hundred and sixty-seven, and prior to April twenty-fourth, one thousand eight hundred and sixty-eight.

The wearing apparel, working tools, arms for muster, one wheel and two pairs of cards, one loom, one Bible and Testament, one hymn book, one prayer-book, and all necessary school books, the property of the defendant, shall be exempt from seizure under execution. And the following property of each head of a family or housekeeper shall be exempt from execution except for taxes: All necessary farming and mechanical tools, one work horse, one yoke of oxen, one cart or wagon, one milch cow and calf, fifteen head of hogs, five hundred pounds of pork or bacon, fifty bushels of corn, twenty bushels of wheat or rice, household and kitchen furniture not to exceed in value

two hundred dollars, the libraries of licensed attorneys at law, practicing physicians and ministers of the gospel, and the instruments of surgeons and dentists used in their professions: Provided, that the value of the personal property exemptions shall not exceed five hundred dollars.

Upon debts contracted and causes of actions accrued since April the twenty-fourth, one thousand eight hundred and sixty-eight, and prior to May first, one thousand eight hundred and seventy-seven.

The property, real and personal, as set forth in article ten of the constitution of the state.

Upon debts contracted or causes of action accruing since May first, one thousand eight hundred and seventy-seven.

The property, real and personal, specified in the third subdivision of this section, and the homestead of any resident of this state shall not be subject to sale under execution or other process thereon, except such as may be rendered or issued to secure the payment of obligations contracted for the purchase of the said real estate, or for laborers' or mechanics' liens, for work done and performed for the claimant of said homestead, or for lawful taxes: Provided, that the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead: Provided further, that the owners of judgments docketed since March eleventh, one thousand eight hundred and eighty-five, shall have two years from first day of April, one thousand nine hundred and one, within which to assign and set apart the homesteads under such judgments, the suspension of the statute of limitations shall be suspended not only as to the judgment under which the homestead is allotted, but as to all other judgments.

Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; 1879, c. 256; R. C., c. 45, s. 7; 1848, c. 38; R. C., c. 45, s. 8; 1844, c. 32; 1846, c. 53; 1848, c. 38, s. 2; 1866-7, c. 61, s. 7; 1876-7, c. 253.

GENERAL OBSERVATIONS. **Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum:** Goodwin v. Claytor, 137-224. **Exemption laws of this state can not protect judgment debtor's property in another state against the operation of its laws; have no extra-territorial effect,** Sexton v. Ins. Co., 132-3; Balk v. Harris, 122-64.

Presumption is in favor of an exemption, and creditor relying on his debt being excepted from those against which exemption can be allotted must bring himself within the exception by proper averment and proof: Mebane v. Layton, 89-396.

A thousand dollars can not be paid debtor in lieu of homestead: Oakley v. Van Noppen, 96-247; Campbell v. White, 95-491—except under circumstances recited in Leak v. Gay, 107-468.

The general assembly can neither enlarge nor reduce the homestead or personal property exemption: Rogers v. Kimsey, 101-564; Wharton v. Taylor, 88-230, overruling Martin v. Hughes, 67-293.

As to effect of passage of chapter 359 of the laws of 1885 restoring the lien of a judgment upon a homestead, see Rankin v. Shaw, 94-405; Leak v. Gay, 107-482; Bevan v. Ellis, 121-224; Jones v. Britton, 102-166; Rogers v. Kimsey, 101-559.

As to the legal status of the homestead: Joyner v. Sugg, 132-580; Thomas v. Fulford, 117-671; Vanstory v. Thornton, 112-196; Gheen v. Summey, 80-187; Littlejohn v. Egerton, 77-384; Bank v. Green, 78-247, overruling Poe v. Hardie, 65-447.

Defendant in action can not be precluded from setting up counterclaim because plaintiff does not own $500 in personalty including debt sued on: Lynn v. Cotton Mills, 130-621.

The acquirement by the defendant of an additional interest in land after execution levied in order to entitle him to a homestead, is not a fraud, and homestead should be allotted: Wright v. Bond, 127-39.

The reservation of homestead in a conveyance is neither conclusive nor presumptive evidence of fraud: Davis v. Smith, 113-94; Banking Co. v. Whitaker, 110-345.

The arrest of a debtor to compel payment of a debt out of property exempt from execution is an abuse of legal process: Lockhart v. Bear, 117-298.

The homestead right can not be destroyed by any irregularity in the proceedings for allotment: Formeyduval v. Rockwell, 117-320.

A sale of land without laying off homestead is void: Ferguson v. Wright, 113-537; Fulton v. Roberts, 113-421; see also under sections 622-651.

Mortgagor's rights to have homestead exhonorated: Leak v. Gay, 107-468; Weil v. Uzzell, 92-515; Hinson v. Adrian, 92-121.

Where homestead sold to satisfy debt created before 1868, a thousand dollars of the proceeds, if that sum is left after paying the old debt, will be treated as the homestead: Leak v. Gay, 107-468. **The amendment of 1885 repealing the clause exempting homesteads from lien of judgments construed:** Ibid; see also Rankin v. Shaw, 94-405.

In an action to rocover land, if defendant desires to claim homestead, he should make proper averment: Wilson v. Taylor, 98-275.

The personal property exemption exists only during homesteader's life and widow can not have allotment to her: Smith v. McDonald, 95-163.

A resident may be enjoined from prosecuting action in another state for the purpose of evading the exemption laws of this state: Wierse v. Thomas, 145-261—**and where debtor ceased to be resident before property belonging to him became applicable to a creditor's claim, the general exemption laws of the state do not operate in his favor,** Ibid.

The reversionary interest in a homestead can be conveyed without grantor's wife joining in the conveyance: Joyner v. Sugg, 132-580 and many cases there cited.

A person to whom homestead has not been allotted, and against whom are no liens under which homestead may be allotted, may alien his land, no matter when title acquired, and pass the entire interest and estate therein, including the homestead right (except the right of dower) without the wife joining in conveyance: Scott v. Lane, 109-154; Hughes v. Hodges, 102-236; also see Cawfield v. Owens, 130-641.

WHAT IS A HOMESTEAD. The homestead is an estate: Adrian v. Shaw, 82-474; Stern v. Lee, 115-426—a determninable fee, Poe v. Hardie, 65-447—a stay of execution, Jones v. Britton, 102-168—a determinable exemption from the payment of debts, Bank v. Green, 78-247—a determinable exemption, Fleming v. Graham, 110-374—a quality annexed to land, Littlejohn v. Egerton, 77-384; see also Hughes v. Hodges, 102-236—a homestead privilege, Simpson v. Wallace, 83-481—the measure of the privilege secured to the debtor, Campbell v. White, 95-345.

WHO ENTITLED TO HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS. The right of a debtor to a homestead is superior to that of all creditors, except so far as it may be impaired by the voluntary act of claimant: Pope v. Harris, 94-62. A homestead allotted to one not entitled is void and can be attacked collaterally: Williams v. Whitaker, 110-393; Formeyduval v. Rockwell, 117-320.

Party entitled to a homestead where even though in a conveyance reserving the homestead wife did not join: Joyner v. Sugg, 132-580; Jordan v. Newsome, 126-553; Dixon v. Robbins, 114-102—and where at a sale under execution announcement was made that land was sold subject to homestead, Wyche v. Wyche, 85-96; Barrett v. Richardson, 76-429; Lowdermilk v. Corpening, 92-333—but where "what interest defendant has" was sold, and judgment was on a debt contracted prior to 1868, defendant not entitled, Grant v. Edwards, 86-513.

A married woman is entitled to a homestead in her separate estate: Harvey v. Johnson, 133-352; Bank v. Ireland, 127-238; Rawlings v. Neal, 126-271; Bailey v. Barron, 112-54; Flaum v. Wallace, 103-296—though where conveyance of land to her by her husband is in fraud of creditors of her husband and invalid, she can not claim, Ritch v. Oates, 122-631.

A party is estopped from claiming homestead who has waived it or properly conveyed the property; and as to what does or does not constitute such waiver or conveyance, see Dixon v. Robbins, 114-102; Ritch v. Oates, 122-631; Wittkowsky v. Gidney, 124-437; Mitchell v. Eure, 126-77; Morrisett v. Ferebee, 120-6; Fleming v. Graham, 110-374; Dickens v. Long, 109-165; Scott v. Lane, 109-154; Hughes v. Hodges, 102-236; Simpson v. Houston, 97-344; Adrian v. Shaw, 82-474; Abbott v. Cromartie, 72-292; Jenkins v. Bobbitt, 77-385; Beavan v. Speed, 74-544; Lambert v. Kinnery, 74-348; Mayho v. Cotton, 69-289.

Widow is entitled when husband dies leaving debts: Finley v. Saunders, 98-463; Smith v. McDonald, 95-163; Hager v. Nixon, 69-108; Watts v. Leggett, 66-197; see section 707—provided there are no children of said husband, Campbell v. Potts, 119-530; Formeyduval v. Rockwell, 117-320; Williams v. Whitaker, 110-393; Saylor v. Powell, 90-202; Simpson v. Wallace, 83-477; Wharton v. Leggett, 80-169—and even if husband during his life had a homstead allotted, Smith v. McDonald, 95-163. The home-

stead, whether laid off to husband or to his widow, can not be divested in favor of heir by extinguishment of deceased husband's debts: Tucker v. Tucker, 103-170. **Wife and children succeed to the homestead when father dies a resident of the state:** Finley v. Saunders, 98-462—**but when father dies a nonresident wife and children not entitled even though they remain resident:** Ibid.

Minor children are entitled to homestead: Welch v. Macy, 78-240; but see Dickens v. Long, 112-311—**but not to personal property exemptions,** Welch v. Macy, 78-240; Bruton v. McRae, 125-210—**and the former is so regardless of their pecuniary circumstances,** Spence v. Goodwin, 128-273; Allen v. Shields, 72-504—**and if there are children of age and one minor the homestead vests in the minor,** Simpson v. Wallace, 83-477; Saylor v. Powell, 90-202; Bruton v. McRae, 125-206—**and if there is a widow who has had dower assigned, the minor children are entitled to a homestead sub modo in the same land,** Watts v. Leggett, 66-197; Graves v. Hines, 108-262; Morrisett v. Ferebee, 120-8—**and a guardian ad litem can not waive infant's right thereto,** Spence v. Goodwin, 128-273. **Where infant heirs allowed judgment that ancestor's land be sold for assets, without claiming homestead, they are estopped from claiming it:** Morrisett v. Ferebee, 120-6.

A bankrupt is entitled: Murray v. Hazell, 99-172; Lamb v. Chamness, 84-379; Windley v. Tankard, 88-223. **A purchaser of land under an executory contract who has paid part of price is entitled, subject to lien for unpaid purchase money:** Dortch v. Benton, 98-190. **A fraudulent grantor of land is entitled as against creditors:** McGowan v. McGowan, 122-168; Cowan v. Phillips, 122-70; Whitehead v. Spivey, 103-66; Hughes v. Hodges, 102-236; Benton v. Collins, 125-83; Dortch v. Benton, 98-190; Rankin v. Shaw, 94-405; Arnold v. Estis, 92-162; Burton v. Spiers, 87-87; Duvall v. Rollins, 71-218; Gaster v. Hardie, 75-460; Crummen v. Bennett, 68-494.

An unmarried man is entitled: Gardner v. Batts, 114-496. **An assignee of an unallotted exemption in personalty from an assignor who becomes a nonresident before allotment is not entitled:** Latta v. Bell, 122-639.

A tenant is not entitled to his personalty exemption out of crops till landlord's lien paid: Hamer v. McCall, 121-196. **The burden is upon the one claiming exemption in lands sold under execution to show that no homestead has been allotted to him:** Marshburn v. Lashlie, 122-237; Fulton v. Roberts, 113-421; Dickens v. Long, 109-165; Mobley v. Griffin, 104-112.

One who alleges title to property in another is entitled to his exemptions in that property if jury negatives the averment: Etheridge v. Davis, 111-293.

A partner is entitled to his personal property exemption out of partnership property before debt due by him to copartner can be deducted: Evans v. Bryan, 95-174; see Scott v. Kenan, 94-296. **The consent of partners is necessary before one can claim exemption:** Richardson v. Redd, 118-677; Scott v. Kenan, 94-296; Stout v. McNeill, 98-1; Burns v. Harris, 66-509, 67-140—**but this consent can be withdrawn before allot-**

ment made: Stout v. McNeill, 98-1. **A surviving partner is not entitled out of partnership assets:** Commission Co. v. Porter, 122-692.

RESIDENCE THE PREREQUISITE. The prime requisite of a homesteader is residence in the state: Jones v. Alsbrook, 115-46; Baker v. Leggett, 98-304; Finley v. Saunders, 98-462; Burgwyn v. Hall, 108-489—**and the words "a resident of this state" mean that one must be an actual and not a constructive resident,** Lee v. Moseley, 101-311; Munds v. Cassidey, 98-558; Jones v. Alsbrook, 115-46—**yet actual absence from the state, when he has the animus revertendi throughout his absence, does not bar his right,** Chitty v. Chitty, 118-647; Jones v. Alsbrook, 115-46; but see Lee v. Moseley, 101-311; Munds v. Cassidey, 98-558—**and where residence once shown, the burden is on adverse party to show a change:** Ferguson v. Wright, 113-537. **When residence ceases pointed out** in Fulton v. Roberts, 113-422.

Effect of party returning to state after property seized by attachment: Baker v. Leggett, 98-304; Watkins v. Overby, 83-165; but see Gamble v. Rhyne, 80-183; also see Abrams v. Pender, 44-260.

AGAINST JUDGMENTS FOR WHAT DEBTS. No homestead can be allotted as against a judgment founded upon a contract made prior to adoption of constitution of 1868: Campbell v. Potts, 119-530; Buie v. Scott, 112-375; Long v. Walker, 105-90; Edwards v. Kearsey, 79-664; Mebane v. Layton, 89-396; Keener v. Goodson, 89-273; Leach v. Jones, 86-404; Dail v. Sugg, 85-104; Carlton v. Watts, 82-212; Earle v. Hardie, 80-177; Gheen v. Summey, 80-188; but see Lowdermilk v. Corpening, 92-333; Gamble v. Rhyne, 80-182; Cobb v. Hallyburton, 92-652—**but where debt created before 1868 and closed by note subsequent thereto, or where part of debt created both prior and subsequent thereto, it is otherwise,** Arnold v. Estis, 92-162; Wilson v. Patton, 87-318; Long v. Walker, 105-90; see concurring opinion of Clark, J., in Gooch v. Faucett, 122-275.

None can be allotted as against a judgment for the purchase money of the premises: Durham v. Wilson, 104-595; Lawson v. Pringle, 98-450; Toms v. Fite, 93-274; Markham v. Hicks, 90-204; Mebane v. Layton, 89-396; Miller v. Miller, 89-402; Smith v. High, 85-93; Durham v. Bostic, 72-353; Whitaker v. Elliott, 73-186; see also Brodie v. Batchelor, 75-51; Fox v. Brooks, 88-234; but see Moore v. Ingram, 91-376; Hoskins v. Wall, 77-249—**or for taxes,** Wilmington v. Sprunt, 114-310; Mebane v. Layton, 89-396—**or for mechanics' and laborers' wages,** Isler v. Dixon, 140-529; Broyhill v. Gaither, 119-443; Mebane v. Layton, 89-396—**or for improvements put upon the land by defendant,** Barker v. Owen, 93-198—**or for allowances to mother for support of bastard child,** State v. Parsons, 115-730—**or for a fine and costs,** State v. Williams, 97-415—**or for costs in partition,** Wilson v. Lumber Co., 131-163.

Exemptions can be allotted against judgments for tort: Gill v. Edwards, 87-76; Dellinger v. Tweed, 66-206—**for devastavit,** Leach v. Jones, 86-404—**on contract of married woman against her separate personal estate where no conveyance to secure:** Harvey v. Johnson, 133-352; Bank v. Ireland, 127-238.

WHAT PROPERTY EXEMPT. The amount and character of property allowed by this section at the time the debt was contracted; see Long

v. Walker, 105-90; Dail v. Sugg, 85-104; Carlton v. Watts, 82-212; Earle v. Hardie, 80-177—**and the date of the judgment will be taken as the date of the debt, unless record shows otherwise,** Mebane v. Layton, 89-396; Buie v. Scott, 107-181—**but the income from such is not exempt,** Bank v. Green, 78-247.

IN WHAT PROPERTY HOMESTEAD ALLOTTED. May be allotted in an equity of redemption: Cheatham v. Jones, 68-153; Montague v. Bank, 118-283; Thurber v. LaRogue, 105-301; Hinson v. Adrian, 92-121—**but can not be allotted in a remainder dependent upon a life estate,** Murchison v. Plyler, 87-79; Stern v. Lee, 115-426—**nor in lands against a judgment for its improvement by defendant,** Barker v. Owen, 93-198—**nor in newly acquired land where already allotted in one tract to which allotment there has been no exception,** Marshburn v. Lashlie, 122-237—**nor in a thousand dollars of the proceeds of a sale of land,** Oakley v. Van Noppen, 96-247.

IN WHAT PROPERTY PERSONAL PROPERTY EXEMPTION ALLOTTED. May be allotted in choses in action: Frost v. Naylor, 68-325—**in property upon which there is no lien, if possible,** Cowan v. Phillips, 122-70—**in property already under attachment,** Chemical Co. v. Sloan, 136-122; Gamble v. Rhyne, 80-183; Comrs. v. Riley, 75-144.

Tenant can not have exemption allotted in crops until landlord's lien discharged: Hamer v. McCall, 121-196.

SUSPENSION OF STATUTE OF LIMITATIONS WHEN HOMESTEAD ALLOTTED. The suspension does not take place until homestead allotted: Farrar v. Harper, 133-71; McDonald v. Dickson, 85-248. **The statute does not run against a judgment, homestead having been allotted, until death of judgment debtor and the coming of age of his youngest child, and the lien continues:** Bevan v. Ellis, 121-224; Formeyduval v. Rockwell, 117-320; Jones v. Britton, 102-201—**but the homestead must be allotted before expiration of ten years from the docketing; otherwise statute does run,** Wilson v. Lumber Co., 131-163; see also Farrar v. Harper, 133-71. **Where one judgment taken upon another under which the homestead was laid off; effect:** Springs v. Pharr, 131-191. **A conveyance of homestead now exposes it to sale by judgment creditor, see section 685.**

686. Conveyed homestead not exempt, when. The allotted homestead shall be exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the constitution, article ten, section eight, the exemption thereof ceases as to liens attaching prior to the conveyance. The homestead right being indestructible, the homesteader who has conveyed his allotted homestead can have another allotted, and as often as may be necessary: Provided, this shall not have any retroactive effect.

1905, c. 111. **The following decisions touch upon the legislature's power to shorten the duration of the homestead:** Kimsey v. Rogers, 101-559; Wharton v. Taylor, 88-230. **This section is not retroactive and the fol-**

lowing cases holding that the right of exemption passes with a conveyance of the homestead to the grantee will still be of interest: Bevan v. Ellis, 121-224; Gardner v. Batts, 114-496; Stern v. Lee, 115-426; Vanstory v. Thornton, 112-196; Lane v. Richardson, 101-181; Simpson v. Houston, 97-344; Adrian v. Shaw, 82-474; 84-832; Littlejohn v. Egerton, 77-379; but see Thomas v. Fulford, 117-667; Allen v. Bolen, 114-560; Fleming v. Graham, 110-374. **The allotted homestead can not be conveyed except with the joinder and private examination of the wife:** Joyner v. Sugg, 132-589; Wittkowsky v. Gidney, 124-437; Thomas v. Fulford, 117-667; Fleming v. Graham, 110-374; Hughes v. Hodges, 102-236; Castlebury v. Maynard, 95-281; Lambert v. Kinnery, 74-348; Jenkins v. Bobbitt, 77-385; Mayho v. Cotten, 69-294.

687. Sheriff to summon and swear appraisers; surveyor, when. Before levying upon the real estate of any resident of this state who is entitled to a homestead under this chapter and the constitution of this state, article ten, the sheriff or other officer charged with such levy, shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest, near or remote, in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." Provided, that in cases where he shall deem it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds.

Code, s. 502; 1893, c. 58; 1868-9, c. 137, s. 2. **For form of certificate of qualification to be indorsed on the return, see section 709 (4). As to who is a resident within the meaning of this section, see under section 685. Where allotted under execution, execution creditor must pay fees or sheriff may refuse to act:** Lute v. Reilly, 65-20; Vannoy v. Haymore, 71-128; Taylor v. Rhyne, 65-530—**but if creditor is required to pay the costs, and proceeds of sale of residue do not pay his debt; effect:** Long v. Walker, 105-90. **Where a debtor has been allotted homestead of less than $1,000 in value in one county and an execution goes into a sheriff's hands in another county, the homesteader is entitled to have the remainder of his homestead allotted in the other county:** Springer v. Colwell, 116-520.

THE JURORS OR APPRAISERS. In executions from justice's courts, the constable may summon and swear them: McAuley v. Morris, 101-369. **In superior court in equitable proceeding the court may appoint them:** Benton v. Collins, 125-83; Formeyduval v. Rockwell, 117-325; Littlejohn v. Egerton, 77-379. **Need not be freeholders:** Hale v. Whitehead, 115-28. **Must be sworn, and same must so appear in record:** Smith v. Hunt, 68-482; Coble v. Thom, 72-123. **If sworn by a deputy sheriff it is only an irregularity and can not be attacked collaterally, if exception not taken in apt time:** Oates v. Munday, 127-439. **Exception to the appraisers, how and when made:** Chambers v. Penland, 74-340; see also Burton v. Spiers, 87-87—**must be in apt time or exception waived,** Chambers v. Penland, 74-340.

688. Duty of appraisers. The said appraisers shall thereupon proceed to value the homestead with its dwelling and buildings thereon, and lay off to said owner such portion as he may select, or to any agent, attorney, or other person in his behalf, not exceeding in value one thousand dollars, and to fix and describe the same by metes and bounds.

Code, s. 503; 1868-9, c. 137, s. 3. **When allotment in one tract of land is not excepted to, debtor can not claim a homestead in another tract after a conveyance thereof by him has been set aside as fraudulent:** Marshburn v. Lashlie, 122-237.

An allotment to one not entitled is void: Formeyduval v. Rockwell, 117-320—**but the fact that allotment was made to "the widow and minor children" does not make it void,** Ibid. **Irregularity in allotting does not destroy homestead right:** Ibid.

The duties of the appraisers extended no farther than the valuation and allotment of the homestead: Aiken v. Gardner, 107-236. **As to equitable action for allotment,** see McCaskill v. McKinnon, 125-179; Gulley v. Cole, 96-447; 102-333; Thornton v. Vanstory, 107-331; Vanstory v. Thornton, 110-10. **As to reallotment for increase in value, see section 691.**

Debtor must be given opportunity to be present and make selection or allotment illegal: McKeithen v. Blue, 142-360; McGowan v. McGowan, 122-164—**and he is not restricted to residence tract or tract contiguous,** Mayho v. Cotton, 69-289; Fulton v. Roberts, 113-421; McCracken v. Adler, 98-403; Flora v. Robbins, 93-38. **A homestead irregularly allotted by a trustee will be reallotted under the direction of the court:** Jordan v. Newsome, 126-553. **Where allotment made, return of appraisers registered, and time for filing objections passed, a second allotment, though under a judgment docketed since first allotment, will be treated as void:** Thornton v. Vanstory, 107-331; but see section 691.

The homesteader should make his selection at the time of the appraisal and assignment, and give notice of any exception to the action of the appraisers then or in a reasonable time thereafter and before sale: Flora v. Robbins, 93-38. **Judgment creditors can not complain of the homesteader's election to take the present value of his homestead:** Leak v. Gay, 107-482.

MAKING THE ALLOTMENT. Manner of making, suggested by Burton v. Spiers, 87-87. **Must be made in severalty and no community of interest allowed:** Campbell v. White, 95-491. **The allotment must not be vague and indefinite:** Coble v. Thom, 72-121; Smith v. Hunt, 68-482—**yet it is not necessary for appraisers to run it off by course and distance, and any description by which land can be located will do,** Ray v. Thornton, 95-571. **The allotment must be in land only:** Oakley v. Van Noppen, 96-247; Campbell v. White, 95-491—**but the buildings thereon are part of the land and must be taken into account, for homesteader only allowed $1,000 worth of land and buildings,** Ray v. Thornton, 95-571. **Where land is indivisible but worth over $1,000 homesteader not entitled to have it all allotted:** Campbell v. White, 95-491. **Where the jury value the**

tract at $2,000 the land should be equally divided and homesteader allowed to take choice: Shoaf v. Frost, 123-343. **The valuation by the jury is conclusive:** Ibid.

689. Return of appraisers; filed and registered; copy to county of execution; original or copy evidence. They shall then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county, and said officer shall likewise make a transcript of said return over his hand and return the same without delay to the clerk of the court of the county from whence the execution issued, and said clerk shall likewise file and make minute of the same as above directed, and in all judicial proceedings the original return or a certified copy thereof may be read in evidence.

Code, s. 504; 1887, c. 272; 1868-9, c. 137, s. 4. **For form of return of appraisers see section 709 (1). As to form of return,** see Gudger v. Penland, 118-832; Ray v. Thornton, 95-571; Coble v. Thom, 72-121. **The omission to insert in their report the date of allotment is not sufficient ground for vacating it:** Beavans v. Goodrich, 98-217. **Appraisers may amend return before filing:** Gudger v. Penland, 118-832; Pate v. Harper, 94-23. **Return need not be registered in county where homestead situated if it is filed in the judgment roll of the action:** Bevan v. Ellis, 121-224. **The filing of the return in the judgment roll is constructive notice:** Ibid. **Clerk must make entry in regard to the homestead allotment when it is returned to him:** Wilson v. Brown, 134-409. **Effect of irregularity, not excepted to, upon judgments against which statute has been suspended by reason of the allotment:** Formeyduval v. Rockwell, 117-320. **The unregistered allotment of a homestead is competence evidence unless objected to in apt time:** Gudger v. Penland, 118-832. **Section merely referred to:** Welch v. Welch, 101-569.

690. Liability of officer or appraiser conspiring. Any officer, appraiser, or assessor who shall wilfully or corruptly conspire with any judgment debtor, judgment creditor, or other person, to undervalue, or to overvalue, the homestead or personal property exemption of any debtor, or shall assign false metes and bounds, or shall make or procure to be made a false and fraudulent return thereof, shall be answerable in a civil action to the party injured thereby for all costs and damages.

Code, ss. 517, 518; 1868-9, c. 137, ss. 18, 19. **For criminal liability, see sections 3584-3586. See** Andrews v. Pritchett, 72-135.

691. Re-allotment for increase of value; appeal; statute not exclusive. Any judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which such homestead lies for an order for the re-allotment of said homestead, if there be in the hands of the sheriff of that county an execution issued from the proper court against said debtor. Such application shall be accompanied by the affidavits of three disinterested freeholders of the county in which said homestead lies, setting forth that, in their opinion, said homestead has increased in value fifty per centum or more since the last allotment thereof. Upon the filing of said application and affidavit the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of the service of said notice and show cause why said homestead shall not be re-allotted. Said notice shall state upon whose application the notice is issued. Upon the return day of said notice the said clerk shall consider the affidavit filed, as heretofore required, and such additional affidavits as may be filed by either party, and if, after hearing and considering the same, he is of opinion that the said homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to allot to the judgment debtor his homestead in the same manner as if no homestead had been allotted. And if upon such allotment any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. From the order of the clerk commanding a re-allotment, or refusing the same, either party may appeal to the judge holding the court of the district, or to the judge of the district, either of whom shall hear the same in chambers in any county of the judicial district to which the county in which the proceedings were instituted belongs. And in all other respects the proceedings upon such appeal shall be as now provided by law for appeals from the clerk on issues of law. This section shall not be construed to prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a re-allotment of the homestead of his judgment debtor in any case.

1893, c. 149.

For costs, see section 1268. If the increase in value is 50 per cent. or more the above section enables the creditor to have a reallotment in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent., the judgment creditor can proceed by a suit in the nature of an equitable action to subject the excess to his debt: McCaskill v. McKinnon, 125-179; Vanstory v. Thornton, 110-10.

692. Levy on excess; return of officer. The levy may be made upon the excess of the homestead, not laid off according to this

chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be) who set off to X. Y. the homestead exempt by law. Levy made upon the excess."

Code, s. 505; 1868-9, c. 137, s. 5. **See the subchapters Execution and Execution Sales for cases on the sale of the excess.**

693. When no election by owner, appraisers elect. In case no election is made by the owner, his agent, attorney, or any one acting in his behalf, of the homestead, to be laid off as exempt, the appraisers shall make such election for him, including always the dwelling and buildings used therewith.

Code, s. 506; 1868-9, c. 137, s. 6. **Party entitled even though he has no dwellings or other buildings on the land, for he may build them himself:** McCracken v. Adler, 98-403; Flora v. Robbins, 93-38; Murchison v. Plyler, 87-79; Spoon v. Reid, 78-244.

694. Tracts not contiguous included, when. Different tracts or parcels of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars.

Code, s. 509; 1868-9, c. 137, s. 15. **A homestead may be laid off in two tracts of land not contiguous:** Martin v. Hughes, 67-293. **Homesteader has the right to have homestead allotted from scattered unencumbered lands whether they embrace his dwelling and other buildings or not:** Flora v. Robbins, 93-38—**or whether they are contiguous thereto,** Fulton v. Roberts, 113-421.

695. Personal property not to exceed $500 appraised on demand; manner; return. Whenever the personal property of any resident of this state shall be levied upon by virtue of any execution or other final process issued for the collection of any debt, and the owner or any agent, or attorney in his behalf, shall demand that the same, or any part thereof, shall be exempt from sale under such execution, the sheriff or other officer making such levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf may select, and to which he may be entitled under this chapter and the constitution of the state, in no case to exceed in value five hundred dollars, which articles shall be exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption.

Code, s. 507; 1868-9, c. 137, ss. 12, 13. **Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum:**

Goodwin v. Claytor, 137-224. **Debtor wishing to claim the personal property exemption must make demand of the sheriff before sale that it be assigned:** Shepherd v. Murrill, 90-208.

The exemption should be such as was allowed debtor at the time of the making of the contract: Long v. Walker, 105-90; Carlton v. Watts, 82-212.

Where the will authorizes the executor to wind up his business and give beneficiaries the net proceeds, no exemptions allowed beneficiaries: Froelich v. Trading Co., 120-39.

Minor children of deceased debtor are not entitled to personal property exemptions: Bruton v. McRae, 125-206; Welch v. Macy, 78-240—**nor is the widow,** Smith v. McDonald, 95-163—**for it passes to the administrator,** Johnson v. Cross, 66-167.

It is only a resident of this state who is entitled to have his personal property to the value of $500 exempted: Jones v. Alsbrook, 115-46—**and where one reserves his exemption and assigns it to another before allotment and then leaves the state the exemption becomes vested in the trustee:** Latta v. Bell, 122-639. **See,** as to who is a resident, annotations under section 685.

Where in an assignment by partnership, partners reserve their exemptions but afterwards compromise with certain creditors and made a new assignment without the reservation stating that the trustee should sell property according to first assignment, partners not entitled to exemptions: Shoe Co. v. Hughes, 122-296.

As to setting aside exemptions to partners, see Commission Co. v. Porter, 122-692; Richardson v. Redd, 118-677; McMillan v. Williams, 109-252; Stout v. McNeill, 98-1; Evans v. Bryan, 95-174; Scott v. Kenan, 94-296; Bruff v. Stern, 81-183; Burns v. Harris, 67-140. **The exemption may be allottted from time to time so as to keep in debtor's possession $500 worth of personalty:** Campbell v. White, 95-344; Frost v. Naylor, 68-325.

The exemption can be claimed as against a judgment rendered in actions for tort: Gill v. Edwards, 87-76; Dellinger v. Tweed, 66-206.

Exemption can not be claimed as against the landlord's lien upon the crops for his rent: Hamer v. McCall, 121-196—**nor as against fines and costs in criminal actions,** State v. Williams, 97-414—**nor as against judgment in arrest and bail,** Fertilizer Co. v. Grubbs, 114-472.

Practice as to exemptions when parties have judgments against each other: Curlee v. Thomas, 74-51; Comrs. v. Riley, 75-144; Duval v. Rollins, 71-218. **The personal property exemption, as fixed in the constitution, can neither be increased nor diminished by the legislature:** Wharton v. Taylor, 88-230; see also Saylor v. Powell, 90-203.

The exemption can be claimed in attached property: Chemical Co. v. Sloan, 136-123; Comrs. v. Riley, 75-144; Shepherd v. Murrill, 90-208; Gamble v. Rhyne, 80-183. **The right of exemption is personal to the debtor and it loses its quality of exemption as soon as transferred:** Lane v. Richardson, 104-642. **Defendant not estopped by his answer alleging property in another from claiming his exemption when jury negatives the averment:** Etheridge v. Davis, 111-293.

The sheriff's refusal to lay off the personal property exemption to a debtor is a breach of his official bond: Scott v. Kenan, 94-296.

Appraisers must be freeholders: Smith v. Hunt, 68-482—**and they must be sworn,** Ibid.

HOW THE EXEMPTION IS ASSIGNED. The property upon which there is no lien must first be exempted: Cowan v. Phillips, 122-70. **The exemption should be ascertained up to and just before the process is executed by a sale:** Jones v. Alsbrook, 115-46; Pate v. Harper, 94-23. **A descriptive list must be made, such as will enable creditors to ascertain which property is exempt:** Smith v. Hunt, 68-482; but see Ray v. Thornton, 95-571. **A chose in action may be allotted if owner selects it:** Frost v. Naylor, 68-325.

The personal property exemption does not protect property in another state: Balk v. Harris, 122-64. **One can not plead the $500 exemption as a counterclaim:** Lynn v. Cotton Mills, 130-621.

Suggestions as to what return of appraisers should contain: Ray v. Thornton, 95-571; Smith v. Hunt, 68-482. **The failure to insert in the appraisers' report the date of allotment is not sufficient ground for vacating it:** Beavans v. Goodrich, 98-217. **The return should be made to the clerk, but if otherwise returned it does not vitiate the allotment:** McAuley v. Morris, 101-369—**for the court has power to direct that the return be made to the proper officer,** Ibid. **Appraisers have the power to correct the allotment if they have omitted property:** Pate v. Harper, 94-23—**for until the return is made it is in fieri,** Ibid; Jones v. Alsbrook, 115-46; Gudger v. Penland, 118-832. **Exceptions to the allotment must be filed in the office of the clerk of superior court where the allotment is made, together with a transcript of the allotment:** McAuley v. Morris, 101-369.

696. Appraiser's oath and fees. The persons summoned to appraise the personal property exemption shall take the same oath and be entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers shall lay off both and be entitled to but one fee.

Code, s. 508; 1868-9, c. 137, s. 14. **Appraisers must be sworn and it must appear that they were sworn:** Smith v. Hunt, 68-482; Coble v. Thom, 72-121. **Merely referring to section:** McAuley v. Morris, 101-372; Walker v. Long, 105-100.

697. Appraisers to set apart selected property; return to register of deeds. Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he may be entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, and sign a descriptive list thereof, and return the same to the register of deeds.

Code, s. 512; 1868-9, c. 137, s. 8. **See annotations under section 695; also see Smith v. Hunt, 68-483. For form of return, see section 709 (3).**

698 Return registered. It shall be the duty of the register of deeds to endorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. The said register shall receive for registering the said returns the same fees that may be allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of said returns by the register.

Code, s. 513; 1868-9, c. 137, s. 9.

699. Exceptions to valuation and allotment; procedure. If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, shall be dissatisfied with the valuation and allotment of the appraisers or assessors (as the case may be) he, within ten days thereafter, or any other creditor, within six months, and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the said allotment shall be made a transcript of the return of the appraisers or assessors (as the case may be) which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return; and thereupon the said clerk shall put the same on the civil issue docket of said superior court for trial at the next term thereof as other civil actions, and such issue joined shall have precedence over all other issues at such term. And the sheriff shall not sell the excess until after the determination of said action: Provided, that the ten days and six months respectively shall begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued.

Code, s. 519; 1887, c. 272, s. 2; 1883, c. 357. **Allotment can not be collaterally attacked by debtor or any one claiming under him, the remedy being hereunder:** Gudger v. Penland, 118-832; Formeyduval v. Rockwell, 117-320; Welch v. Welch, 101-565. **Application for reassessment must be made before sale of excess:** Hartman v. Spiers, 94-150; Heptinstall v. Perry, 76-190. **From an order setting aside the allotment an appeal can be taken:** Beavans v. Goodrich, 98-217. **Questions of fact arising in the allotment of exemption are not such issues of fact as entitle parties to trial by jury:** Ibid. **Notices to adverse party written and served, how:** Allen v. Strickland, 100-225.

Where homesteader acquiesces in allotment of homestead for many years, grantee of homesteader will not be permitted to defeat judgment creditors by proof in good faith for a full price: Oates v. Munday, 127-439. **Estoppel by acquiscence in irregularities and by failure to except and**

appeal: Ibid; Marshburn v. Lashlie, 122-237; Whitehead v. Spivey, 103-66; Spoon v. Reid, 78-244. **Where party had land in two counties and was allotted less than $1,000 worth in one county, it is not necessary for him to except to allotment before proceeding to have the deficit made up in another county:** Springer v. Colwell, 116-520 (Whitehead v. Spivey cited and distinguished.)

700. When increase demanded; what jury shall find; commissioners appointed by court; report. When an increase of the exemption or an allotment in property other than that set apart shall be demanded, the party demanding shall in his exceptions specify the property from which the increase or re-allotment is to be had. If the appraisal or assessment shall be reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment shall be made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, shall meet upon the premises and after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors (as the case may be) in allotting and laying off the homestead or personal property exemption, or both (as the case may be), in accordance with the verdict and judgment aforesaid, allot and lay off the same and file their report to the next term of the court, when the same shall be heard by the court upon exceptions thereto.

1885, c. 347. **Practice when jury returns verdict valuing the first allotment and reallotment had to which exception made:** Shoaf v. Frost, 121-257; 116-675. **Where debtor designated the particular land which he desired to have allotted him as an increase of exemption and the creditors assented thereto neither party can demand that the jury value it:** Beavans v. Goodrich, 98-217.

701. Undertaking of objector. The creditor, debtor or claimant objecting to the allotment made by the appraisers or assessors (as the case may be) under execution or petition, shall file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party of such costs as shall be adjudged against him.

Code, s. 522.

702. Set aside for fraud, complicity or irregularity. Any appraisal or allotment by appraisers or assessors, hereinbefore pro-

vided, may be set aside for fraud, complicity or other irregularity; but whenever any allotment or assessment shall be made or confirmed by the superior court at term time, as hereinbefore provided, the said homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value.

Code, s. 523. **An allotment will not be set aside because it might have been assigned in a manner more convenient to the homesteader:** Ray v. Thornton, 95-571—**or because report of appraisers did not show the date,** Beavans v. Goodrich, 98-217—**or because the appraisers were sworn by a deputy sheriff,** Oates v. Munday, 127-439. **See case of Gully v. Cole, 96-447, which was rendered before section 691 was enacted.**

703. Return registered; original or copy evidence. When the homestead and personal property exemption shall be decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which copy shall be registered as deeds are now registered by law; and in all judicial proceedings the original or a certified copy of said return may be introduced in evidence.

Code, s. 524.

704. Allotted upon petition of owner. Whenever any resident of this state may desire to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the constitution of this state, or by this chapter, such resident, his agent or attorney, shall apply to any justice of the peace of the county in which he resides, and said justice of the peace shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county, who shall, on notice by order of said justice, meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Code, s. 511; 1868-9, c. 137, s. 7. **For form of petition hereunder, see section 709 (2). As to who is a "resident" hereunder, see annotations under section 685.**

A person can apply for homestead to be allotted whether in debt or not: Hughes v. Hodges, 102-254 (dictum from dissenting opinion of Merrimon, J).

Costs must be paid by petitioner and sheriff not bound to act unless paid in advance: Lute v. Reilly, 65-20; Taylor v. Rhyne, 65-530. **Procedure in allotment:** Burton v. Spiers, 87-87; see also cases cited under sections 685-689. **It is only a quasi proceeding in rem:** Williams v. Whitaker, 110-395.

Where land is allotted to a person as a homestead hereunder, it is a dedication of it by him to all the privileges, uses and restrictions of a homestead, no matter at what time the title was acquired: Castlebury v. Maynard, 95-281—**and he can not convey it without his wife joining in deed,** Ibid; also Dixon v. Robbins, 114-102; Bruce v. Strickland, 81-267; also see Hughes v. Hodges, 102-236.

Section merely referred to in Montague v. Bank, 118-286; Formeyduval v. Rockwell, 117-324.

705. Advertisement of petition; time of hearing. When any person entitled to a homestead and personal property exemption shall file his or her petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the said justice shall make advertisement in some newspaper published in the county, if there be one, for six successive weeks, and if there be no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of said applicant of the time and place, when and where the said petition will be heard; and the same shall not be heard nor any decree made in the cause in less than six months nor more than twelve months from the day of making advertisement as above required.

Code, s. 515; 1868-9, c. 137, s. 11. **Only persons having actual or constructive notice are bound by the allotment:** Williams v. Whitaker, 110-393.

Section merely referred to in Montague v. Bank, 118-286.

706. Exceptions, when allotted on petition. When the homestead or personal property exemption is made or allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of said assessment or appraisal, and upon ten days' notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of said county, who shall place the same on the civil issue docket, and the same shall be tried as provided in section six hundred and ninety-nine for homestead and personal property exemptions set off under execution.

Code, s. 520.

707. Allotted after death of homesteader. If any person entitled to a homestead exemption die without such homestead having been set apart, his widow, if he leave no children, or his child or children under the age of twenty-one years, if he leave such, may proceed to have said homestead exemption laid off by petition, and if such widow, child or children, being entitled to a homestead exemption as aforesaid, shall have failed to have the same set apart in the

manner hereinbefore provided, then and in such event, it shall be the duty in an action brought by the personal representative of such decedent to subject the realty of his testator or intestate to the payment of debts and charges of administration, of the court to appoint three disinterested freeholders to set apart to such widow, child or children entitled to a homestead exemption as aforesaid a homestead exemption under metes and bounds in the lands of such decedent, who shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as is now required by law for the registration of homestead exemptions.

Code, s. 514; 1893, c. 332; 1868-9, c. 137, s. 10. **As to widow and minor children being entitled, see under section 685 annotations headed "Who entitled to homestead and personal property exemptions."**

Administrator must lay off homestead to widow or children before proceeding to sell land for assets: Gregory v. Ellis, 86-579; see Watts v. Leggett, 66-197.

153-531

708. Liability of officer failing to allot. Any officer making a levy, who shall refuse or neglect to summon and qualify appraisers as heretofore provided, or who shall fail to make due return of his proceedings, or who shall levy upon the homestead set off by said appraisers or assessors (as the case may be), except as herein provided, he and his sureties shall be liable to the owner of said homestead for all costs and damages in a civil action.

Code, s. 516; 1868-9, c. 137, s. 17. **For additional penalty making misdemeanor, see section 3584. An unlawful sale of property exempt is a breach of sheriff's bond:** Hobbs v. Barefoot, 104-224; Scott v. Kenan, 94-296—**but a debtor can only maintain suit for costs and damages—not for value of homestead:** McCracken v. Adler, 98-400. **As to the measure of damages,** see Jones v. Alsbrook, 115-46; McCracken v. Adler, 98-400. **Sufficiency of complaint in action hereunder:** Scott v. Kenan, 94-296.

Section merely referred to in Welch v. Welch, 101-569.

709. Forms. The following forms shall be substantially followed in proceedings under this subchapter:

No. 1.

[*Appraiser's return when the homestead is valued at less than one thousand dollars and personal property also appraised.*]

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of .....Township, ... County, by C. D., sheriff, (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of ..... and

..... is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this ..... day of ..... 19.....

O. K. ..... (L. S.)

L. M. ..... (L. S.)

R. S. ..... (L. S.)

The above return was made and subscribed in my presence, day and date above given.

C. D. ....., (Sheriff or Constable).

No. 2.

[*Petition for homestead before a justice of the peace.*]

Before ....., J. P.

In the matter of A. B. }

..... County.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling and buildings thereon. He (she or they) further shows that he (she or they, as the case may be is (or are) entitled to a personal property exemption from execution, to the value of (here state the value) consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

No. 3.

[*Form for appraisal of personal property exemption.*]

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of ..... Township, ...County, and to lay off the exemption given by law thereto, by C. D., sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed the following articles of personal property selected by the said A. B., to-wit:..... which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this.....day of.....19....

O. K. ..... (L. S.)

L. M. ..... (L. S.)

R. S. ..... (L. S.)

The above return was made and subscribed in my presence, day and date above given. C. D.....(Sheriff or Constable.)

No. 4.

[*Certificate of qualification to be endorsed on return by sheriff.*]

The within named B. F., G. H. and J. R. were summoned and qualified according to law, as appraisers of the ..... exemption of the said A. B., under an execution in favor of X. Y., this ..... day of .....19....

C. D. ..... (Sheriff).

No. 5.

[*Minute on execution docket.*]

X.....Y.....)
vs.)
A.....B.....)

Execution issued .....19.....

Homestead appraised and set off and return made .....19.....

Code, s. 524.

XXXII. Special Proceedings.

710. This chapter applicable to. The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided.

Code, s. 278. **See section 348. Under this section the provision in section 410 that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff" applies to special proceedings:** Welfare v. Welfare, 108-274—**as does also the provision that one can not unite distinct causes of action in the same complaint:** Garrison v. Cox, 99-481.

This section merely referred to in Railway Co. v. Lumber Co., 132-644.

711. How commenced. When special proceedings are had against adverse parties, they shall be commenced as is prescribed for civil actions.

Code, s. 287; 1868-9, c. 93, s. 4. **See section 718. With the exceptions referred to, jurisdiction is acquired by the issuing and service made upon or accepted by the defendant of a summons:** Railway Co. v. Lumber Co., 132-650. **Special proceedings to condemn land for railroad purposes must be begun by summons:** Railway Co. v. Lumber Co., 132-644—**as also**

proceeding by creditor against personal representative for an account, Isler v. Murphy, 76-52.

No judgment can be rendered without some form of action or special proceeding which in this state must always be commenced by summons or attachment: Morris v. House, 125-560. **See** Guion v. Melvin, 69-242.

712. Summons in; what to contain. The summons in special proceedings shall command the officer to summon the defendant to appear at the office of the clerk of the superior court on a day named in the summons, to answer the complaint or petition of the plaintiff. The number of days within which the defendant is summoned to appear shall in no case be less than ten exclusive of the day of service.

Code, s. 279. **Certain irregularites in summons held not to make proceeding void:** Piercy v. Watson, 118-976. **Where summons in cases where superior court through its clerk has jurisdiction is made returnable to ''term time'' instead of before the clerk, the judge may remand it so as to make it properly returnable:** Simmons v. Steamboat Co., 113-147; Epps v. Flowers, 101-158. **Where proper time not given defendant the action ought not to be dismissed, but further time allowed defendant to answer:** Strayhorn v. Blalock, 92-292. **Less than ten days' notice renders judgment irregular and not void:** Stafford v. Gallops, 123-19. **As to amendment of summons, etc., see section 507.**

713. Return of summons. The officer to whom the summons is addressed shall note on it the day of its delivery to him; if required by the plaintiff, he shall execute the same immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it.

Code, s. 280; C. C. P., s. 75. **Failure of sheriff to note on summons the day received was irregular, but does not render summons void:** Strayhorn v. Blalock, 92-292. **Summons is returnable before the clerk:** Tate v. Powe, 64-644—**and when sheriff returns that he has ''served'' the summons this is prima facie sufficient,** Strayhorn v. Blalock, 92-292. **As to service of summons and return of same, see also sections 433 and 439-443 relating to civil actions.**

As to liability of sheriff for failure to serve and return process or for false return, see sections 298 and 2817.

714. Complaint filed, when. It shall be sufficient for the plaintiff to file his complaint or petition with the clerk of the court, to which the summons is returnable, at the time of issuing the summons, or within ten days thereafter.

Code, s. 281; C. C. P., s. 76; 1876-7, c. 241, s. 4.

715. Nonsuit for failure to file in time. If the plaintiff shall fail to file his complaint or petition within the time limited by the sum-

mons for the appearance and answer of the defendant, the defendant shall be entitled to demand judgment of nonsuit against the plaintiff.

Code, s. 282; C. C. P., s. 78. **For nonsuit for failure to file complaint in time in civil actions, see section 466 (same principle applies). As to nonsuit in trial of issue devisavit vel non,** see Collins v. Collins, 125-98; Hutson v. Sawyer, 104-1. **Entry of nonsuit not a retraxit:** Wharton v. Currituck, 82-11.

716. Time enlarged. The time for filing the complaint, petition, or any pleading whatever, may be enlarged by the court for good cause shown by affidavit, but it shall not be enlarged by more than ten additional days, nor more than once, unless the default shall have been occasioned by accident over which the party applying had no control, or by the fraud of the opposing party.

Code, s. 283; C. C. P., s. 79. **See cases cited under section 512, same principle being involved.**

Where application filed to remove an administrator, and no answer was filed and clerk refused the motion, upon appeal the judge reversed the order and when case remanded to clerk he had power to allow answer to be filed: Patterson v. Wadsworth, 94-538.

717. Equitable defenses pleaded; transferred to civil issue docket; amendments. In special proceedings which have been, or may hereafter be begun, it shall be competent for any defendant or other party thereto to plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. It shall be competent for the trial judge to allow amendments to the pleadings and inter-pleas in behalf of any person claiming an interest in the property with a view to substantial justice between the parties.

1903, c. 566. **Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded, but when pleaded they amount to no more than an equitable defense and can not be affirmatively administered:** Vance v. Vance, 118-864. 149-84

Upon issues of fact, or both of fact and law, being joined on the pleadings in proceedings before the clerk it is his duty to transfer same to the civil issue docket for trial: Woody v. Fountain, 143-66; Smith v. Johnson, 137-43; Hardee v. Weathington, 130-91; Railroad Co. v. Newton, 133-138; Brittain v. Dickson, 111-529; Powell v. Morisey, 98-426; Spencer, Ex parte, 95-274; Brittain v. Mull, 94-595; Jones v. Desern, 94-32; Loftin v. Rouse, 94-508; Edwards v. Cobb, 95-8; Wharton v. Wilkerson, 92-407; Harper v. Harper, 92-300; Jones v. Hemphill, 77-42; but see McMillan v. McMillan, 123-577—**and parties have the right to insist upon it, and where they fail to insist, before an order appointing commissioners is**

made, they waive the right of trial by jury, even if it be conceded that the statute gives them the right of jury trial: Railroad v. Parker, 105-246; see also Spencer v. Credle, 102-68. After the transfer of the cause to the civil issue docket, an agreement that the judge may find the facts, or, facts being agreed, may pronounce judgment, cures all defects: Foreman v. Hough, 98-386. As to what are issues of fact hereunder, see Beckwith, ex parte, 124-114; McMillan v. McMillan, 123-577; Ledbetter v. Pinner, 120-455. The judge has the same power to grant amendments that he has when the action is begun in the superior court: Sudderth v. McCombs, 67-353; see also section 507.

Case merely referring to section, Hanes v. Railroad, 109-492.

718. Ex parte; begun by petition. If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded.

Code, s. 284; 1868-9, c. 93.

719. Clerk hears summarily; attorney must file authority from nonresident. In such cases, if all persons to be affected by the decree, or their attorney, shall have signed the petition, and they be of full age, the clerk of the superior court shall have power to hear the petition summarily, and to decide the same. If either or any of the petitioners shall be residing out of the state, an authority from him or them, to the attorney, in writing, must be filed with the clerk, before he shall make any order or decree to prejudice their rights.

Code, s. 285; 1868-9, c. 93, s. 2.

720. Judge approves when infants are petitioners. If any of the petitioners be an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case, and capable of being prejudicial to the infant, shall be valid, unless submitted to and approved by the judge resident in the district or the judge holding court therein.

Code, s. 286; 1887, c. 61; C. C. P., s. 420; 1868-9, c. 93, s. 3. For what judge to approve, see section 571.

One who joins an infant in a petition for partition is bound by the judgment, though it is not approved by the judge of the court: Lindsay v. Beaman, 128-189. Where infants' lands are sold under ex parte proceeding in which they appeared by next friend, presumed that court protected them: Tyson v. Belcher, 102-112.

The cases required by this section to be approved by the judge are those cases in which there are infants and the procedings ex parte: Stafford v. Harris, 72-198, approved in Mauney v. Pemberton, 75-221; Harris v. Brown, 123-423.

721. Ex parte proceedings validated. Any approval made prior to the tenth day of February, one thousand eight hundred and eighty-seven, of any sale of the land of any infant in any ex parte proceeding, wherein such infant has appeared by his or her guardian, by a judge of the district or a judge holding court therein, is hereby confirmed, as far as regards the jurisdiction of the judge approving such proceedings.

1887, c. 61, s. 2.

722. Orders signed by judge. Every order or judgment in a special proceeding, which is required to be made by a judge of the superior court, either in or out of term, shall be authenticated by his signature.

Code, s. 288; 1868-9, c. 93, s. 5; 1872-3, c. 100. **The court has held this statute, apparently mandatory, should always be observed, still it is held to be only directory and judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge:** Range Co. v. Carver, 118-338; Bond v. Wool, 113-20; Spencer v. Credle, 102-68; Keener v. Goodson, 89-273; Matthews v. Joyce, 85-258; Rollins v. Henry, 78-342.

723. Reports of commissioners and jurors; confirmed, when. Every order or judgment in a special proceeding imposing any duty on commissioners or jurors shall prescribe the time within which such duty shall be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of such duty file their report with the clerk of the superior court; and if no exception is filed to such report within twenty days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties.

1893, c. 209. **See the statutes concerning the appointment of commissioners in the several proceedings.**

724. No report set aside for trivial defect. No report or return made by any commissioners shall be set aside and sent back to them or others for a new report by reason of any defect or omission not affecting the substantial rights of the parties, but such defect or ommission may be amended by the court, or by the commissioners, by permission of the court.

Code, s. 289; 1868-9, c. 93, s. 7.

In report of commissioners to condemn land for right of way, certain irregularties do not invalidate: Hanes v. R. R., 109-490. **The report is, like the verdict of a jury, conclusive of the facts therein ascertained until set aside:** Railroad v. Ely, 101-8. **Substantial defects in report of commissioners in partition:** Skinner v. Carter, 108-106.

725. Commissioners to sell to settle in sixty days. In all actions or special proceedings when any person shall be appointed commissioner to sell any real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said real or personal property, or the payment of the amount of the bid, when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of said sale; and the clerk shall audit said account and record it in the books in which the final settlements of executors and administrators are recorded.

1901, c. 614, ss. 1, 2.

XXXIII. Arrest and Bail.

726. Arrested only as herein prescribed. No person shall be arrested in a civil action, except as prescribed by this chapter; but this provision shall not apply to proceedings for contempt.

Code, s. 290; C. C. P., s. 148.

"Arrest" defined: Lawrence v. Buxton, 102-129. **Arrest and bail presupposes an original action:** Jarman v. Ward, 67-33. **The constitutional provision against imprisonment for debt only applies to debts ex contractu:** Moore v. Green, 73-394; Long v. McLean, 88-3; Burgwyn v. Hall, 108-489 Kinney v. Laughenour, 97-328. **As to execution against the person,** see Peebles v. Foote, 83-102; Huntley v. Hasty, 132-279; also see annotations under section 625. **To entitle a party to this ancillary remedy, he must show that he is entitled to the main relief demanded in the complaint:** Witz v. Gray, 116-48.

A person can not be arrested upon a judgment on a note: Stewart v. Bryan, 121-46—**and it is questionable whether one can be arrested in an action for slander of title,** Sneeden v. Harris, 109-354.

A consignee of goods who sells on credit, when no stipulation in contract that he can not, not liable to arrest hereunder: Grocery Co. v. Davis, 132-96.

727. In what cases. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property, real or personal.

2. In an action for a fine or penalty, or for seduction, or for money received, or for property embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or other

person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property, unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it can not be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed, or disposed of, his property, or is about to do so, with intent to defraud his creditors.

But no woman shall be arrested in any action, except for a wilful injury to person, character or property; and no person shall be arrested on Sunday.

Code, s. 291; C. C. P., s. 149; 1869-70, c. 79; R. C., c. 31, s. 54; 1777, c. 118, s. 6; 1891, c. 541. **For arrest and bail in usurping an office, see section 831.** 151-353

The practice is to set forth the cause for arrest in an affidavit, and not to set it out in the complaint: Roulhac v. Brown, 87-3—**but if set out in the complaint it must be done with the same explicitness as when set forth in an affidavit,** Peebles v. Foote, 83-102.

General rumor will not be sufficient upon which to base an application for an order, the evidence must be such as a reasonable man would believe: Tucker v. Wilkins, 105-272.

Where debt on note set out and charge of fraud likewise, and judgment given by default on note, no arrest allowable hereunder: Stewart v. Bryan, 121-46; see also annotations under section 625.

Cases in which arrest and bail applied for where defendant has committed an act ex delicto and is nonresident: Tucker v. Wilkins, 105-272; Powers v. Davenport, 101-286—**cases where seduction is charged,** Hood v. Sudderth, 111-215; Kinney v. Laughenour, 97-325; Hoover v. Palmer, 80-313—**where breach of promise of marriage alleged,** Moore v. Mullen, 77-327—**where fraudulent conveyance by trustee,** Fertilizer Co. v. Little, 118-808—**where fraudulent assignment of goods by owner,** Preiss v. Cohen, 117-54—**where conversion or misappropriation of money or other personal property by trustee or otherwise:** Powers v. Davenport, 101-286; Grocery Co. v. Davis, 132-96, and cases therein cited; Carroll v. Montgomery, 128-278; Gossler v. Wood, 120-69; Guano Co. v. Bryan, 118-576; Boykin v. Maddrey, 114-89; Travers v. Deaton, 107-500; Guano Co. v. Malloy, 104-674; Chemical Co. v. Johnson, 98-123—**where fraud in contracting debt,** Bahnsen v. Chesbro, 77-325—**where one partner obtains credit for partnership by false representation,** McNeely v. Haynes, 76-122—**where assault and battery,** Huntley v. Hasty, 132-279—**where one**

partner makes fraudulent settlement with copartner, Ledford v. Emerson, 140-288. **Where jury finds that shortage of consigned goods was not due to conversion, order should be vacated and a civil judgment given for the shortage:** Grocery Co. v. Davis, 132-96. **No arrest shall be made on Sunday:** Rodman v. Robinson, 134-507; White v. Morris, 107-92; Devries v. Summit, 86-126.

728. Who issues order. An order for the arrest of the defendant must be obtained from the court in which the action is brought or from a judge thereof.

Code, s. 292; C. C. P., s. 150. **An order of arrest is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction:** Bryan v. Stewart, 123-92—**and must proceed from the court in which the action is brought or from a judge thereof,** Houston v. Walsh, 79-35. **Effect where order issued upon insufficient affidavit:** Bryan v. Stewart, 123-93; Tucker v. Davis, 77-330. **Order can be made out of county:** Ledbetter v. Pinner, 120-455; Parker v. McPhail, 112-502.

729. Order obtained on affidavit. The order may be made where it shall appear to the court or judge thereof, by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case is one of those provided for in this subchapter.

Code, s. 293; C. C. P., s. 151.

THE AFFIDAVIT. It can be sworn to before a notary public of another state: Hinton v. Ins. Co., 116-22. **Affidavit that "defendant is about to leave the state" held insufficient because it does not state that it was with intent to defraud creditors and also state grounds of affiant's belief:** Wilson v. Barnhill, 64-121. **Affidavit that defendant is "about to leave the state," etc., must state the grounds of belief, so it can be seen that the grounds are reasonable:** Judd v. Mining Co., 120-399; Wood v. Harrell, 74-338; Hughes v. Person, 63-548; Harriss v. Sneeden, 101-273—**but when plaintiff relies upon a fact already accomplished, it is only necessary to state the fact in words of the Revisal,** Hughes v. Person, 63-548—**yet if he goes on and attempts to state grounds of belief that are unreasonable, the affidavit will not suffice,** Smith v. Gibson, 74-684. **Mere general rumor will not do:** Tucker v. Wilkins, 105-272. **Affidavit that defendant sold plaintiff a patent right and told him it was no infringement on other patents, which was false, and that defendant was a nonresident; held sufficient:** Bahnsen v. Chesbro, 77-325. **Affidavit must show how funds have been misapplied:** Melvin v. Melvin, 72-384.

Findings of fact upon which order of arrest made are conclusive: Harris v. Sneeden, 101-273; Parker v. McPhail, 112-502.

As to amending affidavit, see Wilson v. Barnhill, 64-121—**and curing first affidavit by reply to counter affidavit,** see Clark v. Clark, 64-150. **Order of arrest must be predicated upon facts alleged in the original affidavit and existing at time.** Devries v. Summit, 86-126.

730. Undertaking before order. Before making the order the court or judge shall require a written undertaking on the part of the plaintiff, with sufficient surety payable to the defendant, to the effect that if the defendant recover judgment, the plaintiff will pay all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars.

Code, s. 294; C. C. P., s. 152; 1868-9, c. 277, s. 7. **For surety companies as surety, see sections 272-277. Liability of sheriff for taking insufficient bail bond:** Howell v. Jones, 113-429.

A plaintiff allowed to sue in forma pauperis has no right to an order of arrest without filing undertaking: Rowark v. Homesley, 68-91. **Undertaking should show on its face that sureties are residents:** Howell v. Jones, 113-429.

731. Time when order may issue; form. The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought, and notice of such return shall be served on the plaintiff or his attorney as prescribed by law for the service of other notices.

Code, s. 295; C. C. P., s. 153. **Construction of the words "before judgment,"** see Preiss v. Cohen, 117-54; Houston v. Walsh, 79-35. **Service of the order can be made on party in jail for criminal offense:** White v. Underwood, 125-25. **Alias orders can be issued at any time before judgment:** White v. Underwood, 125-25. **For execution against the person after judgment, and return of execution not satisfied, see section 625.**

732. Copy of affidavit and order to defendant. The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof.

Code, s. 296; C. C. P., s. 154.

733. Order, how executed. The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law; and may call the power of the county to his aid in the execution of the arrest.

Code, s. 297; C. C. P., s. 155. **For what constitutes an arrest, see** Lawrence v. Buxton, 102-129. **Sheriff may arrest person already in jail on a criminal charge:** White v. Underwood, 125-25. **Can not arrest on Sunday:** Rodman v. Robinson, 134-507; White v. Morris, 107-92; Devries v. Summit, 86-126.

734. Vacated unless served before judgment. The order of arrest shall be of no avail, and shall be vacated or set aside on motion,

unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action.

Code, s. 295; C. C. P., s. 153. **Order must be served twenty days before judgment is docketed or it may be vacated:** Houston v. Walsh, 79-38.

735. Motion by defendant to vacate order; jury trial, when. A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. And he may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues are tried by a jury; and if the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging the defendant from arrest and vacating the order of arrest, and the defendant shall recover of the plaintiff all costs of the proceeding in such arrest as he shall have incurred in defending the said action.

150-712

Code, s. 316; 1889, c. 497; C. C. P., s. 174. **Motion to vacate may be heard by judge out of court and within the district to which he is assigned:** Ledbetter v. Pinner, 120-455, citing Parker v. McPhail, 112-502. **Motion to vacate must be made before judgment:** Roulhac v. Brown, 87-1. **Motion to discharge defendant denied can not be renewed unless upon a new state of facts:** Baker v. Garris, 108-226 and cases cited. **Defendant moving to vacate must fully and clearly meet the facts alleged in affidavit by a counter affidavit:** Powers v. Davenport, 101-286. **If plaintiff, even though suing as pauper, fail to give undertaking for arrest, order may be vacated on motion:** Rowark v. Homesley, 68-91. **For the test of the validity of the order of arrest,** see Devries v. Summit, 86-126. **Effect where justice discharges defendant and there is an appeal by plaintiff:** Patton v. Gash, 99-280. **An appeal lies from order vacating an order of arrest:** Fertilizer Co. v. Grubbs, 114-470. **As to issues submitted to the jury,** see Boykin v. Maddrey, 114-99.

A finding of fact by the judge in considering motion to vacate where there is evidence to support it is final: Parker v. McPhail, 112-502; Harriss v. Sneeden, 101-273; Travers v. Deaton, 107-500. **Where order of arrest appears irregular or issued for insufficient cause, it can be vacated without requiring defendant to give bond:** Devries v. Summit, 86-131, citing Bear v. Cohen, 65-511. **No ground for vacating that defendant has been indicted, tried and acquitted by courts of another state for same charge:** Powers v. Davenport, 101-286. **Procedure on the hearing of motion to vacate order:** Harriss v. Sneeden, 101-273; Roulhac v. Brown, 87-1; Boykin v. Maddrey, 114-99; Powers v. Davenport, 101-286; Bear v. Cohen, 65-511; Devries v. Summit, 86-126; Clark v. Clark, 64-150.

736. Counter affidavits by plaintiff, when. If the motion be made upon affidavits on the part of the defendant, but not otherwise,

the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made.

Code, s. 317; C. C. P., s. 175. **The counter affidavit upon which motion to vacate is based must fully and clearly meet all the facts alleged in the affidavit of plaintiff:** Powers v. Davenport, 101-286; Harriss v. Sneeden, 101-273—**for a simple denial will not do,** Ibid.

Plaintiff can only produce further evidence where defendant moves to vacate upon counter affidavits: Harriss v. Sneeden, 101-273.

Where, instead of moving to vacate for an apparent insufficiency of affidavit, defendant files counter affidavit, plaintiff may cure the insufficiency by filing other affidavits, Devries v. Summit, 86-130.

737. How defendant discharged. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

Code, s. 298; C. C. P., s. 156. **See** Fertilizer Co. v. Grubbs, 114-470; Howell v. Jones, 113-431. **Nonresident defendants entitled to benefit of statute relating to insolvent debtors:** Burgwyn v. Hall, 108-489. **As to insolvent debtors being discharged, see sections 1920-1934.**

148-417
150-912

738. Defendant's undertaking. The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section seven hundred and twenty-seven, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under subchapter entitled Claim and Delivery.

Code, s. 299; C. C. P., s. 157. **See sections 727, 752. If defendant already in jail under criminal charge, he need not give bail until he is released:** White v. Underwood, 125-28.

Liability of sheriff for taking insufficient bail: Howell v. Jones, 113-429; see Winborne v. Mitchell, 111-13; also see section 298—**and the measure of damages therefor,** Roulhac v. Miller, 90-174; but see section 743.

Summary judgment entered against sureties, when: Patton v. Gash, 99-283; see also Robbins v. Killebrew, 95-19; Councill v. Averett, 90-168.

739. Defendant's undertaking delivered to clerk; plaintiff's exceptions. Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon

the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from the liability.

Code, s. 304; C. C. P., s. 162.

740. Qualification of bail. The qualifications of bail must be as follows:

1. Each of them must be a resident and freeholder within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Code, s. 306; C. C. P., s. 164. **The bail bond should show on its face that the surety is a resident and freeholder within the state:** Howell v. Jones, 113-429.

741. Notice of justification; new bail. On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or his attorney, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form hereinbefore perscribed.

Code, s. 305; C. C. P., s. 163.

See section 738. Sheriff failing to give notice is liable as special bail: Howell v. Jones, 113-429.

742. Justification of bail. For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such a manner as the court, the justice of the peace, or the judge, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by bail, if required by the plaintiff.

Code, s. 307; C. C. P., s. 165. **If party offering to become bail is not a resident and freeholder he is not sufficient:** Howell v. Jones, 113-429.

743. If bail sufficient, examination certified, sheriff exonerated. If the court, justice of the peace or judge find the bail sufficient, he shall annex the examination to the undertaking, endorse his allow-

ance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

Code, s. 308; C. C. P., s. 166.

744. Deposit in lieu of bail. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged from custody.

Code, s. 309; C. C. P., s. 167.

745. Deposit paid into court; liability on sheriff's bond. The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquencies.

Code, s. 310; C. C. P., s. 168. **As to sheriff's liability upon his bond, see section 298.**

746. Bail substituted for deposit. If money be deposited, as provided in the two preceding sections, bail may be given and justified upon notice according to law any time before judgment; and thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly.

Code, s. 311; C. C. P., s. 169.

747. Deposit applied to plaintiff's judgment. When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied.

Code, s. 312; C. C. P., s. 170.

748. Defendant in jail, sheriff may take bail. If any person for want of bail shall be lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued

on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

Code, s. 318; R. C., c. 11, s. 8.

749. Sheriff liable as bail, when. If, after being arrested, the defendant escape, or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant, to enforce an order or judgment in the action.

Code, s. 313; C. C. P., s. 171. **As to sheriff's liability,** see Howell v. Jones, 113-429; Winborne v. Mitchell, 111-13; see also section 298.

750. Action on sheriff's bond, when. If a judgment be recovered against the sheriff, upon his liability as bail; and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

Code, s. 314; C. C. P., s. 172.

751. Bail exonerated. The bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, at any time before final judgment against the bail.

Code, s. 303; C. C. P., s. 161. **Imprisonment in state's prison expiring before judgment against principal in original action or against bail upon his undertaking does not exonerate bail:** Sedberry v. Carver, 77-319; Adrian v. Scanlin, 77-317. **"State prison" as used means either penitentiary or county jail:** Sedberry v. Carver, 77-319.

Case merely referring to section: Patton v. Gash, 99-283.

752. Surrender of defendant. At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court, or a judge thereof, may, upon a notice to the

plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision three of section seven hundred and twenty-seven, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under subchapter entitled "Claim and Delivery."

Code, s. 300; C. C. P., s. 158. **See sections 727-752.**

753. Bail may arrest defendant. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person over twenty-one years of age to do so.

Code, s. 301; C. C. P., s. 159. **Merely referred to** in Sedberry v. Carver, 77-321.

754. Proceedings against bail by motion. In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days' notice to such bail.

Code, s. 302; C. C. P., s. 160. **See** Patton v. Gash, 99-284. **As to measure of damages,** see Roulhac v. Miller, 90-174. **Section merely referred to** in Mahoney v. Tyler, 136-43.

755. Bail liable to sheriff, when. The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.

Code, s. 315; C. C. P., s. 173.

756. Bail to pay costs, when. Whenever a notice shall issue against any person, as the bail of any other person, and the bail, at or before the term of the court at which such bail is bound to appear, or ought to plead, shall not be discharged from his liability as bail by the death or surrender of his principal or otherwise; in that case the bail shall be liable for all costs which may accrue on said notice, notwithstanding the bail may be afterwards discharged, by the death or surrender of the principal, or otherwise.

Code, s. 319; R. C., c. 11, s. 10. **The costs allowed against bail, notwithstanding a surrender, etc., do not include such as are incurred on account of an improper and ineffectual appeal:** Clark v. Latham, 53-1.

757. Bail not discharged by amendment. No amendment of process or pleading shall discharge the bail of the party arrested

thereon, unless the amendment be to enlarge the sum demanded beyond the sum expressed in the bail bond.

Code, s. 320; R. C., c. 11, s. 11.

XXXIV. Attachment.

758. When issued. A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in this chapter, when the action is to recover a sum of money only, or damages for one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to real or personal property, in consequence of negligence, fraud, or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act.

Code, s. 347; 1893, c. 77; 1901, c. 740; C. C. P., s. 197.

GENERAL OBSERVATIONS. Attachment is an auxiliary remedy: Toms v. Warson, 66-417; Mixer v. Guano Co., 65-552; Marsh v. Williams, 63-371—and the statutes relating thereto must be strictly construed: Wheeler v. Cobb, 75-21; Leak v. Moorman, 61-168; Parker v. Scott, 64-120—but if it appears from the whole record that the statute has been substantially complied with, the action will not be dismissed, or attachment dissolved, Grant v. Burgwyn, 70-513.

The situs of a debt for attachment purposes is where either the debtor or creditor resides: Sexton v. Ins Co., 132-1; Strause v. Ins. Co., 126-223; Balk v. Harris, 124-467; Cooper v. Security Co., 122-463; Winfree v. Bagley, 102-515—and the location of an agent in a state other than the place of residence of debtor will not make the latter state the situs of debts owing by such debtor and subject to garnishment there, Strause v. Ins. Co., 126-223; but see Balk v. Harris, 124-467.

Plaintiff must first show that he is entitled to the main relief demanded in the complaint: Witz v. Gray, 116-48—and if he fail, the attachment should be vacated, Knight v. Hatfield, 129-191. Attachment is not, strictly speaking, a proceeding in rem and a judgment therein is only conclusive upon the parties to it and those in privity with them: Hornthal v. Burwell, 109-10; Bernhardt v. Brown, 118-700.

The clerk only acts ministerially in issuing the process for attachment: Evans v. Etheridge, 96-42.

The word "property" defined in Webb v. Bowler, 50-362.

ATTACHMENT LIES IN WHAT CASES. For unliquidated damages arising out of breach of contract: Foushee v. Owen, 122-360; Judd v. Mining Co., 120-397; Long v. Ins. Co., 114-470; Mullen v. Canal Co., 114-8, overruling former cases—for injury to gas pipes embedded in the earth causing gas to escape, Gas Light Co. v. Construction Co., 113-549—where one domiciled elsewhere resides here, Howland v. Marshall, 127-

430; see Wheeler v. Cobb, 75-25—**where one voluntarily moves to another state to discharge duties of an office of indefinite duration,** Carden v. Carden, 107-214. **Attachment lies against unpaid subscription by resident of this state to the stock of a foreign corporation:** Cooper v. Security Co., 122-463—**against debt under garnishment in same action,** Baker v. Belvin, 122-190—**against property of dissolved foreign corporation,** Kruger v. Bank, 123-16—**against corn, to property of assignee of draft on purchaser with bill of lading attached,** Finch v. Gregg, 126-176—**against claim for loss under insurance policy,** Sexton v. Ins. Co., 132-1—**against money from sale of ward's land in hands of clerk, after confirmation of sale,** LeRoy v. Jacobosky, 136-443.

ATTACHMENT DOES NOT LIE IN WHAT CASES. Does not lie against a national bank: Mfg. Co. v. Bank, 130-609—**nor against the sheriff's tax books,** Davis v. Blackburn, 117-383; Powell v. Wall, 117-386—**nor against property taken by sheriff under claim and delivery to be delivered by him to a third party,** Williamson v. Nealy, 119-339 and cases there cited—**nor against property of a foreign corporation rechartered in this state, except in cases stated** in Bernhardt v. Brown, 119-506. **Nor does it lie when a person leaves the state for the purpose of joining his country's army,** Abrams v. Pender, 44-260—**nor leaves state to seek work with a view of locating,** Mahoney v. Tyler, 136-40—**nor where plaintiff can not recover,** Knight v. Hatfield, 129-191—**nor where property sought to be attached is in custodia legis,** Lemly v. Ellis, 143-211; Williamson v. Nealy, 119-339—**nor against funds in hands of a collector of a foreign fraternal order,** Brenizer v. Royal Arcanum, 141-409—**nor against personal exemptions reserved by trustor in deed of trust who leaves state before allotment,** Latta v. Bell, 122-639.

759. Affidavit must show what. To entitle the plaintiff to such a warrant he must show by affidavit to the satisfaction of the court granting the same as follows:

1. That one of the causes of action specified in the preceding section exists against the defendant. If the action is to recover damages for breach of contract, the defendant must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state, or a domestic corporation none of whose officers can be found in the state after due diligence; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors or to avoid service of summons, or keeps himself concealed therein with like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with the like intent.

Code, s. 349; 1897, c. 476; C. C. P., s. 201. **The warrant can be issued only upon affidavit of facts existing at the time when the proceedings were commenced:** Devries v. Summit, 86-126. **An insufficient affidavit does not make the whole proceeding void; it merely makes it irregular:** Spillman v. Williams, 91-483. **The statute must be strictly followed in drawing the affidavit:** Wheeler v. Cobb, 75-24; Spiers v. Halstead, 71-209; Love v. Young, 69-65; Leak v. Moorman, 61-168; Parker v. Scott, 64-119; Marsh v. Williams, 63-371. **The court has power to allow amendments to the substance or form of affidavit:** Howland v. Marshall, 127-429; Cook v. Mining Co., 114-617; Shelton v. Kivett, 110-408; Cushing v. Styron, 104-338; Penniman v. Daniel, 93-332; Palmer v. Bosher, 71-291; Brown v. Hawkins, 65-645—**and from the court's order there is no appeal,** Cook v. Mining Co., 114-617; also see under section 507. **An attachment wrongfully issued from justice's court against a citizen of the state transiently absent, is remedied by recordari:** Merrell v. McHone, 126-528. **Affidavit made by an agent need not state why it is not made by the principal,** Sheldon v. Kivett, 110-408. **A corporation is a necessary party to an attachment proceeding to subject amounts due it from unpaid subscriptions to its stock to the payment of debts:** Cooper v. Security Co., 122-463.

As to what constitutes ''residence'' and ''nonresidence,'' see Mahoney v. Tyler, 136-40; Fulton v. Roberts, 113-428; Carden v. Carden, 107-214; Howland v. Marshall, 127-431; Bernhardt v. Brown, 119-506; Wheeler v. Cobb, 75-25; Abrams v. Pender, 44-260; also see Chitty v. Chitty, 118-648 and cases cited.

CONTENTS OF AFFIDAVIT. Affidavit stating that defendant is ''about to remove property, etc.,'' or ''about to assign, etc.,'' should state the grounds of affiant's belief: Judd Mining Co., 120-397; Harriss v. Sneeden, 101-273; Penniman v. Daniel, 90-154; Wood v. Harrell, 74-338; Brown v. Hawkins, 65-645; Gashine v. Baer, 64-108; Hughes v. Person, 63-548—**but where it states a fact as accomplished, the reason need not be given,** Hess v. Brower, 76-428; see also Hughes v. Person, 63-548.

The statute put the grounds of the issuance of an attachment order in the alternative, and affidavit may state them all, and the plaintiff succeeds if he establishes either: Penniman v. Daniel, 90-154. **Affidavit need not state that defendant has property in the state:** Foushee v. Owen, 122-360; Parks v. Adams, 113-473; Branch v. Frank, 81-180, **overruling** Spiers v. Halstead, 71-209; Windley v. Broadway, 77-333—**nor that defendant ''can not, after due diligence, be found within this state,''** Luttrell v. Martin, 112-593, **correcting syllabus** in Sheldon v. Kivett, 110-408 (This might be different as to a domestic corporation whose officers can not be found, see subsection 2.)

A warrant of attachment can not be supported by an allegation that defendant is about to remove from the state to defraud his creditors: Hale v. Richardson, 89-62.

Section merely referred to in Evans v. Etheridge, 96-43.

760. Affidavits for attachment filed. It shall be the duty of the plaintiff procuring a warrant of attachment, within ten days from

the issuing thereof, to file the affidavits on which the same was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom the process is made returnable.

Code, s. 355; C. C. P., s. 201.

761. By whom granted. If the action be not founded on a contract, or if founded on a contract and the sum demanded exceed two hundred dollars, a warrant of attachment may be obtained from the judge of the district embracing the county in which the action has been instituted, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action or debts due him, and shall be made returnable in term time to the court from which the summons issued.

Code, s. 351; C. C. P., s. 199; 1869-70, c. 147; 1870-1, c. 166, ss. 1, 3; 1874-5, c. 111; 1876-7, c. 251. **The clerk, acting as and for the court, has authority out of term time to grant the warrant of attachment and to allow amendments:** Howland v. Marshall, 127-429 citing Cushing v. Styron, 104-338. **The clerk acts ministerially and therefore, upon his affidavit taken before another who is empowered to administer oaths, he can issue the warrant in case in which he is plaintiff:** Evans v. Etheridge, 96-42. **Ministerial and judicial acts distinguished:** Jackson v. Buchanan, 89-74. **The warrant which does not state when or where returnable is irregular:** Backalan v. Littlefield, 64-233.

762. Time of issuance; service of summons essential. The warrant of attachment may be granted to accompany the summons, or at any time after the commencement of the action. Personal service of the summons must be made upon the defendant against whose property the attachment is granted, within thirty days after the granting thereof, or else upon the expiration of the same time, service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof.

Code, s. 348; C. C. P., s. 197. **For affidavit and service of summons by publication, see sections 442, 443 and 765. No summons need be issued where it appears that defendant is not in reach of the process of the court and can not be personally served; in such case the action should be commenced by the filing of affidavit to be followed by publication:** Grocery Co. v. Bag Co., 142-174, **approving** Best v. British and American Co., 128-351, **and overruling** McClure v. Fellows, 131-509. **A general appearance by defendant waives all antecedent irregularities in the process:** Wheeler v. Cobb, 75-21.

763. Undertaking. Before issuing the warrant, the officer issuing the same shall require a written undertaking on the part of

the plaintiff, with sufficient surety, to the effect, that if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

Code, s. 356; C. C. P., s. 202. **The successful defendant in attachment must seek relief for damages in a separate action on the undertaking:** Mahoney v. Tyler, 136-40—**which if not over $200 must be begun before a justice of the peace,** Railroad v. Hardware Co., 135-73. **As to pleading, proof and measure of damages due defendant when attachment vacated:** Bowen v. Harris, 146- ; Railroad v. Hardware Co., 138-174; see also Crawford v. Pearson, 116-718; Kirkman v. Coe, 46-423; Williams v. Hunter, 10-545. **Attaching creditor not liable for failure of sheriff to perform his duty relative to attached property:** Mahoney v. Tyler, 136-40. **Cause of action of wrongful attachment and one against surety on the bond can not be joined:** Railroad v. Hardware Co., 135-73. **Misjoinder to sue a person for damages in taking out attachment and also surety on the bond:** Ibid.

764. Validity of undertaking. It shall not be a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

Code, s. 358.

765. To whom warrant directed; what required of officer. The warrant shall be directed to the sheriff of any county in which the property of such defendant may be, or in case it be issued by a justice of the peace, to such sheriff, or to any constable of such county, and shall require such sheriff or constable to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties: Provided, that where the warrant is issued by a justice of the peace to another county than his own, the clerk of the superior court of his county shall certify that he is a justice of the peace; that the signature to the warrant is in the handwriting of the said justice of the peace.

Code, s. 357; 1895, c. 435, s. 1; C. C. P., s. 203. **Failure to specify in warrant the date and the place of return renders warrant voidable; but such defect is waived if the defendant appears and gives an undertaking for the redelivery of the property seized:** Backalan v. Littlefield, 64-233. **Case merely referring to section:** Davie v. Blackburn, 117-385.

766. Notice, how served. When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in said publication to the defendant of the issuing of the attachment, and when the warrant of attachment is obtained after the issuing of the summons, the defendant shall be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if there be none such, then in one published in the judicial district including said county, and if there be no newspaper published in the district, then in any newspaper published in the state. Said publication shall state the names of the parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable: Provided, that in proceedings by attachment begun and had before justices of the peace, advertisement in a newspaper shall not be necessary, but in all such cases, advertisement at the courthouse door and four other public places in the county for four successive weeks shall be sufficient publication, both as to the summons and warrant of attachment.

Code, s. 352; 1893, c. 363; 1870-1, c. 166, s. 3; 1874-5, c. 111, s. 2.

For service of summons by publication generally, see sections 442 and 443. No summons need be issued when party is beyond the reach of the process of the court, and can not be personally served; the action is commenced by affidavit for publication: Grocery Co. v. Bag Co., 142-174, **approving** Best v. British American Co., 128-351 **and overruling** McClure v. Fellows, 131-509. **Service by publication must be made strictly in accordance with the statute:** Bacon v. Johnson, 110-116. **Where a publication began July 11, 1900, was defective in not containing notice also of the warrant of attachment, an alias order of publication, duly made prior to the November term, cured the defect:** Best v. British American Co., 128-351. **Where publication of warrant made but summons not served, a judgment thereon is void:** Ditmore v. Goins, 128-325. **A service by publication on a nonresident in an action affecting property is invalid without attachment:** Graham v. O'Brian, 120-463. **As to amending order of publication after publication made,** see Bank v. Blossom, 92-695. **It seems affidavit may be filed after order of publication in certain cases,** see Bank v. Blossom, 92-695. **Publication of summons without attachment cured by subsequent publication:** Best v. British American Co., 128-351. **Personal service of summons or publication of same for time required necessary to make judgment valid:** Ditmore v. Goins, 128-327. **Where service by publication defective, it may be remedied by order and republication:** Bank v. Blossom, 92-695; Penniman v. Daniel, 90-154; Price v. Cox, 83-261—**and where affidavit defective it may be amended and an alias order of publication made without dismissiong the action:** Mullen v. Canal Co., 112-109; Branch v. Frank, 81-180.

767. How executed; lien on land. The officer to whom such warrant of attachment is directed and delivered shall seize and take

into his possession the tangible personal property of the defendant, or so much thereof as may be necessary, and he shall be liable for the care and custody of such property, as if the same had been seized under execution; he shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on; subject to the direction of the court, he shall collect and receive into his possession all debts owing to the defendant, and take such legal proceedings, either in his own name or in that of the defendant, as may be necessary for that purpose: Provided, that where the sheriff or other officer shall levy an attachment upon real estate, he shall certify said levy to the clerk of the superior court of the county where the land lies, with the names of the parties, and the clerk shall note the same on his judgment docket and index the same on the index to judgments, and said levy shall be a lien only from the date of said entry by the said clerk: Provided, however, that if such levy is so docketed and indexed within five days after the making thereof it shall be a lien from the time it was made.

Code, s. 359; 1895, c. 435, s. 2; C. C. P., s. 204. **As to levy on tangible personalty:** Ins. Co. v. Davis, 68-17—**on funds in hands of agent,** Blair v. Puryear, 87-101—**on debts due defendant,** Bowen v. Harris, 146- ; Cooper v. Security Co., 122-463—**on land,** Morrison v. Mining Co., 143-250; Atkinson v. Ricks, 140-418; Evans v. Alridge, 133-378; Grier v. Rhyne, 67-338. **A levy on land located in another county than that in which judgment obtained may be made without docketing transcript in county where land lies:** Evans v. Alridge, 133-378, and cases cited. **Failure to certify levy to clerk of county where land lies does not invalidate levy:** Ibid.

Case of seizure by sheriff when indemnifying bond given: Stein v. Cozart, 122-280.

768. Return of warrant of, by sheriff. The sheriff shall return the warrant of attachment, and the undertakings provided for in this chapter, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, such return, he may obtain from the court to which the same was returnable, a certified copy thereof, which shall be held and deemed for the purpose of giving him authority, the same as the original, and when the warrant shall have been fully executed or discharged, the sheriff shall return the same, with his proceedings, to said court.

Code, s. 376; C. C. P., s. 214.

769. When granted by justice of peace. If the action be not founded on contract, and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of attachment

may, or if the action be founded on contract, and the sum demanded does not exceeed two hundred dollars, the warrant of attachment must, be obtained from, and made returnable before some justice of the peace of a county to the superior court of which it might have been returnable had the sum demanded exceeded two hundred dollars, or had the action not have been founded on contract.

Code, s. 353; C. C. P., s. 200; 1876-7, c. 251.

770. Issued by justice of peace; publication. The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, shall cause publication thereof to be made for four successive weeks at the courthouse door and four other public places in the county where the warrant is returnable.

Code, s. 350; C. C. P., s. 198; 1868-9, c. 95, s. 3; 1870-1, c. 166, s. 4; 1874-5, c. 111.

For computation of time, see section 887. For publication of summons, see sections 442-444, 766. Where justice issued a summons and warrant of attachment and publication of warrant was made but summons not served, judgment rendered thereon is void: Ditmore v. Goins, 128-325.

As to computing time of publication, see Guilford v. Georgia, 109-310.

771. Justice's attachment against land. If the attachment be levied on real property, the justice shall proceed to try the action, but shall issue no execution to sell the real property, and shall return the papers in the case to the office of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, shall be a lien on the real estate, when the provisions of section seven hundred and sixty-seven are complied with.

Code, s. 354; 1868-9, c. 95, s. 4. **Attachment issued by justice creates a lien from its levy and not merely from the docketing of the judgment in superior court:** Morefield v. Harris, 126-626. **As to regularity of proceedings to sell land attached,** see Grier v. Rhyne, 67-338.

Case merely referring to section: Merrell v. McHone, 126-529.

772. Sale of attached property pendente lite. If any property, so seized, shall be perishable, or is of such a character as to materially deteriorate in value pending litigation, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, shall not within ten days after the serving of such attachment reclaim the same, the sheriff or other officer having possession thereof, shall apply to the court for authority to sell the same, stating the circumstances, and the

same shall be sold, under the order and direction of the court, and the proceeds of such sale shall be liable to the judgment obtained upon such attachment, and shall be retained by the sheriff or other officer to await such judgment.

Code, s. 360; R. C., c. 7, s. 6; 1777, c. 115, s. 28; C. C. P., s. 205. **For sale of corporate property by receiver during litigation,** see section 1232. **Where goods of a third party sold hereunder and third party interpleads and recovers judgment, the costs and expenses of attachment can not be taken out of fund:** Haywood v. Hardie, 76-384. **As to recovery of damages where perishable property wrongfully seized and sold,** see Mahoney v. Tyler, 136-40.

773. Replevy by defendant; undertaking. The person owning the property advertised to be sold according to the provisions of this subchapter, his agent or attorney may, at any time before sale, replevy the same, by giving an undertaking, in double the amount of the value of the property, with sufficient surety, to the effect that he will return the property to the sheriff, or other officer, if return thereof be adjudged by the court, and pay all costs that may be awarded against him; and if return of said property can not be had, then that he will pay plaintiff the value of said property; and all costs and damages that may be awarded against him. And upon the execution of this undertaking, the sheriff, or other officer, shall deliver said property to the person owning the same.

Code, s. 361; R. C., c. 7, s. 5; 1777, c. 115, s. 28. **Recitals in undertaking as to sheriff's seizure of, and levy on, goods, estops defendant to attack sufficiency and validity of seizure and levy:** Pearre v. Folb, 123-239.

774. Defendant may apply for discharge and delivery of property. Whenever the defendant shall have appeared in such action, he may apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the same; and if the same be granted, all the proceeds of sale, and moneys collected in such action, and all the property attached remaining in the hands of any officer of the court, under any process or order in such action, shall be delivered or paid to the defendant or to his agent, and released from the attachment. And where there is more than one defendant, and the several property of either of the defendants has been seized by virtue of the order of attachment, the defendant, whose several property has been seized, may apply in like manner for relief.

Code, s. 373; C. C. P., s. 212. **The clerk has jurisdiction to vacate an attachment:** Palmer v. Bosher, 71-291. **Motion to vacate may be made before return term of summons:** Wilson v Mfg. Co., 88-5. **In considering motion to vacate court need not pass on matters irrelevant:**

Knight v. Hatfield, 129-191. **Improper refusal to vacate will not affect validity of judgment on the merits:** Luttrell v. Martin, 112-594. **An appeal lies from a refusal to vacate:** Judd v. Mining Co., 120-397. **Sheriff has no right, after attachment vacated, to sell property seized, as it becomes his duty to deliver it immediately to defendant:** Mahoney v. Tyler, 136-44; see Devries v. Summit, 86-126. **The provision as to sheriff returning property does not apply to cases where there has been a sale or transfer of property by defendant to plaintiff after levy:** Jackson v. Burnett, 119-195—**and issue as to ownership must be submitted and upon it being answered must return property to true owner:** Ibid. **When court should set forth its findings of fact on a motion to vacate:** Milbiser v. Balsley, 106-433. **On motion to vacate for insufficiency of affidavit, a counter affidavit in answer to the one filed by defendant, may cure the insufficiency:** Brown v. Hawkins, 65-645.

WHEN ATTACHMENT MAY BE VACATED. When pleadings show that plaintiff's action must fail, it may be vacated without defendant being required to give bond: Knight v. Hatfield, 129-191; Devries v. Summit, 86-131; Bear v. Cohen, 65-511.

Will not be vacated when grounds assigned involve finding of facts and such as defendant has no interest in: Foushee v. Owen, 122-360—**or where defendant denies ownership of the property,** Ibid—**or where it appears reasonably necessary to hold the property to protect plaintiff's rights till the trial,** Bruff v. Sterns, 81-183—**or where the statute has been substantially complied with,** Best v. British American Co., 128-351—**or where clerk has already transmitted issue of fact to superior court for trial,** Howland v. Marshall, 127-431—**or where defendant has made a general appearance rendering the matter of vacating immaterial,** Rocky Mount Mills v. R. R., 119-693.

775. Defendant's undertaking. Upon such application the defendant shall deliver to the court an undertaking, executed by two sureties residing in this state, approved by such court, to the effect that such surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be of less value than the amount claimed by the plaintiff, the court or judge may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And where there is more than one defendant, and the several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court an undertaking, in accordance with this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against

such defendant. And all of this section, applicable to such an undertaking, shall be applied thereto.

Code, s. 374; C. C. P., s. 213.

776. Corporate stock, etc., liable to attachment. The rights or shares which the defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this state of such defendant, shall be liable to be attached and levied on, and sold to satisfy the judgment and execution.

Code, s. 362; C. C. P., s. 206. **For execution against, see section 1215. Unpaid subscription of resident stockholder to the capital stock of foreign corporation is subject to attachment:** Cooper v Security Co., 122-463. **The lien of the attachment upon stock of a corporation dates from its levy, not from the final judgment:** Morehead v. R. R., 96-362.

Case merely referring to section: Simmons v. Steamboat Co., 113-152.

777. Levied on incorporeal property. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or with the secretary, cashier or managing or local agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on. Such certified copy must be furnished to the sheriff by the plaintiff, and the certification must be by the clerk of the court from which the warrant was issued, or by the justice of the peace who issued the same: Provided, that any person receiving or collecting moneys within this state for or on behalf of any corporation of this or any other state or government shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides in the state, or when such service can be made within the state personally upon the president, treasurer or secretary thereof.

Code, s. 363; C. C. P., s. 207; 1905, c. 294. **See sections 1212-1218; also** Cooper v. Security Co., 122-463; Morehead v. R. R., 96-362.

778. Certificate of defendant's interest to be furnished to sheriff. Whenever the sheriff or other lawful officer, with a warrant of attachment or execution, shall apply to any president, or other head of any association or corporation or director, secretary, cashier or managing agent thereof, or to any debtor or individual, for the purpose of attaching or levying on the property of the defendant

in such warrant, such officer, debtor or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to the defendant. If such officer, debtor or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

Code, s. 369; C. C. P., s. 208. **See section 1215.**

779. Garnishee summoned; answer of; judgment against. When the sheriff or other officer shall serve an attachment on any person supposed to be indebted to, or to have any effects of the defendant in the attachment, he shall at the same time summon such person as a garnishee in writing, which summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment shall be returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what effects of the defendant he hath in his hands, and had at the time of serving such attachment, and what effects or debts of the defendant there are in the hands of any other, and what person, to his knowledge and belief; and when an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee, for all sums of money due to the defendant from him, and for all effects and estates of any kind belonging to the defendant, and in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of any garnishee belonging to the defendant shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment.

Code, s. 364; R. C., c. 7, s. 7; 1777, c. 115, s. 28. **Maker of negotiable note payable to defendant or order can demand indemnity against third persons where he is garnished in action against defendant:** Shuler v. Bryson, 65-201—**but not after he has admitted owing the note to the defendant,** Rice v. Jones, 103-226; Shuler v. Bryson, 65-201.

Where person garnished in another state for debt owing defendant in this state, it is a good defense in an action by defendant here against garnishee, provided foreign court obtained jurisdiction of subject matter and parties in the first suit: Wright v. R. R., 141-164; see Balk v.

Harris, 124-467; 122-64—for court in this state presumes everything regular, and the power over the person of the garnishee confers jurisdiction on court of state where writ issued without regard to the situs of the debt, as the obligation is transitory, Ibid.

Courts here can proceed against a foreign corporation in garnishment proceedings in an action brought in this state against its saleman, the cause of action having arisen here and subject of action being situated here: Goodwin v. Claytor, 137-224.

The court entertaining garnishment must have some jurisdiction over the thing garnished: Balk v. Harris, 124-467.

Clerk can be garnished for money arising from sale of lands belonging to ward after sale confirmed: LeRoy v. Jacobosky, 136-443. A fund in the hands of the town to be applied to payment for work when completed is not subject of garnishment: Gastonia v. Engineering Co., 131-359.

Where foreign corporation having its property and principal place of business here was garnished here in action between two citizens of Virginia, exemption law of Virginia not applicable: Goodwin v. Claytor, 137-224.

Where summons on nonresident served by publication and debt due defendant was garnished, plaintiff lost no lien on debt by taking judgment against defendant and garnishee: Ibid.

No personal judgment can be taken against defendant where summons served by publication: Ibid.

Money due by garnishee, or goods in his hands at the time of appearance and answer, are applicable to the debt though not earned and due when he was summoned to answer: Ibid.

Plaintiff can enforce no greater claim against garnishee than could defendant have done: Ibid.

Earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure in garnishment: Ibid.

Voluntary payment by a garnishee to the attaching creditor in another state of a debt due by such garnishee to the defendant in this state will not discharge him from liability to the latter: Balk v. Harris, 122-64.

Where judgment given against garnishee in action against debtor, it is proper to make an order applying collections made on such judgment to the judgment obtained or to be obtained against the debtor: Baker v. Belvin, 122-190.

780. When garnishee fails to appear. When any garnishee shall be summoned as aforesaid, and shall fail to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment shall not be entered against him; and if, upon due execution thereof, such garnishee shall fail to appear at the time and place named in the notice, and discover on oath in manner aforesaid, the court shall confirm said

judgment and award execution for the plaintiff's whole judgment and costs; and if, upon examination of the garnishee, it shall appear to the court that there is any of the defendant's estate in the hands of any person who has not been summoned, the court shall, upon motion of the plaintiff, grant a judicial attachment, to be levied in the hands of every such person having any of the estate of the defendant in his custody or possession, who shall appear and answer, and shall be liable as other garnishees.

Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1838, c. 2.

781. Garnishee denying property; issued tried. When any garnishee shall deny that he owes to, or has in his possession any property of, the defendant, and the plaintiff shall on oath suggest to the court the contrary; or when any garnishee shall make such a statement of facts that the court can not proceed to give judgment thereon, then the court shall order an issue to be made up, which shall be tried by a jury, and on their verdict judgment shall be rendered: Provided, that in a court of a justice of the peace, he may try such issue, unless a jury be demanded, and then proceedings are to be conducted, in all respects, as in jury trials before courts of justices of the peace.

Code, s. 366; R. C., c. 7, s. 9; 1793, c. 389, s. 2. **The plaintiff, upon the suggestion that he wishes to traverse the return of the garnishee, is entitled, without any formal or verified statement, to have the issue tried by jury:** Brenizer v. Royal Arcanum, 141-409.

Where it is denied by defendant that ownership of property attached is in him, no issue submitted: Foushee v. Owen, 122-360; Cowles v. Oaks, 14-96.

782. Property with garnishee valued; when excused. When a garnishee shall on oath confess that he has in his hands any property of the defendant of a specific nature, or is indebted to such defendant by any security or assumption for the delivery of any specific article, except as hereafter excepted, then the court shall immediately order a jury to be impaneled and sworn to inquire of the value of such specific property, and the verdict of the jury shall subject such garnishee to the payment of the valuation, or so much thereof as shall be sufficient to satisfy the debt or damages, and costs to the plaintiff: Provided, that in a court of a justice of the peace, he may try such issue, unless a jury be demanded, and then proceedings are to be conducted in all respects as in jury trials before courts of justices of the peace: Provided further, that if such garnishee shall also state in his answer that said specific property was left, or deposited, in his possession by the defendant as a bailment, or that he hath tendered said specific articles agree-

able to contract, and that they were refused by the defendant, and that he then was, and always had been, ready to deliver the same; or that he had such specific articles at the time and place specified in such covenant or agreement ready to be delivered, and is still ready to deliver the same; and such statement shall be admitted by the plaintiff or found by a jury or the court, then in any such case, the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been originally levied on the property.

Code, s. 367; R. C., c. 7, s. 11; 1793, c. 389; 1794, c. 424. **Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him the consideration and then absconded; held that dentist was not liable as garnishee:** Cherry v. Hooper, 52-82.

One transiently within the state served with garnishment papers, if he have in his possession within the state money or property of defendant or has contracted to pay money or deliver property within such jurisdiction, may be charged: Balk v. Harris, 124-467.

783. Conditional judgment against garnishee, when. When any garnishee shall declare in his answer that the money or specific article due by him will become payable or deliverable at a future day, and the same shall be admitted by the plaintiff or found by a jury or the court, in such case conditional judgment shall be entered against the garnishee, and the plaintiff may obtain judgment against the defendant for his demand, but shall not take final judgment against the garnishee without notice to show cause.

Code, s. 368; R. C., c. 7, s. 12; 1794, c. 424, s. 2.

784. Judgment, how satisfied. In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose—

1. By paying over to such plaintiff the proceeds of all property sold by him, and of all debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose, shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached, under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff, since the service of the attachment, the property attached, and the disposition thereof, also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same, any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or to his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice, and time of service, as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

Code, s. 370; C. C. P., s. 209. **A sheriff, who in attachment proceedings wrongfully seizes and sells property which is subsequently adjudged to belong to an intervenor, can not retain the costs and expenses of the seizure and sale:** Stein v. Cozart, 122-280.

Lien of judgment can not be divested by dissolution of foreign corporation, the defendant, in the home state: Gruger v. Bank, 123-16.

The lien of a judgment relates to the time of levy and not the docketing of the judgment: Morefield v. Harris, 126-626; Glass Plate Co. v. Furniture Co., 126-893.

Attachment is simply a levy before judgment, and upon execution issuing on the judgment it is the duty of the sheriff to sell the attached property: Mfg. Co. v. Steinmetz, 133-194, citing Gamble v. Rhyne, 80-183.

Sale under attachment only passes right of defendant in attachment: Electric Co. v. Eng. Co., 128-199; see Davis v. Garrett, 25-459.

Where the court has the custody of property it will be retained to await result of the action and satisfy any judgment that may be recovered: Lemly v. Ellis, 143-200. **Plaintiff in attachment can not recover an amount in excess of that stated in summons:** Cotton Mills v. Weil, 129-452.

Land of a decedent, against whose executor judgment obtained can not be sold through a commissioner by an order in the cause, even though land may be subject to lien of an attachment levied during decedent's life: Atkinson v. Ricks, 140-418.

Where a person in possession of property is not a party to attachment suit, the plaintiff can only get judgment for his debt, and must proceed under this section to subject the property attached: Electric Co. v. Eng. Co., 128-199.

Under this section the sheriff, upon receiving execution, is directed to sell the property previously attached and is invested with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property: May v. Getty, 140-310.

As to one's exemptions in attached property, see Chemical Co. v. Sloan, 136-123; Gamble v. Rhyne, 80-193; Comrs. v. Riley, 75-144.

785. Plaintiff may sue on defendant's bonds, when. The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff, of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall in all cases, when required by the sheriff, justify by making an affidavit that each is a freeholder, and worth double the amount of the penalty of the bond, over and above all demands, liabilities and exceptions.

Code, s. 371; C. C. P., s. 210. **See** Baker v. Belvin, 122-190; Shuler v. Bryson, 65-201.

786. On defendant's recovery, bonds and property delivered to him. If the foreign corporation, or the absent, absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken upon the issuing of the warrant of attachment, and any bond taken by the sheriff, except such as are mentioned in the preceding section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released.

Code, s. 372; C. C. P., s. 211.

787. Motion to vacate, or increase security. The defendant, or a person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies.

Code, s. 377. **See annotations under section 774.**

788. Exceptions to and justification of sureties. The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as prescribed in respect to bail upon an order of arrest.

Code, s. 378.

789. Interpleader. When the property attached shall be claimed by any other person, the claimant may interplead, as provided for interpleader in claim and delivery.

Code, s. 375; R. C., c. 7, s. 10; 1793, c. 389, s. 3. **The subject of "interpleader" is annotated under section 800, the decisions treating this section along with that.**

XXXV. Claim and Delivery.

790. Claim for delivery of personal property, when. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this subchapter.

Code, s. 321; C. C. P., s. 176. **Strictly speaking there is no such action now as claim and delivery. The action is for the recovery of a specific chattel and the delivery thereof is a provisional remedy ancillary but not essential to such action. If the plaintiff see fit, the delivery may be waived and action prosecuted to recover possession as in the old action of detinue or to recover the value as in trover or trespass:** Wilson v. Hughes, 94-182; Hargrove v. Harris, 116-418; Hopper v. Miller, 76-402.

Plaintiff can only claim the delivery of the property against one in possession at time suit brought: Bowen v. Harris, 146- ; Webb v. Taylor, 80-305; Haughton v. Newberry, 69-456.

Not necessary to issue summons if defendant not in reach of the process of the court; action can be begun by affidavit for publication: Grocery Co. v. Bag Co., 142-174, **overruling** McClure v. Fellows, 131-509 **—but otherwise summons must be issued in order to give clerk jurisdiction to make order,** Potter v. Mardre, 74-36.

As to jurisdiction, see McGehee v. Breedlove, 122-277; Kiser v. Blanton, 123-402; Whitaker v. Dunn, 122-103; Elliott v. Tyson, 117-116; Hargrove v. Harris, 116-418; Leathers v. Morris, 101-184; Mfg. Co. v. Barrett, 95-36; Morris v. O'Briant, 94-72; Deloatch v. Coman, 90-186; Asher v. Reizenstein, 105-213; see also under sections 1419, 1420, 1500.

To entitle a party to an ancillary remedy he must show that he is entitled to the main relief demanded in the complaint: Witz v. Gray, 116-48.

CLAIM AND DELIVERY LIES, WHEN: For recovery of a title deed: Pasterfield v. Sawyer, 132-258, 133-42. **For recovery by lessor of tenant's crop:** Boone v. Darden, 109-74; see also Rich v. Hobson, 112-79; Smith v. Tindall, 107-88; Jordan v. Bryan, 103-59; Livingston v. Farish, 89-140; Patapsco v. Magee, 86-350. **For recovery of personal property by one tenant in common as against another in certain cases:** Waller v. Bowling, 108-289; Strauss v. Crawford, 89-149; Grim v. Wicker, 80-343. **For recovery by mortgagee of tenant's crop when matured:** Cotten v. Willoughby, 83-75; but see Loftin v. Hines, 107-360. **For recovery of property in hands of officer, under execution:** Mitchell v. Sims, 124-411; Jones v. Ward, 77-337; Churchill v. Lee, 77-341. **For recovery, by assignee of chattel mortgage, of the possession of property before mortgage becomes due:** Satterthwaite v. Ellis, 129-67. **For recovery by vendor of property, the sale of which was induced by vendee's fraud:** Troxler v. Building Co., 137-62; Wallace v. Cohen, 111-103; Blake v. Blackley, 109-257; Wilson v. White, 80-280. **For recovery by lessee of his portion of the crop:** Wilson v. Respass, 86-112. **For recovery of property seized by a sheriff for taxes after expiration of time limited by law for their collection:** Ray v. Horton, 77-334.

Will not lie for recovery of chattel of which defendant has not present possession: Moore v. Brady, 125-37, and cases cited. **Will not lie for recovery of crops produced on wife's land under crop lien given by husband without her consent:** Rawlings v. Neal, 126-271—**nor for recovery by landlord of the growing crop of his tenant,** Jordan v. Bryan, 103-59; but see Patapsco v. Magee, 86-350—**nor for recovery of logs severed from plaintiff's land while defendant in possession claiming title:** Harrison v. Hoff, 102-126—**nor for recovery of a cow sold and delivered to vendee upon agreement that vendee pay for it in services and vendee dies before fully performing,** McCraw v. Gilmer, 83-162—**nor for recovery of personal property by one tenant in common against another,** Shearin v. Riggsbee, 97-216; Powell v. Hill, 64-169; but see Walker v. Bowling, 108-289; Strauss v. Crawford, 89-149; Grim v. Wicker, 80-343—**nor for recovery, by owner of the grain, of whisky distilled from it:** Potter v. Mardre, 74-36—**nor for recovery of planks made from owner's timber,** Gaskins v. Davis, 115-85—**nor for recovery of a bale of cotton out of a whole crop,** Moore v. Brady, 125-35.

Cases of general interest hereunder: Gulley v. Copeland, 102-327; Timberlake v. Powell, 99-233; Queen v. Wernwag, 97-383; Howland v. Forlaw, 108-567; Hargrove v. Harris, 116-418; Phipps v. Wilson, 125-106; Manix v. Howard, 82-125; Alsbrook v. Shields, 67-333.

791. Affidavit and requisites. Where a delivery is claimed, an affidavit must be made, before the clerk of the court in which the action is required to be tried, or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That the same has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property.

Code, s. 322; C. C. P., s. 177; 1881, c. 134.

For statute forbidding seizure of property taken for a tax, see s. 821. Affidavit required only when actual seizure and delivery of property asked: Jarman v. Ward, 67-32. **This affidavit is indispenable to maintain claim and delivery:** Griffith v. Richmond, 126-377.

Under this section there is no limitation or restriction put upon a plaintiff who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax, assessment or fines pursuant to a statute or seized under execution or attachment against property of plaintiff or if so seized it is by statute exempt from seizure: Mitchell v. Sims, 124-411.

Affidavit filed preliminary to obtaining requisition for seizure and delivery of property will not be treated as a complaint, and its averments can not cure defect in summons or complaint: Singer Mfg. Co. v. Barrett, 95-36.

As to amendment of affidavit: Joyner v. Earley, 139-49; Singer Mfg. Co. v. Barrett, 95-36; McPhail v. Johnson, 115-298; Planing Mills v. McNinch, 99-517; see also under section 507.

Affidavit must conform strictly to all the requirements of the statute: Hirsh v. Whitehead, 65-516—**must state that the property has not been taken under execution,** Ibid—**and must give value of property,** Ibid. **The affidavit made by plaintiff, "per" another, sufficient:** Spencer v. Bell, 109-39.

Section merely referred to in Kiser v. Blanton, 123-400; Hargrove v. Harris, 116-420; Timberlake v. Powell, 99-234; Evans v. Etheridge, 96-43.

792. Order for sheriff to seize property and deliver to plaintiff. The clerk of the court shall, thereupon, by an indorsement in writing

upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant and deliver it to the plaintiff: Provided, the plaintiff shall give the undertaking prescribed in the succeeding section.

Code, s. 323; C. C. P., s. 178. **An order without a summons having been issued is no justification to the sheriff or defendant for any action in the premises:** Potter v. Mardre, 74-36. **No amendment of requisition allowed after third parties have acquired rights which may be prejudiced by the amendment:** Phillips v. Holland, 78-31; see under section 507. **Deputy clerk can make order:** Jackson v. Buchanan, 89-74; see Evans v. Etheridge, 96-42; Miller v. Miller, 89-402.

Section merely referred to in Thompson v. Onley, 96-10.

793. Plaintiff's undertaking; copies furnished defendant. Upon the receipt of the order from the clerk with a written undertaking payable to the defendant executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant with damages for its deterioration and detention if return can be had, and if for any cause return can not be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereupon as damages for such seizure and detention, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Code, s. 324; 1885, c. 50; C. C. P., s. 179. **See section 570. For extent of sureties' liability,** see Hendley v. McIntyre, 132-276; Hall v. Tillman, 110-220; Taylor v. Hodges, 105-349. **Objection that what purports to be plaintiff's undertaking was not properly executed comes too late when made at trial term:** Spencer v. Bell, 109-39.

Section merely referred to in Grubbs v. Stephenson, 117-72.

794. Exceptions to undertaking; liability of sheriff. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff personally, or by leaving a copy at his office in the county town of the county, or, if he have no such office, at the office of the clerk of the court, that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the

defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or until new sureties shall be substituted and justify. If the defendant except to the sureties, he can not reclaim the property as provided in the succeeding section.

Code, s. 325; C. C. P., s. 180. **Exception to undertaking made at trial term comes too late:** Spencer v. Bell, 109-39.

795. Defendant's undertaking for replevy. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and its detention, if delivery can be had, and if such delivery can not for any cause be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, unless it shall be claimed by an interpleader.

Code, s. 326; 1885, c. 50, s. 2; C. C. P., s. 181. **See section 570. Sheriff liable, if, instead of taking this bond, he takes a bond from defendant to indemnify him:** Hughes v. Newsom, 86-424. **As to liability of sureties on bond,** see Hendley v. McIntyre, 132-276; Griffith v. Richmond, 126-377; Hall v. Tillman, 110-220; 103-276. **Where defendant gives an insufficient bond and then a sufficient bond, how sureties charged:** Smith v. Whitten, 117-390. **Sureties make defendant their agent to compromise and agree on amount of damages in action on undertaking:** Nimocks v. Pope, 117-315. **Sheriff liable for taking insufficient bond hereunder:** Wells v. Bourne, 113-82; Hughes v. Newsom, 86-424; see section 298.

Summary judgment hereunder against sureties on undertaking: Hall v. Tillman, 103-276; Robbins v. Killebrew, 95-19; Council v. Averett, 90-168; Harker v. Arendell, 74-85; Ins. Co. v. Davis, 74-78; see also section 570.

796. Justification of defendant's sureties. The defendant's sureties, upon a notice to the plaintiff of not less than two or more than six days, shall justify before the court, a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant.

The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Code, s. 327; C. C. P., s. 182.

797. Qualification and justification of defendant's sureties, how. The qualification of the defendant's sureties, and their justification, shall be as prescribed in respect to bail upon an order of arrest.

Code, s. 328; C. C. P., s. 183. **See section 730.**

798. Property concealed in buildings. If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered he shall cause the building or enclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county, and if the property be upon the person the sheriff or other officer may seize the person, and search for and take the same.

Code, s. 329; C. C. P., s. 184. **Case merely referring to section:** Worth, Treas., v. Comrs., 118-124.

799. How property seized shall be kept. When the sheriff shall have taken property, as in this subchapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Code, s. 330; C. C. P., s. 185.

800. Property taken claimed by third person. When the property taken by the sheriff shall be claimed by any person other than the plaintiff or the defendant the claimant may interplead upon his filing and affidavit of his title and right to the possession of the property, stating the grounds of such right and title; and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in plaintiff's affidavit, for the delivery of the property to the person entitled to the same, and for the payment of all such costs and damages as may be awarded against him; this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavits shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in said action, when the court trying the same shall order

a jury to be impaneled to enquire in whom is the right to the property specified in plaintiff's complaint; and the finding of the jury shall be conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal: Provided, that in a court of a justice of the peace he may try such issue unless a jury be demanded, and then proceedings are to be conducted in all respects as in jury trials before courts of justices of the peace.

Code, s. 331; C. C. P., s. 186; 1793, c. 389, s. 3; R. C., c. 7, s. 10.

An outsider claiming the property can intervene and ask for a collateral issue as to the title and right to possession: Mfg. Co. v. Tierney, 133-630; Foushee v. Owen, 122-360; Grambling v. Dickey, 118-986; Blair v. Puryear, 87-101; Sims v. Goettle, 82-268; Toms v. Warson, 66-417. **The burden of showing title is on the intervenor:** Mfg. Co. v. Tierney, 133-630; Cotton Mills v. Weil, 129-452; Redman v. Ray, 123-502; Wallace v Robeson, 100-206. **When intervenor introduces a bill of lading with draft attached, properly indorsed, the presumption is that he is a purchaser for value and without notice:** Mfg. Co. v. Tierney, 133-630; but see Bank v. Burgwyn, 108-62; Pugh v. Grant, 86-39. **The intervenor can not interfere in the action between the original parties, being interested only in the title:** Cotton Mills v. Weil, 129-452; Dawson v. Thigpen, 137-462; Foushee v. Owen, 122-360; Bank v. Furniture Co., 120-475—**therefore he can not object to the irregularity of the attachment,** Cook v. Mining Co., 114-617; Blair v. Puryear, 87-101. **A separate trial for the intervenor is in the discretion of the judge:** Cotton Mills v. Weil, 129-452. **A justice of the peace can try the interplea as to title, even though property is worth over $50:** Grambling v. Dickey, 118-986. **Where plaintiff takes a non-suit, action goes on for the interpleader:** Dawson v. Thigpen, 137-462. **In superior court on appeal from the justice one already made a party defendant can be allowed to become an intervenor ab initio:** Finch v. Gregg, 126-176.

As to rights of intervenor against a sheriff who in attachment proceedings wrongfully seizes and sells his property, see Stein v. Cozart, 122-280.

Delivery of property to intervenor must not be made until security given: Bear v. Cohen, 65-511.

801. When sheriff may deliver property to intervenor. Upon the filing by the claimant of the undertaking set forth in the preceding section, the sheriff shall not be bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff shall execute and deliver to him a similar undertaking to that required of claimants; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity.

Code, s. 332; R. C., c. 7, s. 10; 1793, c. 389, s. 3.

802. Sheriff to return undertaking, etc., in ten days. The sheriff

shall return the undertaking, notice and affidavit with his proceedings thereon to the court in which the action is pending within ten days after taking the property mentioned therein.

Code, s. 333; C. C. P., s. 187.

XXXVI. Controversy Without Action.

803. How submitted; affidavit; judgment. Parties to a question in difference which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall thereupon hear and determine the case, and render judgment thereon as if an action were pending.

Code, s. 567; C. C. P., s. 315. **This section does not contemplate a jury trial:** Moore v. Hinnant, 90-163. **This section does not apply to proceedings before justices of the peace:** Wilmington v. Atkinson, 88-54—**nor where parties differ and seek to propound interrogatories as to their rights:** McKethan v. Ray, 71-165; see Board of Ed. v. Kenan, 112-566; Bates v. Lilly, 65-232—**nor to contests over title to office,** Davis v. Moss, 81-303—**nor to criminal actions,** State v. Alphin, 81-566.

The affidavit must appear in the record: Grandy v. Gulley, 120-177—**must show that controversy is real and proceeding in good faith,** Grandy v. Gulley, 120-176; Arnold v. Porter, 119-123; Ruffin v. Ruffin, 112-102; Jones v. Comrs., 88-56; Wilmington v. Atkinson, 88-55; Grant v. Newsom, 81-36; Hervey v. Edmunds, 68-243. **It must appear that the court would have had jurisdiction if proceeding was by summons:** Grandy v. Gulley, 120-176; Jones v. Comrs., 88-56. **No affidavit accompanying the case agreed, action dismissed:** Arnold v. Porter, 119-123. **Where no affidavit, defendant being present and not objecting, plaintiff may on motion be allowed to file affidavit:** Grandy v. Gulley, 120-176, citing Bank v. Loan & Trust Co., 119-553. **Even after issues are joined, parties may submit an agreed case:** Hervey v. Edmunds, 68-247.

As to how the facts agreed should be stated, see Farthing v. Carrington, 116-315; Railroad v. Reidsville, 101-404; Overman v. Sims, 96-451; Jones v. Comrs., 88-56; Moore v. Hinnant, 87-505. **No prayer for judgment is necessary:** Williams v. Comrs., 132-300.

Section merely referred to in McClure v. Fellows, 131-510; Pender v. Pender, 129-58; Smathers v. Comrs., 125-480; Bank v. Gilmer, 118-670; Jones v. Hoggard, 107-350.

804. Judgment roll. Judgment shall be entered on the judgment docket, as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

Code, s. 568; C. C. P., s. 316. **Judgment can be rendered hereunder in vacation, by consent:** Harrell v. Peebles, 79-26; Hervey v. Edmunds, 68-243.

805. Judgment enforced; appealed from. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Code, s. 569; C. C. P., s. 317. **No particular assignment of error necessary on appeal:** Davenport v. Leary, 95-203. **See** Moore v. Hinnant, 87-505.

XXXVII. Injunction.

806. Temporary, issued, when. The writ of injunction as a provisional remedy is abolished, and a temporary injunction by order is substituted therefor. The order may be made by any judge of a superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried.

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it shall appear by affidavit that a party thereto is doing, or threatens, or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it shall appear by affidavit of any person, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud the plaintiff.

Code, ss. 334, 338; C. C. P., ss. 188, 189. **For injunction to suspend business of corporation or appoint receiver, see section 1205.**

The powers of the court as to injunctions enlarged: Lumber Co. v. Wallace, 93-22. **Injunction is still an extraordinary and provisional remedy and will not be granted before plaintiff has exhausted ordinary remedies, unless it appears that damage irreparable:** Frink v. Stewart, 94-484; Newton v. Brown, 134-445; Hocutt v. R. R. 124-214; Porter v. Armstrong, 132-66; Cooper v. Cooper, 127-490; Lumber Co. v. Hines Bros., 127-130; but see Davis v. Lumber Co., 132-233. **Injunction will not be granted when a motion in the original cause would suffice:** Faison v. McIlwaine, 72-313 and cases there cited—**or where relief desired can be had in another action pending between same parties,** Grant v. Moore, 88-77.

Observations upon common and special injunctions in connection with the C. C. P., made in Jarman v. Saunders, 64-367; see also Heilig v. Stokes, 63-612; Blackwell v. McElwee, 94-425.

Court will require party seeking injunction to make full discovery

of facts and use perfect candor in alleging them: Phifer v. Barnhart, 88-333.

If a threatened injury can be compensated for in damages, injunctive relief will not be granted: Porter v. Armstrong, 132-66; Newton v. Brown, 134-445; Land Co. v. Webb, 117-478; Sharpe v. Loane, 124-1; Wilson v. Featherstone, 120-449; McNamee v. Alexander, 109-242; Lewis v. Lumber Co., 99-11; Walton v. Mills, 86-280; Hettrick v. Page, 82-65—and it will never be granted where no injury will result to plaintiff by a refusal, Railway Co. v. Mining Co., 112-669, citing R. R. v. R. R., 88-79—nor be continued where it may work a greater injury to defendant than is reasonably necessary for protection of the plaintiff, Blackwell v. McElwee, 94-425; Heilig v. Stokes, 63-612. Where refusal will result in damages to plaintiff and granting will result in no injury to defendant, it will be granted till the hearing: McCorkle v. Brem, 76-407.

The granting or refusing of injunction is not strictly discretionary, and either party may appeal: Jones v. Thorne, 80-72; Mayo v. Comrs., 122-5. To entitle plaintiff to the order, he must allege a cause of action: Moore v. Mining Co., 104-534; Jones v. Comrs., 107-265 and cases cited—and state facts so court can see necessity for intervention, Porter v. Armstrong, 132-66; Lewis v. Lumber Co., 99-11—and not merely allege "irreparable injury," Ibid; also Bond v. Wool, 107-153; Frink v. Stewart, 94-484—and must allege insolvency of defendant, when, Kistler v. Weaver, 135-388; Porter v. Armstrong, 132-66; James v. Markham, 125-145; McKay v. Chapin, 120-159; Rwy. Co. v. Mining Co., 112-661; Land Co. v. Webb, 117-478; Ousby v. Neal, 99-146; Albright v. Albright, 91-220; McCormick v. Nixon, 83-113; but see section 807.

A second motion for injunction upon same grounds as the first, which was refused, will not be heard: Henry v. Hilliard, 120-487; Jones v. Thorne, 80-72—but denial of first motion no obstacle to second when based upon new material averment and evidence supporting, Halcombe v. Comrs., 89-346.

No injunction lies to prevent a fact accomplished: Huet v. Lumber Co., 138-443.

A perpetual injunction can be granted only in county where cause pending and by judge who tries cause at final hearing: Hamilton v. Icard, 112-589. A temporary restraining order can be issued by any judge of the superior court anywhere in the state, and must be made returnable within 20 days to a judge of the district where action pending or judge riding the district: Ibid. Where injunction is granted during term a party is fixed with notice: Hemphill v. Moore, 104-379.

Title to public office can not be tried by injunction: Cozart v. Fleming, 123-547; Jones v. Comrs., 77-280; Patterson v. Hubbs, 65-119—nor against a town attempting the enforcement of an unlawful ordinance: can title to personal property be thus determined, Kistler v. Weaver, 135-388; Baxter v. Baxter, 77-118. Injunction is not the proper remedy Hargett v. Bell, 134-394; Paul v. Washington, 134-363; Scott v. Smith, 121-94; Rosenbaum v. Newbern, 118-83; Wardens v. Washington, 109-21; Cohen v. Comrs., 77-2—nor for testing the constitutionality of a statute,

Smallwood v. Newbern, 90-36—**nor for staying execution pending appeal,** Bryan v. Hubbs, 69-433. **Injunction is inapplicable in processioning proceeding:** Wilson v. Alleghany, 124-7; but see Sprinkle v. Hutchinson, 66-450.

Quantum of proof, etc., necessary to obtain an interlocutory injunction as compared with quantum necessary to obtain permanent injunction, discussed in Faison v. Hardy, 114-58; Person v. Leary, 127-117.

Cases where bond given as against damages that might accrue to plaintiff, so defendant's business may not be stopped by injunction: Comrs. v. Lumber Co., 114-505; Lumber Co. v. Wallace, 93-22.

AS TO WHETHER INJUNCTIVE RELIEF CAN BE HAD IN CASES STATED: When it is sought to prevent building of stock-law fence: Smalley v. Comrs., 122-607; McNair v. Comrs., 93-370—**to prevent an entry upon land under force of color of legal process,** German v. Clark, 71-417—**to prevent trespass upon land,** Lumber Co. v. Cedar Co., 142-411; Bynum v. Wicker, 141-95; Alleghany Co. v. Lumber Co., 131-6; Johnson v. Duvall, 135-642; Puryear v. Sanford, 124-276; Sharpe v. Loane, 124-1; Wilson v. Featherstone, 120-449; Bond v. Wool, 107-153; Frink v. Stewart, 94-484; German v. Clark, 71-417—**to prevent exercise of official powers and duties,** Merrimon v. Paving Co., 142-539; Glenn v. Comrs., 139-412; Graves v. Comrs., 135-49; Edgerton v. Water Co., 126-93; Stratford v. Greensboro, 124-127; McPeeters v. Blankenship, 123-651; Herring v. Dixon, 122-420; Comrs. v. Thorn, 117-211; Burwell v. Comrs., 93-73; Busbee v. Comrs., 93-143; Campbell v. Wolfenden, 74-103—**to prevent erection or maintenance of mills, dams, gins, and other things likely to injure anyone or become a nuisance,** Durham v. Cotton Mills, 144-705; Pedrick v. R. R., 143-485; Hickory v. R. R., 143-451; 141-716; 138-311; Hull v. Roxboro, 142-453; Reyburn v. Sawyer, 135-328; Vickers v. Durham, 132-880; Roanoke Nav. Co. v. Emry, 108-130; Evans v. R. R., 96-45; Daughtry v. Warren, 85-136; Dorsey v. Allen, 85-358; Walton v. Mills, 86-280; Ellison v. Comrs., 58-57; Barnes v. Calhoun, 37-199—**to prevent waste,** Latham v. Lumber Co., 139-9; Peterson v. Ferrell, 127-169; Morrison v. Morrison, 122-598; Godwin v. Watford, 107-168—**to prevent enforcement of judgment by execution,** Barker v. Barker, 136-316; Henderson v. Moore, 125-383; McLean v. Shaw, 125-492; Bostic v. Young, 116-766; Powell v. Allen, 103-46; Gatewood v. Burns, 99-357; Springs v. Schenck, 99-556; Knott v. Taylor, 99-511; Neville v. Pope, 95-346; Bristol v. Hallyburton, 93-384; Banks v. Parker, 80-157; Walker v. Gurley, 83-429; Parker v. Bledsoe, 87-221; Chambers v. Penland, 78-53; Faison v. McIlwaine, 72-312; Wilder v. Lee, 64-50; Smith v. Dewey, 64-463; Foard v. Alexander, 64-69—**to prevent waste or wrongful disposition of the property of a dissolved corporation,** Atty. General v. Roanoke Nav. Co., 84-705—**to prevent county commissioners from making tax levy to pay interest on railroad bonds,** Graves v. Comrs., 135-49—**to prevent multiplicity of actions,** Featherstone v. Carr, 132-800—**to prevent resident creditor from maintaining suit in another state against corporation of which plaintiff's receiver,** Davis v. Lumber Co., 132-233—**to prevent location of a right-of-way after one already granted but not located on same land,** Lumber Co. v. Hines Bros., 127-130—**to prevent removal of gates across highway,** Edwards v. Supervisors,

127-62—**to prevent payment of county orders for building bridge by one county over boundary stream,** McPeeters v. Blankenship, 123-651 **to prevent administrator from selling land for assets,** McCorkle v. Brem, 76-407; Johnson v. Jones, 75-206—**to prevent personal representative from wasting estate of deceased,** Coleman v. Howell, 131-125; Mahoney v. Stewart, 123-106; Godwin v. Watford, 107-168—**to prevent sale of one's personal property exemption already allotted,** Baxter v. Baxter, 77-118—**to prevent disposition of trust funds pending litigation as to the rights of parties,** Roberts v. Lewald, 107-305; Frank v. Robinson, 96-28—**to prevent removal of fixtures by mortgagors in possession who default and holders under bonds for title who default, etc.,** Moore v. Valentine, 77-188—**to prevent lessor from selling tenant's part of crop,** Wilson v. Respass, 86-112—**to prevent discrimination in rates of public utility companies,** Griffin v. Water Co., 122-206—**to prevent diversion or cutting off of water,** Wilson v. Featherstone, 120-449; Walton v. Mills, 86-280—**to prevent the issuing of a grant upon ground of irregularity of entry,** Brem v. Houck, 101-627—**to prevent the collection of taxes,** R. R. v. Reidsville, 109-494; Railroad v. Lewis, 99-62; Mace v. Comrs., 99-65; Matthews v. Comrs., 99-69; see section 821—**to prevent the disposition and transfer of bonds while litigation pending with reference to them,** Caldwell v. Stirewalt, 100-201—**to prevent sale under a collusive judgment,** Bost v. Lassiter, 105-490—**to prevent sale or conveyance of land while action pending with reference to it,** Jones v. Buxton, 121-285; Faison v. Hardy, 118-142; Bostic v. Young, 116-766; Mortgage Co. v. Long, 113-123; Hutaff v. Adrian, 112-259; Browning v. Lavender, 104-69; Brower v. Buxton, 101-419; Frank v. Robinson, 96-28; Tillery v. Wrenn, 86-217; Fox v. Kline, 85-173; Galbreath v. Everett, 84-546; Pritchard v. Sanderson, 84-299; Cunningham v. Bell, 83-328; Southerland v. Harper, 83-200; Dockery v. French, 69-308; Sprinkle v. Hutchinson, 66-450; see under this paragraph "foreclosure of mortgages," etc.—**to prevent the use of the name "The Bingham School,"** Bingham v. Gray, 122-699—**to prevent disbursement of taxes illegally collected,** Edgerton v. Water Co., 126-93—**to prevent city from opening street for one's private benefit,** Stratford v. Greensboro, 124-127—**to prevent private use of park dedicated to public,** Conrad v. Land Co., 126-776—**to prevent mismanagement by silent partner,** Hodgin v. Bank, 128-111—**to prevent trustee's executor from selling under trust deed in absence of request from cestui que trust,** Eason v. Dortch, 136-291—**to prevent construction of street railway to the injury of abutting owner,** Merrick v. Street R. R., 118-1081—**to prevent railroad company from moving the location of a depot,** Dewey v. R. R., 142-392—**to prevent sale of property by assignee for creditors pending action to set aside deed,** Preiss v. Cohen, 112-278—**to prevent one from violating contract of sale of one's good will,** Hauser v. Harding, 126-295; Kramer v. Old, 119-1; Reeves v. Sprague, 114-647—**to prevent sewerage company from disconnecting residences from main sewer-pipe,** Soloman v. Sewerage Co., 142-439—**to prevent one suing on or enforcing a judgment rendered in another state,** Levin v. Gladstein, 142-482—**to prevent city from annulling arbitrarily its license already granted,** Railway v. Asheville, 109-688—**to prevent stockholders and officers of a corporation taking action ultra**

vires that will cause injury to other stockholders, Moore v. Mining Co., 104-534—**to prevent ultra vires acts of public officials,** Merrimon v. Paving Co., 142-539; Vaughan v. Comrs., 118-636; Glenn v. Comrs., 139-421; Stratford v. Greensboro, 124-127—**to prevent commissioners appointed by legislature from surveying and determining the lines between two counties,** Comrs. v. Thorn, 117-211—**to prevent during action of divorce, defendant's husband from interfering with her separate property or collecting her rents,** Robinson v. Robinson, 123-136—**to prevent city from contributing to a dispensary,** Garsed v. Greensboro, 126-159—**to prevent the foreclosure of a mortgage or deed of trust,** Eason v. Dortch, 136-296; Smith v. Parker, 131-470; Harrington v. Rawls, 131-39; Williams v. Brown, 127-51; Churchill v. Turnage, 122-426; Jones v. Buxton, 121-285; Montague v. Bank, 118-283; Scott v. Ballard, 117-195; Basket v. Moss, 115-448; Faison v. Hardy, 114-58; Meroney v. Loan Asso., 112-842; Hutaff v. Adrian, 112-259; Davis v. Lassiter, 112-128; Carver v. Brady, 104-219; Cook v. Patterson, 103-127; Gooch v. Vaughan, 92-610; Manning v. Elliott, 92-48; Harrison v. Bray, 92-488; Bridgers v. Morris, 90-32; Pender v. Pittman, 84-372; Pritchard v. Sanderson, 84-299; Capehart v. Biggs, 77-261; Purnell v. Vaughan, 77-268; Gold Co. v. Ore Co., 73-468; Howes v. Mauney, 66-218—**to prevent mortgagee after forfeiture from disposing of crops,** Jones v. Hill, 64-198—**to prevent sale under mechanic's lien,** Huntsman v. Lumber Co., 122-583—**to prevent disposition by defendant of the rents and profits of land,** Baldwin v. York, 71-463; but see Horton v. White, 84-297—**to prevent the cutting of timber trees,** Lumber Co. v. Cedar Co., 142-411; Latham v. Lumber Co., 139-9, see sections 807-809—**to prevent a right-of-way from being condemned by private corporation,** Cozard v. Hardwood Co., 139-283—**to prevent the disposing of shares of stock of a corporation,** Currie v. Jones, 138-189—**to prevent the violation of an alleged covenant in a lease,** Cobb v. Clegg, 137-153—**to prevent a nuisance that is injuring the health and destroying the comfort of one's home,** Hull v. Roxboro, 142-453; Redd v. Cotton Mills, 136-342; Duffy v. Meadows, 131-31; Vickers v. Durham, 132-880; Simpson v. Justice, 43-115—**to prevent execution upon husband's property pending his appeal from a judgment for alimony,** Barker v. Barker, 136-316—**to prevent the maintenance of fish nets in a channel,** Reyburn v. Sawyer, 135-328—**to prevent the transfer of ward's land sold by guardian contrary to provisions of order of sale,** In re Propst, 144-562—**to prevent the pollution of a city's water supply,** Durham v. Cotton Mills, 141-615; 144-705—**to prevent the destruction or removal of personal property held in common,** Thompson v. Silverthorne, 142-12—**to prevent private nuisance that is dubious, possible or contingent,** Durham v. Cotton Mills, 141-615; 144-705, and cases cited; Simpson v. Justice, 43-115; see also Hickory v. R. R., 143-451; Hull v. Roxboro, 142-453; Redd v. Cotton Mills, 136-342 and cases there cited; Vickers v. Durham, 132-880—**to prevent the construction and maintenance of a drawbridge likely to become a nuisance,** Pedrick v. R. R., 143-485—**to prevent a railroad from enlarging its depot on the ground that it will be a public nuisance,** Hickory v. R. R., 138-311; 141-716; 143-451—**to prevent the payment of a fund in bank to an endorsee of one insolvent and against whom party asking injunction has recovered judgment for the fund,** Mfg. Co. v. Sum-

mers, 143-102—**to prevent sale by insolvent partner of partnership land under a mortgage which such partner bought in after dissolution,** Taylor v. Russell, 119-30—**to prevent the working of a gold mine,** Parker v. Parker, 82-165—**to prevent one railroad from using the right-of-way of another,** Fayetteville Rwy. v. R. R., 142-423; Rwy. Co. v. Mining Co., 112-661—**to prevent a railroad from building on right-of-way after condemnation proceedings instituted but before appraisal and payment of damages,** R. R. v. Newton, 133-132; R. R. Co. v. Lumber Co., 116-924; but see Fayetteville Rwy. v. R. R., 142-423—**to prevent parties from interfering with railroad construction upon its right-of-way,** Railroad v. Olive, 142-257—**to prevent life tenant from wasting timber in which there is contingent remainder,** Latham v. Lumber Co., 139-9; Peterson v. Ferrell, 127-169—**to prevent funds of a foreign fraternal order collected by assessment from being used to satisfy debt in this state,** Brenizer v. Royal Arcanum, 141-409.

807. Solvent defendant restrained from cutting trees. In an application for an injunction to enjoin a trespass on land it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees.

1885, c. 401. **Cases directly supporting section:** Lumber Co. v. Cedar Co., 142-411; McKay v. Chapin, 120-159; Roper v. Wallace, 93-22. **Injunction will lie to protect contingent remainderman against waste of life tenant:** Latham v. Lumber Co., 139-9. **This section does not deprive court of the discretion to require bond to be given by defendant to secure plaintiff's damages:** Kistler v. Weaver, 135-388.

153-195

Case merely referring to section: Newton v. Brown, 134-445.

808. Timber lands, trial of title to. In all actions to try title to timber lands and in all actions for trespass thereon for cutting timber trees, whenever the court shall find as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees shall be finally determined in such action: Provided, that in all cases where the title to any timber or tree, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another or others, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term shall be suspended during the pendency of such action.

153-195

1901, c. 666, s. 1; 1903, c. 642. **Legal effect of section and purpose of its enactment:** Moore v. Fowle, 139-51. **As to what constitutes prima facie**

title sufficient to make up a bona fide claim, see Lumber Co. v. Cedar Co., 142-411; Bynum v. Wicker 141-95; Johnson v. Duvall, 135-642; Alleghany Co. v. Lumber Co., 131-6. **When plaintiff satisfies judge that claim is bona fide and that he can show an apparent title to the timber, judge should not dissolve injunction, but continue till final determination of title:** Moore v. Fowle, 139-51.

Section referred to in Lumber Co. v. Cedar Co., 142-411; Kistler v. Weaver, 135-390; Newton v. Brown, 134-443.

809. When timber may be cut. Whenever in any such action the judge shall find as a fact that the contention of either party thereto is not in good faith and is not based upon evidence constituting a prima facie title, that upon motion of the other party thereto, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the said timber trees by giving bond as now required by law. Nothing in this section shall effect the right of appeal as now allowed by law, and whenever any party to such action may be enjoined, a sufficient bond shall he required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law.

1901, c. 666, ss. 2, 3. **See section 808.**

For decisions treating of same subject matter prior to enactment of this section, see Ousby v. Neal, 99-146; McKay v. Chapin, 120-159. 153-195

Where injunction dissolved, defendants entitled to value of timber cut by them before injunction was served and converted by plaintiff: Timber Co. v. Rountree, 122-45.

Before an order allowing a person to cut timber can be made in an action to quiet title, the court must find as a fact, and incorporate it in the order, that the party allowed to cut claims land in good faith and has a prima facie title thereto and that claim of adverse party is not made in good faith: Johnson v. Duvall, 135-642.

810. Time of issuing; copy of affidavit served. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exists therefor. A copy of the affidavit must be served with the injunction.

Code, s. 339; C. C. P., s. 190. **An injunction can not issue unless a summons has been issued returnable to the superior court of the county in which action brought:** Horne v. Comrs., 122-466—**and if injunction issue before summons it is premature and irregular and will be vacated upon motion,** Hirsh v. Whitehead, 65-516; Grant v. Edward, 90-31; Troxler v. Newsom, 88-13; McArthur v. McEachin, 64-72; Patrick v. Joyner, 63-573—**but if defendant answers complaint and objection be not taken until trial, irregularity is waived,** Heilig v. Stokes, 63-612. **Summons does not have to be returned before injunction issues:** Fleming v. Patterson, 99-404.

811. Not issued for more than twenty days without notice; continues until dissolved. No restraining order, or order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except upon due notice to the adverse party; but the said order shall continue and remain in force until vacated after notice, to be fixed by the court, of not less than two nor more than ten days.

Code, s. 346; C. C. P., s. 345; 1905, c. 26. **When issued for more than 20 days without notice it may be dissolved on motion:** Foard v. Alexander, 64-69.

812. Issued after answer, only on notice. An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction.

Code, s. 340; C. C. P., s. 191.

For statute regulating notice, see sections 876, 877.

813. Order to show cause; restraint in meantime. If the judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Code, s. 342; C. C. P., s. 193.

814. What judges have jurisdiction. The judge of the superior court shall have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings which are authorized by law: Provided, that a judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he may have jurisdiction to hear and determine under the commission issued to him, and the same shall be returnable as directed by the judge in the order.

Code, s. 335; 1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss, 1, 3.

All superior court judges have jurisdiction anywhere in the state to issue restraining orders for twenty days returnable to the resident judge or judge riding the courts of the district: Hamilton v. Icard, 112-589—**but jurisdiction to issue injunctions until the hearing of cause is restricted to the resident judge or judge assigned to courts of the district or holding such courts by exchange,** Ibid; see Worth v. Bank, 121-347. **A perpetual injunction must be granted in the county in which cause pending and by judge presiding at trial:** Hamilton v. Icard, 112-589.

815. Before what judge returnable. All restraining orders and

injunctions granted by any of the judges of the superior court, except a judge holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is depending, within twenty days from date of order. And if the judge before whom the same is returned shall, from sickness, inability, or from any cause, fail to hear said motion and application, or to continue the same to some other time and place, then it shall be competent for any judge resident in some adjoining district, or a judge assigned to hold the court of some adjoining district, or the judge holding by exchange the court of some adjoining district, to hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavits or otherwise that the judge before whom the same was returnable failed to act upon the same, or to continue the same to some other time and place. The effect of such removal shall be to continue in force the motion and application theretofore granted, till the same can be heard and determined by the judge having jurisdiction of the same.

Code, s. 336; 1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51. **For cases as to whether injunction should be dismissed or continued to hearing, see under section 819.**

The restraining order for twenty days can be made returnable anywhere in the state: Hamiliton v. Icard, 112--589, **notwithstanding** Galbreath v. Everett, 84-546—**but must be returnable before the resident judge or judge riding the courts of the district in which action is pending,** Hamilton v. Icard, 112-589—**and though the courts of the district for his term are over, he can still grant it if it is during the six months of the year in which he has been assigned to the district,** Ibid; also Stith v. Jones, 101-360.

If judge before whom returnable fail to hear it, judge of adjoining district can hear it upon ten days' notice to parties: Hamilton v. Icard, 112-589.

On hearings, the title to land is not required to be proved with that strictness and certainty of proof as upon trial: Moore v. Fowle, 139-51.

Section merely referred to in Moore v. Moore, 131-372; Ledbetter v. Pinner, 120-457; Wilson v. Rankin, 129-450.

816. Stipulation as to judge to hear. By a stipulation in writihg signed by all the parties to an application for an injunction order, or their attorney, to the effect that the matter may be heard before any judge, to be designated in such stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon

receipt of such stipulation forward the same and all the papers to the judge designated in the stipulation, whose duty it shall thereupon be to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage money to be furnished to the judge.

Code, s. 337; 1883, c. 33. **Parties can agree in writing to have hearing before any judge of superior court:** Hamilton v. Icard, 112-589.

817. Undertaking. Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the said clerk, or by the judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto.

Code, s. 341; C. C. P., s. 192. **Amount of undertaking must be fixed by judge:** Bynum v. Comrs., 101-412. **The requirement that undertaking be given is mandatory:** James v. Withers, 114-474; McKay v. Chapin, 120-159—**and an injunction issued without it is irregular, but not void,** McKay v. Chapin, 120-159; Young v. Rollins, 90-125; Sledge v. Blum, 63-374—**and such injunction can be vacated on motion,** Sledge v. Blum, 63-374; Wilson v. Featherstone, 120-449; Miller v. Parker, 73-58; Faison v. McIlwaine, 72-312; Hirsh v. Whitehead, 65-516—**but plaintiff may be allowed to file bond even in supreme court,** McKay v. Chapin, 120-159.

A second undertaking, upon the continuance of injunction to the hearing, can not be ordered unless the first one insufficient: Preiss v. Cohen, 112-278.

As to approval of bond by judge, see Sternberger v. Hawley, 85-141; also Bynum v. Comrs., 101-412. **As to depositing money in lieu of undertaking,** see Richards v. Baurman, 65-162. **Recovery of damages by one who has been injured by injunction is limited to penalty of undertaking:** Timber Co. v. Rountree, 122-45. **As to damages on injunction bond generally and how assessed,** see McCall v. Webb, 135-365 and cases cited.

Section merely referred to in Mahoney v. Tyler, 136-43.

818. Damages. A judgment dissolving an injunction shall carry with it judgment for damages against the party procuring the injunction and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge shall direct, and the decision of the court thereupon shall be conclusive as to the amount of damages upon all the persons who have an interest in the undertaking.

Code, s. 341; 1893, c. 251. **As to procedure for recovery of damages upon undertaking,** see R. R. v. Mining Co., 117-191; Timber Co. v. Rountree,

122-45; Crawford v. Pearson, 116-718; Gold Co. v. Ore Co., 79-48; McKesson v. Hennessee, 66-473; Hyman v. Devereux, 65-588; Thompson v. McNair, 64-448.

819. Issued without notice, vacated when; verified answer an affidavit. If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction thereof, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge at the time being in the district, and if there be no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer; but if no such application be made, the injunction shall continue, and be in force until such application shall be made and determined by the judge, and a verified answer has the effect only of an affidavit.

Code, s. 344; C. C. P., s. 195; 1905, c. 26.

(Notice that this section was amended in 1905 as to the judge who can vacate an injunction and decisions on this point prior thereto are obsolete.)

If the judge in granting injunction founded his action solely upon affidavits of plaintiff, he can modify same without notice: Sledge v. Blum, 63-374. **In an action for injunction, if plaintiff's whole equity is denied and it appears from answer and affidavits that his case is fully met, injunction should not be continued till final hearing:** Rigsbee v. Durham, 98-81; Cooper v. Cooper, 127-490; Walker v. Gurley, 83-429; Perry v. Michaux, 79-94; Mitchell v. Comrs., 74-487; Faison v. McIlwaine, 72-312; Woodfin v. Beach, 70-455; Bell v. Chadwick, 71-329—**nor should it be continued where it appears that there is not probable cause from which it may be reasonably inferred that plaintiff will make out his case at final hearing:** Craycroff v. Morehead, 67-422; see Woody v. Timber Co., 141-471; Hyatt v. DeHart, 140-270—**nor where it will interfere with the prosecuting of enteprises which tend to develop resources of the county,** Hyatt v. DeHart, 140-270. **On the other hand if it appears from the pleadings and affidavits that there is probable cause from which it may be reasonably inferred that plaintiff will be able to make out his case on final hearing, the injunction will not be dissolved:** Craycroff v. Morehead, 67-422; Bynum v. Wicker, 141-95; Moore v. Fowle, 139-51; Currie v. Jones, 138-189; Erwin v. Morris, 137-48; Cobb v. Clegg, 137-153; Griffin v. Water Co., 122-206; Cozart v. Fleming, 123-560; Tobacco Co. v. McElwee, 94-425—**nor will it be where a reasonable doubt exists as to whether the equity set up in the complaint is sufficiently negatived by answer,** Lowe v. Comrs., 70-532; Atkinson v. Evertt, 114-670; Nimocks, v. Shingle Co., 110-230; Frank v. Robinson, 96-28; Durham v. R. R., 104-261; Turner v. Cuthrell, 94-239; Morris v. Willard, 84-293; Ponton v. McAdoo, 71-101—

nor where it would be difficult and impracticable to ascertain actual damages, Jolly v. Brady, 127-142—nor where the injunctive relief may be the real relief demanded, and not simply auxiliary, and the evidence raises serious question as to existence of facts making for plaintiff's right and sufficient to establish it, Tise v. Whitaker-Harvey Co., 144-507; Hyatt v. DeHart, 140-270; Vickers v. Durham, 132-880; Harrington v. Rawls, 131-39; Whitaker v. Hill, 96-2; Marshall v. Comrs., 89-103—nor will it be dissolved when it encourages and facilitates public convenience except in clear cases, Rwy. v. Asheville, 109-688—nor where serious questions are raised as indicated in Harrington v. Rawls, 131-40—nor where reasonably necessary to protect plaintiff's rights until trial, Heilig v. Stokes, 63-612.

For injunction with conditions attached, the fulfillment of which will vacate the order, see Hickory v. R. R., 143-455; 141-716; 138-311.

The vacating or refusal to vacate an injunction is appealable: French v. Wilmington, 75-387—but the order vacating or continuing the injunction is not vacated by the appeal, Green v. Griffin, 95-50; Reyburn v. Sawyer, 128-8; James v. Markham, 125-145. The decision of an appeal is neither an estoppel nor the "law of the case:" Soloman v. Sewerage Co., 142-439. The supreme court, on appeal, can review the findings of fact: Burns v. McFarland, 146- ; Hooker v. Greenville, 130-472; Mayo v. Comrs., 122-5; Roberts v. Lewald, 107-305; Jones v. Boyd, 80--258. On appeal the findings of fact by the judge below are not conclusive, but there is a presumption in favor of proceedings below: Hyatt v. DeHart, 140-270.

820. Opposing affidavits. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted.

Code, s. 345; C. C. P., s. 196. Verified answer is an affidavit hereunder: Tobacco Co. v. McElwee, 94-425—and when so used, plaintiff may file counter affidavits, Ibid; also King v. Winants, 68-63; Howerton v. Sprague, 64-451—and may also file counter affidavits to affidavits filed by defendants, Young v. Rollins, 85-485.

821. When granted to restrain collection of taxes. No injunction shall be granted by any court or judge to restrain the collection of any tax or any part thereof, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for an illegal or unauthorized purpose or be illegal or invalid, or the assessment be illegal or invalid.

1901, c. 558, s. 30; 1899, c. 15, s. 78; 1887, c. 137, s. 84. For action to recover illegal taxes paid, see section 2855.

The above section constitutional: R. R. v. Reidsville, 109-494 and cases there cited; Matthews v. Comrs., 99-69. As to how facts as to the illegality and invalidity of the tax should be set out, see Mace v. Comrs., 99-55. A taxpayer may maintain an injunction to prevent sale of his property under an illegal tax or he may pay tax under protest and sue to recover

it: Purnell v. Page, 133-125. Injunctive relief may be invoked by taxpayer when tax is invalid or illegal: Armstrong v. Stedman, 130-217; Range Co. v. Carver, 118-331.

This section does not apply when the right to collect taxes in arrears has been revived containing no restrictions applicable to a particular case arising thereunder: Moore v. Sugg, 112-233. In cases where restraining order not allowed, plaintiff should pay the tax and pursue the remedy provided for its recovery: Hall v. Fayetteville, 115-281.

Under this section, the following cases are held not to be within the exception and therefore no restraining order can be granted: McDonald v. Teague, 119-604; Hall v. Fayetteville, 115-281; Mace v. Comrs., 99-67. The exceptive words of the section apply not to the levy or illegal levy of the taxes, but to the "illegal or unauthorized" purpose of the levy: Mace v. Comrs., 99-67.

Where an act authorizing a tax levy is void as to part, collection of the whole should be enjoined, Williams v. Comrs., 119-520. As to who are parties defendant to action for injunction to prevent collection of taxes on unlisted property, see Land and Lumber Co. v. Smith, 146- .

XXXVIII. Mandamus.

822. Begun by summons and verified complaint. All applications for writs of mandamus shall be made by summons and complaint, and the complaint shall be duly verified.

Code, s. 622; 1871-2, c. 75.

Nature and use of mandamus: Bear v. Comrs., 124-204; Burton v. Furman, 115-166; Haymore v. Comrs., 85-268; Belmont v. Reilly, 71-260; Brown v. Turner, 70-93.

As to contents of complaint to compel levying of tax to pay debt, see Blanton v. Comrs., 101-532.

Superior court has jurisdiction to issue writ: Tate v. Comrs., 122-661—but a justice of the peace has not, Robinson v. Howard, 84-151; Wright v. Kinney, 123-618.

Mandamus lies in favor of one who wishes to be restored to an unoccupied office: Lyon v. Comrs., 120-237—of a treasurer to compel county commissioners to consider and pass on claim for commissions, Bennett v. Comrs., 125-468, cited in Martin v. Clark, 135-178; Koonce v. Comrs., 106-192—to compel city aldermen to call election when proper number of voters petition, Pace v. Raleigh, 140-65—to compel school authorities to maintain school term up to constitutional limit, Lowery v. School Trustees, 140-33—to compel city officer to issue permit for property owner to connect property with sewer, Slaughter v. O'Berry, 126-181—to compel issue of corporate stock where proper tender of payment made, Wilson v. Telephone Co., 139-395—to compel county commissioners to issue bonds, Jones v. Comrs., 135-218; 137-579; see Railroad v. Jenkins, 65-173—to compel county treasurer to pay claims, Martin v. Clark, 135-178; Wright v. Kinney, 123-618; Comrs. v. Comrs., 73-298—to compel corporation commission to assess railroad for taxation, Jackson v. Commission, 130-386—to compel

proper city and county authorities to levy and collect taxes with which to pay claims, Broadfoot v. Fayetteville, 124-478; Bear v. Comrs., 124-204; Hughes v. Comrs., 107-528; Leach v. Comrs., 84-829; Gooch v. Gregory, 65-142; Lutterloh v. Comrs., 65-403; Pegram v. Comrs., 64-557; Winslow v. Comrs., 64-218—to compel county commissioners to levy tax in excess of constitutional limitation for road improvements without vote of people, Tate v. Comrs., 122-812—to compel county commissioners to grant petition for stock law, Perry v. Comrs., 130-558—to compel public officers to discharge mere ministerial duties, Russell v. Ayer, 120-180; Wool v. Edenton, 115-10; County Bd. v. State Bd., 106-81—to compel officer to perform specific duty required by law, Bennett v. Comrs., 125-468; Russell v. Ayer, 120-180; Harrington v. King, 117-117; Railroad v. Jenkins, 68-502; Tate v. Comrs., 122-812; Wool v. Edenton, 115-10; State v. Justices, 24-430—to compel a municipal corporation which has already occupied land for public purposes to proceed to have damages assessed, McDowell v. Asheville, 112-747—to compel payment of a salary to an office holder, White v. Auditor, 126-570; but see Cotten v. Ellis, 52-545; Bayne v. Jenkins, 66-356; Boner v. Adams, 65-639—to compel public officer to deposit public funds in proper depository, Bearden v. Fullam, 129-477—to compel commissioners to draw a grand jury, Mott v. Comrs., 126-866—to compel school committeemen to issue warrant for the salary of teacher, Robinson v. Howard, 84-151—to compel county superintendent of schools to sign school order, Ducker v. Venable, 126-447—to compel installation of telephones without discrimination, Godwin v. Telephone Co., 136-259.

Mandamus does not lie to compel an unlawful or prohibited act: Betts v. Raleigh, 142-229—nor to compel state board of education to apportion money to schools under circumstances recited in Bd. of Ed. v. State Board, 114-313—nor to regulate or control affairs of a foreign fraternal insurance company, Brenizer v. Royal Arcanum, 141-409—nor to compel county commissioners to levy tax beyond constitutional limit, Cromartie v. Comrs., 87-134; but see Tate v. Comrs., 122-812—nor to compel county commissioners to keep in repair a bridge which a former board contracted so to keep, Glenn v. Comrs., 139-412—nor to compel judge below to send up a correct statement of the case upon affidavit that case is incorrect, McDaniel v. King,, 89-29—nor to compel telephone company to install telephone in bawdy house, Godwin v. Telephone Co., 136-258—nor to control the discretion of county commissioners in the granting of liquor license, Barnes v. Comrs., 135-27; Bridgers v. Comrs., 135-25; Loughran v. Hickory, 129-281; Burton v. Furman, 115-166; Comrs. v. Comrs., 107-335; Jones v. Comrs., 106-436; Muller v. Comrs., 89-171—nor to control the judgment and discretion of state dental board in issuing license, Ewbank v. Turner, 134-77—nor to compel register of deeds to allow copies of records to be taken, Newton v. Fisher, 98-20—nor to compel sheriff to sell land liable to execution where there is adequate remedy at law, Wright v. Bond, 127-39—nor to compel state treasurer to pay warrant improperly drawn, Arendell v. Worth, 125-111—nor to compel county commissioners to approve and receive officers' bonds, Harrington v. King, 117-117—nor to compel state treasurer to pay claims which he claims are not due or are fraudulent, Garner v. Worth, 122-250—nor to try title to office, Brown v. Turner,

70-93; Ellison v. Raleigh, 89-125—**nor to direct state treasurer to pay claims against state, however just and unquestioned, whenever no appropriation made for it,** Garner v. Worth, 122-250—**nor to compel state treasurer to pay claim when no warrant is issued for it,** Burton v. Furman, 115-166—**nor to annul a contract,** Printing Co. v. Hoey, 124-794—**nor to compel auditor to issue a warrant,** Burton v. Furman, 115-166; see Cotten v. Ellis, 52-545—**nor to compel presiding officers of two houses of legislature to sign act passed by that body,** Scarborough v. Robinson, 81-409—**nor to compel county commissioners to induct inelligible persons into office,** McNeil v. Somers, 96-467.

823. Money demand enforced at term. In all such applications, when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice shall be the same as is prescribed for civil actions.

Code, s. 623; 1871-2, c. 75, s. 2. **Summons returnable in term time:** Ducker v. Venable, 126-447; Rogers v. Jenkins, 98-129; Steele v. Comrs., 70-137. **If improperly returned to chambers, should not be dismissed but transferred to proper docket:** Martin v. Clark, 135-178; Jones v. Comrs., 135-218—**but transfer waived if not moved for,** Ibid. **As to what is a money demand,** see Ducker v. Venable, 126-447.

824. Other actions returnable in vacation; issues of fact. When the plaintiff seeks relief other than the enforcement of a money demand, the summons shall be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall proceed to hear and determine the action, both as to law and fact: Provided, that when an issue of fact is raised by the pleading, it shall be the duty of the court, upon the motion of either party, to continue the action until said issue of fact can be decided by a jury at the next regular term of the court.

Code, s. 623; 1871-2, c. 75, s. 3. **Summons may be made returnable at chambers:** Ducker v. Venable, 126-447; Horne v. Comrs., 122-466; Rogers v. Jenkins, 98-129; Steele v. Comrs., 70-137. 147-462

XXXIX. Nuisance.

825. How remediable. Injuries remediable by the old writ of nuisance are subjects of action as other injuries: and in such action there may be judgment for damages, or for the removal of the nuisance, or for both.

Code, s. 630; C. C. P., s. 387. **For injunctions against nuisances, public and private, see annotations under section 806. Remedy for nuisance is by injunction not mandamus:** Horne v. Comrs., 122-470. **Judgments with**

conditions attached: Hickory v. R. R., 143-451; Hyatt v. Myers, 71-271. **Permanent damages to premises by nuisance can not be recovered, but owner thereof may enjoin commission of it and recover temporary damages sustained therefrom:** Taylor v. S. A. L., 145-400.

XL. Quo Warranto.

826. Writs of sci. fa. and quo warranto abolished. The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this subchapter.

Code, s. 603; C. C. P., s. 362; R. C., c. 26, ss. 5, 25. **Power of state to change remedies and effect of statute abolishing writ of scire facias and quo warranto reviewed:** McCall v. Webb, 135-356; McDowell v. Asbury, 66-444; Kingsbury v. Hughes, 61-328; Riddick v. Hinton, 61-291; Bingham v. Richardson, 61-315; Mardre v. Felton, 61-279; Parker v. Shannonhouse, 61-209. **An action in the nature of a quo warranto the proper remedy to try title to public office:** Cozart v. Fleming, 123-547; Lyon v. Comrs., 120-237; State v. Norman, 82-687; Davis v. Moss, 81-303; Saunders v. Gatling, 81-298; Swain v. McRae, 80-111; Cloud v. Wilson, 72-155; Brown v. Turner, 70-93—**but does not lie against one not in office,** Cozart v. Fleming, 123-559; but see same case, page 560; see Cunningham v. Sprinkle, 124-640. **Whether a liquor dealer has violated the law under which license granted, can not be tested by quo warranto:** Hargett v. Bell, 134-396.

827. Action by attorney general upon usurpation or forfeiture of office. An action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or,

2. When any public officer, civil or military, shall have done or suffered an act which, by law, shall make a forfeiture of his office.

183-468

Code, s. 607; C. C. P., s. 366. **For right of attorney general to institute actions for the forfeiture of corporate charters and the like, see section 1198. For right to institute action to forfeit grants, see section 1750.**

As to what is a public office, see Wootton v. Smith, 146- ; State Prison v. Day, 124-362; Wood v. Bellamy, 120-212; McNeill v. Somers, 96-467; Doyle v. Raleigh, 89-133; Eliason v. Coleman, 86-236; Brown v. Turner, 70-93; Nichols v. McKee, 68-429; Welker v. Bledsoe, 68-457; Clark v. Stanley, 66-59; Hoke v. Henderson, 15-1.

Contested election cases, (excluding the "office-holding cases" which, see below): Mitchell v. Alley, 126-84; Cozart v. Fleming, 123-547; Hough-

talling v. Taylor, 122-141; Shennonhouse v. Withers, 121-377; Lyon v. Comrs., 120-237; Stanford v. Ellington, 117-158; Hines v. Vann, 118-3; Foard v. Hall, 111-369; Van Arminge v. Taylor, 108-196; Hampton v. Waldrop, 104-453; Deberry v. Nicholson, 102-465; Gatling v. Boone, 98-573; 101-61; Roberts v. Calvert, 98-580; Hannon v. Grizzard, 96-293; Kilburn v. Patterson, 98-593; Hahn v. Stinson, 98-591; Hancock v. Hubbs, 98-589; Ellison v. Raleigh, 89-125; Hannon v. Comrs., 89-123; Deloatch v. Rogers, 86-358; State v. Norman, 82-687; Davis v. Moss, 81-303; Saunders v. Gatling, 81-298; People v. Wilson, 72-155; People v. Hilliard, 72-169; Norfleet v. Staton, 73-546; Jones v. Comrs., 77-280; State v. Tate, 66-231; Patterson v. Hubbs, 65-119; Clark v. Stanly, 66-59.

Cases known as the "office-holding cases," being contests for office based principally upon the legislative right to abolish an office and recreate it and thereby oust the incumbent, and defended principally upon the doctrine that an office holder has a property right in the office: Mial v. Ellington, 134-131 (overruling Hoke v. Henderson, 15-1, on the point that one has property in an office and all other cases based thereon) Taylor v. Vann, 127-243; White v. Murray, 126-153; Wilson v. Neal, 126-781; Mott v. Griffith, 126-775; Baker v. Hobgood, 126-149; Dalby v. Hancock, 125-325; White v. Hill, 125-194; Gattis v. Griffin, 125-333; McCall v. Zachary, 125-249; 131-466; McCall v. Webb, 125-243; McCall v. Gardner, 125-238; Abbott v. Beddingfield, 125-256; Greene v. Owen, 125-212; Bryan v. Patrick, 124-651; State Prison v. Day, 124-362; Wilson v. Jordan, 124-683; Cunningham v. Sprinkle, 124-640; R. R. v. Dortch, 124-663; Ward v. Elizabeth City, 121-1; Caldwell v. Wilson, 121-468; Wood v. Bellamy, 120-212; Lusk v. Sawyer, 120-225; Miller v. Alexander, 122-721; McDonald v. Morrow, 119-676; Trotter v. Mitchell, 115-193; State v. Womble, 112-867; Bd. of Ed. v. Kenan, 112-568; McNamee v. Alexander, 109-246; State v. Cutshall, 110-545; Lyon v. Akin, 78-258; Prairie v. Worth, 78-169; Vann v. Pipkin, 77-408; Bunting v. Gales, 77-383; Brown v. Turner, 70-93; Clark v. Stanly, 66-59; King v. Hunter, 65-603; State v. Smith, 65-369; Galloway v. Jenkins, 63-147; Barnes v. Barnes, 53-366; Cotten v. Ellis, 52-545; State v. Glen, 52-321; Thompson v. Floyd, 47-313; State v. Moss, 47-66; Houston v. Bogle, 32-496; Hoke v. Henderson, 15-1.

Plaintiff's right to recover in a contested election case depends upon his own right to the office and not upon defects in defendant's title: Stanford v. Ellington, 117-158.

Cases where forfeiture of public office claimed: Caldwell v. Wilson, 121-425; Vann v. Pipkin, 77-408.

Action brought by citizen and taxpayer to try right of one person to hold two offices: Barnhill v. Thompson, 122-493.

In whose name and what form action brought, see Atty. General v. R. R., 134-481; State v. Norman, 82-687; Saunders v. Gatling, 81-298; People v. Heaton, 77-18; Tuck v. Hunt, 73-24; People v. Hilliard, 72-169; Patterson v. Hubbs, 65-119; Loftin v. Sowers, 65-251.

What is a usurpation of or intrusion into office hereunder, discussed in Brown v. Turner, 70-93.

Attorney general can not of his own motion bring action to vacate charter: Attorney General v. R. R., 134-481.

Case where it is sought to vacate franchise: Attorney General v. R. R., 134-481—**where it is sought to vacate oyster entry,** Blount v. Simmons, 120-19.

828. Leave granted by attorney general to private person, when. When application shall be made to the attorney general by a private relator to bring such an action, he shall grant the leave that the same may be brought in the name of the state, upon the relation of such applicant, upon such applicant tendering to the attorney general satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the bringing of such action.

Code, s. 608; 1874-5, c. 76; 1881, c. 330. **For costs in such action, see section 1261. For leave in actions relating to corporations, see section 1196.**

The above section allowing prosecution of an action in the name of the state to assert the right of a citizen to a public office is not for that reason unconstitutional: McCall v. Webb, 135-356.

As to relator in contested election cases, and in other cases where right of office involved, see Houghtalling v. Taylor, 122-141; Barnhill v. Thompson, 122-493; Shennonhouse v. Withers, 121-376; Hines v. Vann, 118-3; Foard v. Hall, 111-369; Saunders v. Gatling, 81-298 and cases cited; Tuck v. Hunt, 73-24; Tate v. Morehead, 65-681; Loftin v. Sowers, 65-251—**in action to try title of person holding two offices at one time,** Barnhill v. Thompson, 122-493—**in action to vacate a charter,** Attorney General v. R. R., 134-481—**in action to vacate an oyster entry,** Blount v. Simmons, 120-19.

As to when indemnifying bond may be filed and consent to bring action secured: Shennonhouse v. Withers, 121-376.

Case merely referring to section: Blount v. Simmons, 120-20.

829. Solvent sureties required. The attorney general, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the state against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of said sureties as may be satisfactory to him.

1901, c. 595, s. 2.

830. Leave withdrawn, action dismissed, bond insufficient. When the attorney general shall have granted leave to a private relator to bring an action in the name of the state to try the title to an office, and it shall afterwards be shown to the satisfaction of the attorney general that the bond filed by such private relator is insufficient, or that the securities thereto are insolvent, the attorney general may recall and revoke such leave theretofore granted, and

upon a certificate of the withdrawal and revocation by the attorney general to the clerk of the court of the county where any such action is pending, it shall be the duty of the judge presiding, upon motion of the defendant, to dismiss the action.

1891, c. 595.

831. Arrest and bail of defendant usurping office. Whenever such action shall be brought against a person for usurping an office, the attorney general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order shall be granted by a judge of the superior court for the arrest of such defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Code, s. 609; C. C. P., s. 369; 1883, c. 102. **As to complaint hereunder:** Houghtalling v. Taylor, 122-141; Hancock v. Hubbs, 98-589; Hahn v. Stinson, 98-591; Oden v. Bates, 98-594; Kilbrun v. Patterson, 98-593; Patterson v. Hubbs, 65-119.

832. Claim of several persons to office tried in one action. Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Code, s. 614; C. C. P., s. 374. **Objection of misjoinder sustained** in Cromartie v. Parker, 121-198.

833. Trials expedited. All actions to try the title or right to any office, state, county or municipal, shall stand for trial at the return term of the summons, if a copy of the complaint shall have been served with the summons, at least thirty days before the return day thereof; and it shall be the duty of the judges to expedite the trial of such actions, and give them precedence over all other actions, civil or criminal. But it shall be unlawful to appropriate any public funds to the payment of counsel fees in any such action.

Code, s. 616; 1901, c. 42; 1874-5, c. 173.

834. Action brought within ninety days after induction into office. All actions brought by a private relator, upon the leave of the attorney general, to try the title to an office shall be brought, and a copy of the complaint served on the defendant, within ninety days after the induction of the defendant into the office to which the

title is sought to be tried; and when it shall appear from the papers in the cause, or otherwise be shown to the satisfaction of the court that the summons and complaint have not been served within ninety days, it shall be the duty of the judge upon motion of defendant to dismiss the action at any time before the trial at the cost of the plaintiff.

1901, c. 519; 1903, c. 556.

835. Defendant's undertaking before answer. Before the defendant is permitted to answer or demur to the complaint he shall execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time, in the discretion of the judge, to be void upon condition that the defendant shall pay to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover.

1895, c. 105.

836. Possession of office not disturbed pending hearing. In any civil action pending in any of the courts of this state wherein the title to any office is involved, the defendant being in the possession of said office and discharging the duties thereof, shall continue therein pending such action, and no judge shall make any restraining order interfering with or enjoining such officer in the premises; and such officer shall, notwithstanding any such order, continue to exercise the duties of such office pending such litigation, and receive the emoluments thereof.

1899, c. 33.

837. Judgment by default and inquiry for failure of defendant to give bond. At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether such complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the resident judge or the judge riding the district at chambers, to require the defendant to give said undertaking; and it shall be the duty of the judge to require the defendant to give such undertaking within ten days, and if the undertaking shall not be so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at term for damages, including loss of fees and salary. Upon the filing of said judgment for the recovery of such office with the

clerk, it shall be the duty of the clerk to issue and the sheriff to serve the necessary process to put plaintiff into possession of the office. In case defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary: Provided, that nothing herein shall prevent the judge's extending, for cause, the time in which to give the undertaking.

1899, c. 49; 1895, c. 105, s. 2.

838. Service of summons and complaint. The service of the summons and complaint as hereinbefore provided may be made by leaving a copy thereof at the last residence or business office of the defendant or defendants, and the same shall be held and deemed a legal service of the said summons and complaint.

1899, c. 126.

839. Judgment in such actions. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

Code, s. 610; C. C. P., s. 370. **Judgment rendered, how, when action brought by attorney general on his own information and not on behalf of contestant:** Saunders v. Gatling, 81-298; People v. Hilliard, 72-169. **Section referred to** in State v. Ballard, 122-1028.

840. Judgment for usurping office or franchise; fine. When the defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars.

Code, s. 615; R. C., c. 95; C. C. P., s. 375; Const., Art. IX, s. 5.

841. Mandamus to aid relator, when. Whenever in any civil action brought to try the title or right to hold any office, the judgment of the court shall be in favor of the relator in such action, it shall be the duty of the court to issue a writ of mandamus or such other process as may be necessary and proper to carry such judgment into effect, and to induct the party so entitled into such office.

1885, c. 406, s. 1. **See decision rendered prior to this enactment** in Hannon v. Comrs., 89-125. 153-468

842. On appeal, occupant of office to give bond for fees. No appeal by the defendant from the judgment of the superior court in such action to the supreme court shall stay the execution of the judgment, unless a justified undertaking be executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by such appellant by virtue or under color of his said office: Provided, that in no event shall said judgment be executed pending said appeal, unless a justified undertaking be executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of his said office during his occupancy thereof.

1885, c. 406, s. 2. **See decision prior to this enactment** in Hannon v. Comrs., 89-125.

843. Relator inducted into office, when. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

Code, s. 611; C. C. P., s. 371. **Where relator had been appointed and qualified, supreme court decision in his favor, upon being filed, and ex proprio vigore, places him in possession:** Caldwell v. Wilson, 121-480.

The judgment in a proceeding to recover possession of an usurped office is self-executing, and operates itself as ouster of defendant, requiring no further and final process to render it effectual: Hannon v. Comrs., 89-124.

844. Damages by usurpation recovered. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

Code, s. 613; C. C. P., s. 373. **Judgment in favor of one claiming office lays foundation for action for damages for time office has been wrongfully withheld:** McCall v. Webb, 126-760; 135-361; Swain v. McRae, 80-113; Jones v. Jones, 80-127; Howerton v. Tate, 70-161—**and failure to get judgment in quo warranto for fees and salary is a bar to a new and independent action for such fees and salary,** McCall v. Webb, 135-356.

845. Action to recover forfeited property for state. Whenever any property, real or personal, shall be forfeited to the state, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court.

Code, s. 621; C. C. P., s. 381.

XLI. Receivers.

846. What judge appoints. Any judge of the superior court having authority to grant restraining orders and injunctions shall have the like jurisdiction in appointing receivers, and all motions to show cause shall be returnable as is provided for injunctions.

Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

As to receivers of orphan's estates, see sections 1811-1815—of state banks, see Worth v. Bank, 121-343; also section 250—**of corporations, see section 1219-1232—in supplementary proceedings, see sections 679-682.**

The clerk can not appoint: Parks v. Sprinkle, 64-637. **As to question of priority of application and conflict of court's jurisdiction,** see Worth v. Bank, 121-343; Young v. Rollns, 85-485. **Before receiver can be appointed it must be shown that plaintiff is entitled to the relief demanded:** Witz v. Gray, 116-48. **As to who should or should not be appointed,** see Fisher v. Trust Co., 138-90; Young v. Rollins, 85-485. **Court should not appoint more receivers than necessary:** Bank v. Bank, 126-531. **The order appointing receiver not void for lack of security:** Nesbitt v. Turrentine, 83-535. **The practice of appointing receiver upon unverified complaint and without notice to creditors and others interested is not commended:** Fisher v. Trust Co., 138-90. **Foreign receiver proves his appointment by a certified copy of the order appointing:** Person v. Leary, 126-504, 127-114. **Appointment of receivers is matter of record and should be shown by the record:** Person v. Leary, 126-504.

847. In what cases appointed. A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations and sub-

chapter thereof entitled Receivers; and in like cases, of the property within this state of foreign corporations.

The subchapter entitled Receivers, in the chapter entitled Corporations, shall be applicable, as near as may be, to receivers appointed hereunder.

Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

For appointment of receivers in proceedings supplemental to execution, see subchapter Supplemental Proceedings, section 679.

A receiver will be appointed before judgment where plaintiff shows imminent danger of loss by defendant's insolvency: Mahoney v. Stewart, 123-106; Taylor v. Russell, 119-33; Whitehead v. Hale,, 118-601; Bank v. Bridgers, 114-381; Lovett v. Slocumb, 109-110; Stith v. Jones, 101-360; Venable v. Smith, 98-523; Durant v. Crowell, 97-367; McNair v. Pope, 96-502; Albright v. Albright, 91-220; Oldham v. Bank, 84-304; Parker v. Parker, 82-165; Nesbitt v. Turrentine, 83-535; Railroad v. Wilson, 81-223; Kerchner v. Fairley, 80-24; Rollins v. Henry, 77-467; Gause v. Perkins, 56-177; Deep River Co. v. Fox, 39-61—**or where there is reason to apprehend that the subject of the controversy will be destroyed or removed, or otherwise disposed of by defendants pending action,** Ellett v. Newman, 92-519; Thompson v. Silverthorne, 142-12—**or where defendant is insolvent and all property must be sold to pay debts,** Machine Co. v. Lumber Co., 109-576—**or where it is alleged that defendant is trying to defraud plaintiff,** Stern v. Austern, 120-107; Commission Co. v. Porter, 122-692; Pearce v. Elwell, 116-595. **No receiver will be appointed where it does not appear that property is in danger of being lost or materially injured:** Venable v. Smith, 98-523; Bryan v. Moring, 94-694; Levenson v. Elson, 88-182; Twitty v. Logan, 80-69; Rollins v. Henry, 77-467—**nor will one be appointed, pendente lite upon a mere allegation that party "has reason to believe" that property in dispute will be wasted or destroyed, without stating the reasons of such belief,** Hanna v. Hanna, 89-68—**nor where foreign insurance company has no assets or property other than assessments to become due, within this state, which can be taken into possession,** Blackwell v. Life Asso., 141-117.

Where receiver should be appointed to carry judgment into effect; Pipe and Foundry Co. v. Howland, 111-625; Richards v. Baurman, 65-162.

848. Appointment refused, bond being given, when. In all cases where there is an application for the appointment of a receiver upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom such application is made or pending shall have the discretionary power to refuse the appointment of a receiver, if the party against whom such relief is asked, whether a person, partnership or corporation, shall tender to the court an undertaking payable to the adverse party in an amount double

the sum demanded by the plaintiff, with at least two sufficient sureties and duly justified according to law, conditioned for the payment of such amount as may be recovered in such action, and summary judgment may be taken upon said undertaking. In the progress of the action the court shall have power in its discretion to require additional sureties on such undertaking.

1885, c. 94.

Where there is danger of loss, instead of appointing a receiver, defendant may be allowed to give bond to secure plaintiff: Durant v. Crowell, 97-367—**and it is error to appoint without giving defendant this opportunity,** Stith v. Jones, 101-360.

In the matter of appointment of receivers the powers of the courts have been enlarged by the Code: Lumber Co. v. Wallace, 93-22. **Appointment of a receiver is not a matter of positive right but rests in sound legal discretion of the judge:** Whitehead v. Hale, 118-602.

Motion for the appointment of a receiver may be made before any judge, and temporary receiver be appointed: Worth v. Bank, 121-343—**and order made returnable before resident judge, for judge holding courts of district,** Ibid—**and the hearing may be outside of the county where action brought,** Parker v. McPhail, 112-504.

Cases merely referring to section: Moore v. Moore, 131-372; Wilson v. Rankin, 129-450; Bank v. Cotton Mills, 115-513.

849. Receiver's bond. A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court wherein the action is pending, an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, with the like condition. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, nor for increasing the same, nor for removing a receiver.

Code, s. 383. **For giving bond in surety companies, see section 272, 273. Liability of receiver:** Alston v. Massenburg, 125-582; Collins v. Gooch, 97-186. **Clerk's bond liable as receiver's bond, when,** Alston v. Massenburg, 125-582; Waters v. Melson, 112-89; Boothe v. Upchurch, 110-62; Presson v. Boone, 108-78; Syme v. Bunting, 91-48; Rogers v. Odom, 86-432. **Practice in bringing action on bond:** Boothe v. Upchurch, 110-62; Black v. Gentery, 119-502; Atkinson v. Smith, 89-72; Bank v. Creditors, **86-323.**

XLII. Trust Funds Summarily Protected.

850. Trust funds ordered paid into court. When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money or other thing capable of deliv-

ery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the judge.

Code, s. 380; C. C. P., s. 215.

851. Trust funds, etc., ordered seized by sheriff, when. Whenever, in the exercise of his authority, a judge shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge.

Code, s. 381; C. C. P., s. 215. **For punishment as for contempt, see section 944;** also Worth v. Bank, 121-344.

852. Defendant ordered to satisfy sum admitted to be due. When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

Code, s. 382; C. C. P., s. 215. **Cases supporting section:** Curran v. Kerchner, 117-264; Parker v. Bledsoe, 87-222.

XLIII. Waste.

853. How remediable. Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises.

Code, s. 624; C. C. P., s. 383.

Waste defined: Sherrill v. Connor, 107-630; King v. Miller, 99-583; Dills v. Hampton, 92-565; Ballentine v. Poyner, 3-110; Ward v. Sheppard, 3-283. **Instances of what is, and what is held not to be waste:** Cherry v. Canal Co., 140-422; Starnes v. Hill, 112-9; Sherrill v. Connor, 107-630; Dorsey v. Moore, 100-41; King v. Miller, 99-583; Sledge v. Blum, 63-374; Dodd v. Watson, 57-48; Lambeth v. Warner, 55-165; Davis v. Williams, 40-308; Shine v. Wilcox, 21-631; Carr v. Carr, 20-317; Parkins v. Coxe, 3-339; Ballentine v. Poyner, 3-268; Ward v. Sheppard,, 3-283. **Statute must be followed:** Hybart v. Jones, 130-227. **In action by widow against heirs to recover payments allotted to her as dower and made a charge on land, heirs can not set up her waste as counterclaim, but must proceed hereunder:** Hybart v. Jones, 130-227.

854. For and against whom lies. In all cases of waste, an action shall lie in the superior court at the instance of him in whom the

right is, against all persons committing the same, as well tenant for term of life as tenant for term of years and guardians.

Code, s. 625; R. C., c. 116, s. 1; 52 Hen. III., c. 23; 6 Edw. I., c. 5; 20 Edw. I., st. 2; 11 Hen. VI., c. 5.

Action for waste lies in favor of him who hath the estate of inheritance, the remainderman or reversioner: Cherry v. Canal Co., 140-422; Dorsey v. Moore, 100-41; Wall v. Williams, 91-477; Burnett v. Thompson, 51-210; Browne v. Blick, 7-511—**but not in favor of a contingent remainderman, who must be protected by injunction,** Latham v. Lumber Co., 139-9; Cowand v. Meyers, 99-198; Gordon v. Lowther, 75-193; Douthett v. Bodenhamer, 57-444; Braswell v. Morehead, 45-26. **Action may be brought by reversioner though he may have purchased particular estate after waste committed:** Dupree v. Dupree, 49-387. **Action for waste lies against tenant in dower, when:** Carr v. Carr, 20-317—**but not against husband of such tenant,** Davis v. Gilliam, 40-308—**unless such husband attempts to remove a house therefrom, even though he built it himself,** Dozier v. Gregory, 46-100. **Action for permissive waste can be brought against life tenant:** Sherrill v. Connor, 107-630. **Creditor can not bring action hereunder:** Jones v. Britton, 102-174. **The right to sue for waste includes the right to restrain its commission:** Morrison v. Morrison, 122-598.

855. Tenant in possession of particular estate liable. Where tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action shall lie against the said tenant for life or years.

Code, s. 626; R. C., c. 116, s. 2; 11 Hen. VI., c. 5.

856. Action by tenant against cotenant. Where a joint tenant or a tenant in common commits waste, an action shall lie against him at the instance of his cotenant or joint tenant.

Code, s. 627; R. C., c. 116, s. 4; 13 Edw. I., c. 22. **Under this section one tenant in common may sue his cotenant for cutting cross ties and hauling them away:** Hinson v. Hinson, 120 400—**and since right to sue carries with it right to restrain, one tenant can restrain his cotenant,** Morrison v. Morrison, 122-598. **As to what is waste as between tenants in common for which action can be brought,** see Darden v. Cowper, 52-210; Smith v. Sharpe, 44-91; Walling v. Burroughs, 43-60.

857. Heirs may sue, when. Every heir shall have his action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestors as in his own.

Code, s. 628; R. C., c. 116, s. 5; 6 Edw. I., c. 5; 11 Hen. VI., c. 5; 20 Edw. I., st. 2. **In a suit by widow against heirs to recover payments allotted to her as dower and made charge on land, heirs can not set up by way of counterclaim damages for waste committed by widow, but must proceed under statute:** Hybart v Jones, 130-227.

858. Judgment for treble damages and possession. In all cases of waste, when judgment shall be against the defendant, the court may give judgment for thrice the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the said damages shall not be paid on or before a day to be named in the judgment.

Code, s. 629; R. C., c. 116, s. 3; 6 Edw. I., c. 5; 20 Edw. I., st. 2. **Judgments according to this section:** Hybart v. Jones, 130-227; Sherrill v. Connor, 107-543. **Not error to render judgment for damages merely, and not also for place wasted:** Bright v. Wilson, 1-251. **As to waste by plaintiff set up as counterclaim,** see Hybart v. Jones, 130-227.

152-705

XLIV. Compromise.

859. Effect of compromise. In all claims, or money demands, of whatever kind, and howsoever due, where an agreement shall have been or shall be made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of such less amount according to any such agreement in compromise of the whole shall be a full and complete discharge of the same.

Code, s. 574; 1874-5, c. 178. **This section constitutional:** Koonce v. Russell, 103-179. **A compromise made since this enactment is presumed to have been made with reference thereto:** Ibid. **The payment of a less amount in accordance with agreement in compromise of whole is a full discharge:** York v. Westall, 143-276; Wittkowsky v. Baruch, 127-313; Kerr v. Sanders, 122-635; Pruden v. R. R., 121-509; Petit v. Woodlief, 115-120; Jones v. Mizell, 104-16; Koonce v. Russell, 103-179; Tiddy v. Harris, 101-593—**and a contract to compromise at certain figures is enforceable,** Boykin v. Buis, 109-501. **As to certain agreements of compromise being within statute of frauds,** see York v. Westall, 143-276. **Where agreement of compromise contains condition to be performed by plaintiff before payment, failure of defendant to pay does not invalidate compromise, plaintiff having failed to comply with condition:** Ramsey v. Browder, 136-251. **Agreement of compromise by telegram can not be altered by creditor:** Pruden v. R. R., 121-509. **Where plaintiff agreed to accept $50 in compromise of what he figured was a $54 debt, but afterward found debt was larger, held no compromise except of $54:** Holden v. Warren, 118-327. **Where claim for damages compromised by defendant primarily liable it enures to benefit of one secondarily liable:** Brown v. Louisburg, 126-701. **Where there was an agreement to compromise a charge upon land, but defendant failed to comply, the debt did not become a personal one but still remained a charge:** Hunt v. Wheeler, 116-422. **As to compromise of municipal debt,** see Bank v. Comrs., 116-339. **Where debtor pays a sum supposed by him to be a balance due on a bond, but creditor simply says he will credit on bond, it is no compromise:** King v. Phillips, 94-555. **Where check for less amount than due was marked "in full for**

services,'' when cashed it is a settlement in full: Kerr v. Sanders, 122-635; Cline v. Rudisill, 126-523; Petit v. Woodlief, 115-120—**and creditor can not alter the matter by writing on check ''accepted for one month's services,''** Ibid; also Pruden v. R. R., 121-509; Long v. Miller, 93-233.

Section merely cited: Smith v. Richard, 129-269; Jones v. Jones, 118-448.

860. Tender of judgment; effect of refusal to accept. The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment he can not recover costs, but must pay the defendant's costs from the time of the offer. In case the defendant shall set up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counterclaim to the amount specified with costs. If the defendant accept the offer, and give notice thereof in writng within ten days, he may enter judgment as above for the amount specified, if the offer entitled him to judgment, or if the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in said offer, he can not recover costs, but must pay the plaintiff's costs from the time of the offer.

Code, s. 573; C. C. P., s. 328. **Money paid into court as a tender, if taken out by plaintiff, is a settlement of the debt, he having accepted same upon conditions and terms annexed:** Cline v. Rudisill, 126-523. **Tender by tenant of rent accrued after termination of lease does not preclude landlord from recovering possession:** Vanderford v. Foreman, 129-217. **Where plaintiff recovers no more than the tender, he should be taxed with costs:** Pollock v. Warwick, 104-638; see Smith v. B. & L. Asso., 119-256 and cases cited; Russ v. Brown, 113-227. **As to tender in action for conversion of personal property,** see Stephens v. Koonce, 103-266. **Offer of compromise not accepted can not be given in evidence:** Hughes v. Boone, 102-137. **A tender hereunder must be made by all the defendants or by their common attorney:** Williamson v. Canal Co., 84-629.

151-276

861. Conditional tender of judgment for damages. In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, ten days before the trial, and on the trial have a verdict, the damages shall be assessed accordingly.

Code, s. 575; C. C. P., s. 329. **We know of no law or practice which will permit a tender as an aid to a defective demurrer; this section provides that such tender may accompany an answer and this alone is its proper placing so far as a pleading is concerned, or in reply to counterclaim:** Hall v. Tel. Co., 139-373.

Where, pending action for damages to tobacco, an agreement was made that damages be placed at a certain figure per pound should plaintiff recover, it was not a compromise hereunder: Garrett v. Pegram, 120-288.

862. Effect of refusal. If the plaintiff does not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. Such expense shall be ascertained at the trial.

Code, s. 576; C. C. P., s. 330. **As to costs when plaintiff fails to recover more than tender, see section 860.**

863. Disclaimer of title in action of trespass; tender of judgment. In actions of trespass upon real estate, wherein the defendant in his answer shall disclaim to make any title or claim to the lands on which the trespass is by the complaint supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be permitted to make a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass; whereupon, or upon some of them, the plaintiff shall join issue, and if the issue be found for the defendant, or if the plaintiff shall be nonsuited, he shall be barred from the said action and all other suits concerning the same.

Code, s. 577; R. C., c. 31, s. 79; 1715, c. 2, s. 7. **Case of involuntary trespass on account of ignorance of boundary:** Blackburn v. Bowman, 46-441.

XLV. Examination of Parties.

864. Action for discovery abolished. No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this subchapter.

Code, s. 579; C. C. P., s. 332. **Effect of this enactment:** Helms v. Green, 105-251; Tobacco Co. v. Tobacco Co., 144-369; Holt v. Warehouse Co., 116-490; Dunn v. Johnson, 115-258; Fertilizer Co. v. Taylor, 112-141; Hudson v. Jordan, 108-13; Coates v. Wilkes, 92-376. **Section only authorizes examination of parties or those interested in action:** Strudwick v. Broadnax, 83-401; but as to corporations, see next section. **Where venue changed, pending removal, these proceedings can be had in either county:** Comrs. v. Lemly, 85-341.

865. Adverse party examined. A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to an action, then any officer or agent of the corporation may be examined as is herein provided.

Code, s. 580; C. C. P., s. 333; 1907, c. 799. **As to examining officers and employees of corporations,** see Tobacco Co. v. Tobacco Co., 144-369 **(notice the amendment of 1907, c. 799);** Holt v. Warehouse Co., 116-480— **and examining books of corporations,** see Holt v. Warehouse Co., 116-480. **Appeal does not lie from an order made for examination or a refusal to discharge order:** Clark v. Peebles, 122-163; Holt v. Warehouse Co., 116-480— **or from order directing examination to proceed,** Vann v. Lawrence, 111-32. **Examination of defendant filed in record can not be taken as a part of answer for purpose of passing upon demurrer:** Whitaker v. Jenkins, 138-476.

Plaintiff does not make defendant his witness by examining him hereunder: Coates v. Wilkes, 92-376; Shober v. Wheeler, 113-370.

866. Before trial in his own county. The examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown, the judge or court shall order otherwise. But the party to be examined shall not be compelled to attend in any county other than that of his residence, or where he may be served with a summons for his attendance.

Code, s. 581; 1893, c. 114; 1899, c. 65; C. C. P., s. 334.

Where, by assent of defendant, order was made for examination outside of county, he can not withdraw his assent and refuse to answer; his refusal puts him in contempt: Fertilizer Co. v. Taylor, 112-141; Ledbetter v. Pinner, 120-457. **Plaintiff not compelled to use testimony of adversary on the trial:** Shober v. Wheeler, 113-370. **No leave of court necessary to entitle plaintiff to examine defendant or party in interest:** Vann v. Lawrence, 111-32.

867. Party compelled to attend. The party to be examined, as in the preceding section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge, clerk or commissioner in like manner, and may be read by either party on the trial.

Code, s. 582; 1899, c. 65, s. 2; C. C. P., s. 335. **Plaintiff not compelled to use testimony of adversary at trial:** Shober v. Wheeler, 113-370. **Testimony of defendant can not be taken as part of answer for purpose of passing upon demurrer:** Whitaker v. Jenkins, 138-476.

868. Testimony may be rebutted. The examination of the party thus taken may be rebutted by adverse testimony.

Code, s. 583; C. C. P., s. 336. **Plaintiff can rebut defendant's deposition on trial:** Hudson v. Jordan, 108-13; Helms v. Green, 105-261. **As to cross-examination and impeachment of adversary,** see Coates v. Wilkes, 92-376.

869. Refusal to testify; penalty. If a party refuses to attend and testify, as in the four preceding sections provided, he may be punished as for a contempt, and his pleadings may be stricken out.

Code, s. 584; C. C. P., s. 337. **Where, by assent of defendant, order was made for examination outside of county, he can not withdraw his assent and refuse to answer; his refusal places him in contempt:** Fertilizer Co. v. Taylor, 112-141; Ledbetter v. Pinner, 120-457.

870. Testimony of party may be rebutted. A party examined by an adverse party, as in this subchapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the enquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

Code, s. 585; C. C. P., s. 338.

871. Real party in interest examined. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

Code, s. 586; C. C. P., s. 339. **Section authorizes examination of parties only of those interested in the action:** Strudwick v. Brodnax, 83-401; **but this has been changed as to agent, etc., of corporations, see section 865.**

872. Examination of co-plaintiff or co-defendant. A party may be examined on behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separte and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in behalf of the party examined. And whenever one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defense, and shall be so received.

Code, s. 587; C. C. P., s. 340. **For production of writings, see section 1656 et seq. See** Penny v. Brink, 75-68.

XLVI. Motions and Orders.

873. What is an order. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

Code, s. 594; C. C. P., ss. 344, 345.

874. Motions; where and when made. An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for a new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy shall have preference over all other motions.

Code, s. 594; C. C. P., ss. 344, 345. **Motions which do not involve a substantial right, and the decision of which is not subject to appeal may be renewed as subsequent events require:** Allison v. Whittier, 101-490; Sanderson v. Daily, 83-67—**but decision on motions from which appeals might have been taken, but which were not taken, are res judicata, and motion can not be renewed,** Sanderson v. Daily, 83-67; Henry v. Hilliard, 120-479; Allison v. Whittier, 101-490; Moore v. Grant, 92-316; Roulhac v. Brown, 87-1; Mabry v. Henry, 83-298; Jones v. Thorne, 80-72; but see Moore v. Moore, 131-371—**but can be renewed before proper judge where first made before improper judge,** Bank v. Wilson, 80-200. **Party consenting to hearing of motion at chambers can not in supreme court object that it was not heard at term:** Gatewood v. Leak, 99-363. **Except by consent, a motion other than a motion for an ancillary order or provisional remedy can not be heard out of the county:** Parker v. McPhail, 112-502; Moore v. Moore, 131-372, 130-334; Henry v. Hilliard, 112-479; Skinner v. Terry, 107-103; McNeill v. Hodges, 99-248—**and the consent necessary to hear outside must affirmatively appear of record,** Godwin v. Monds, 101-354.

A motion in supreme court must be made in writing: Brafford v. Reed, 124-346—**and notice of ten days must be given the adverse party,** Herndon v. R. R., 121-498. **The judge has the power to vacate or modify orders made in a cause at any time before final judgment:** Welch v. Kingsland, 89-179.

875. Affidavit for or against, compelled. When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue:

Code, s. 594; C. C. P., ss. 344, 345.

876. Motions determined in ten days. Whenever a motion shall be made in any cause or proceeding in any of the courts, to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or a motion to vacate or modify the same is made, it shall be the duty of the judge before whom such motion is made, to render and make known his decision on such motion within ten days after the day upon which such motion shall or may be submitted to him for decision.

Code, s. 594; C. C. P., ss. 344, 345.

877. Notice of motion. When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Code, s. 595; C. C. P., s. 346.

147-595

Notice is necessary in all proceedings had before clerk: Blue v. Blue, 79-69—**in appeals taken from justice's court when not taken at trial,** State v. Johnson, 109-852—**to subject administrator personally, when in an accounting assets are found and there is a return of nulla bona thereon,** McDowell v. Asbury, 66-444—**before granting injunction staying execution on judgment,** Faison v. McIlwaine, 72-312—**before hearing motion to set aside judgment or order,** Fisher v. Mining Co., 105-123.

A person made a party to an action and upon whom service of summons has been made is fixed with notice of all motions, orders and decrees and all that transpires in the conduct of the case of which record is made: Spencer v. Credle, 102-68; Sparrow v. Davidson College, 77-35; Hemphill v. Moore, 104-379; Stith v. Jones, 119-428; Ferrell v. Hales, 119-199; Zimmerman v. Zimmerman, 113-432; Coor v. Smith, 107-430; Wilson v. Pearson, 102-290; Williams v. Whiting, 94-481; Stancill v. Gay, 92-455; University v. Lassiter, 83-38—**but not of motions and orders made out of term, of which notice must be given,** Harper v. Sugg, 111-324; Coor v. Smith, 107-431; Allison v. Whittier, 101-490; Branch v. Walker, 92-87.

XLVII. Notices.

878. In writing. All notices shall be in writing.

Code, s. 597; C. C. P., s. 349. **Contents of notices generally:** Allen v. Strickland, 100-225. **Must be in writing:** Marion v. Tilley, 119-473; Allen v. Strickland, 100-225—**but this seems to have reference only to notices in judicial proceedings,** State v. Telfair, 130-645; Martin v. Buffaloe, 128-305. **Notice surety on indemnity bond of sheriff that sheriff has been sued need not be in writing:** Martin v. Buffaloe, 128-305—**nor need overseer's notice to hands to work public roads,** State v. Telfair, 130-645.

879. On whom served. Notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter.

Code, s. 597; C. C. P., ss. 349, 353. **For statute against service on Sunday, see section 727. Service of notices and papers hereunder must be made by an officer authorized to serve process of the court:** Cullen v. Absher, 119-441—**but anyone not a party to an action may serve a subpoena and prove such service on his oath,** State v. Johnson, 109-853. **Service of case on appeal must be made by officer of the court:** Herbin v. Wagoner, 188-656; McNeill v. R. R., 117-643; Forte v. Boone, 114-176; Cummings v. Hoffman, 113-267; Lyman v. Ramseur, 113-503; State v. Price, 110-599; Sondley v. Asheville, 112-694—**and so must notice of appeal,** State v. Johnson, 109-852—**and in neither case can attorney make valid service,** Roberts v. Partridge, 118-355; Cummings v. Hoffman, 113-267; State v. Price, 110-599; State v. Johnson, 109-852—**nor can a constable serve a case on appeal to supreme court,** Forte v. Boone, 114-176. **A chief of police can serve notices where given special powers of sheriff in town charter:** Lowe v. Harris, 121-287. **As to powers of city police and town constables in service of papers,** see Lowe v. Harris, 121-287; Baker v. Brem, 126-367; Appomattox Co. v. Buffaloe, 121-37; Davis v. Sanderlin, 119-84. **Alias notice can be issued and served where original notice was placed in hands of proper officer who failed to properly serve:** Hinsdale v. Underwood, 116-594; Allen v. Strickland, 100-225. **Town constable can not serve notice of deposition in action pending in superior court,** Cullen v. Absher, 119-441. **Notice of a deposition, signed by a party to the action, is not process:** Cullen v. Absher, 119-441. **As to notice required of motions and orders made after term of court,** see Harper v. Sugg, 111-324; Coor v. Smith, 107-430 and cases cited. **As to service on agent in action against principal,** see Bank v. School Comrs., 118-383.

880. Service upon attorney. If served upon an attorney, service may be made during his absence from his office, by leaving a copy of the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open so as to

admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

Code, s. 597; C. C. P., ss. 349, 353. **Notice to attorney is notice to client:** Ladd v. Teague, 126-549; Banking Co. v. Walker, 121-115; Hulbert v. Douglas, 94-122—**and an attorney is still an attorney until court releases him or until judgment is satisfied,** Ladd v. Teague, 126-544; Branch v. Walker, 92-87. **Notice of motion to set aside a judgment may be properly served on attorney of record of opposing party:** Branch v. Walker, 92-87.

881. Served on a party. If upon a party, it may be made by leaving a copy of the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Code, s. 597; C. C. P., ss. 349, 353. **Leaving notice with wife sufficient:** Turner v. Holden, 109-182. **Case on appeal served as above directed:** State v. Price 110-599; Watkins v. R. R., 116-961; see section 591. **A return "executed by delivering a copy" implies that he left a copy with each party: McDonald v. Carson, 94-497—the word "executed" ex vi termini carrying with it the idea of full performance,** Isley v. Boon, 113-249.

882. Served by publication. If upon a person who can not be found after due diligence, or who is not a resident of this state, the service thereof may be made by the publication of the notice once a week for four successive weeks in some newspaper published in the county from which the notice is issued; and if no newspaper be published therein, then in some newspaper published within the judicial district; and the proof of service shall be as is required by law in the case of a service of a summons by publication.

Code, s. 597; C. C. P., ss. 349, 353. **See section 442. The time above designated is in lieu of the ten days personal notice:** Guilford v. Georgia Co., 109-310.

883. Publication of notices in Buncombe county. Whenever the clerk of the superior court of Buncombe county or a judge of the superior court holding the superior court of said county shall sign or make any order directing the publication of any notice, order or proceeding required by law to be published in Buncombe county, it shall be the duty of said clerk or said judge to designate in the said order the newspaper in which said notice, order or proceeding shall be published, and no notice, order or proceeding published in any paper other than the one designated in the said order shall be legal and sufficient.

1905, c. 438.

884. Subpœna, issuance and service. Service of a subpœna for witnesses may be made by a sheriff, coroner or constable, and proved

by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpœna for witness need not be signed by the clerk of the court; it shall be sufficient if subscribed by the party or by his attorney.

Code, s. 597; C. C. P., ss. 349, 353. **For issuance of subpœnas by clerk, see section 1369. A subpœna may be served by one not an officer who is not a party to the action and the service proven on his oath:** Smith v. Smith, 119-314; State v. Johnson, 109-853.

885. To what this subchapter applies. This subchapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Code, s. 597; C. C. P., ss. 349, 353.

886. Officer's return evidence of service. When a notice shall issue to the sheriff, his return thereon that the same has been executed shall be deemed sufficient evidence of the service thereof.

Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537. **The return of an officer is prima facie true:** Williamson v. Cocke, 124-585; Miller v. Powers, 117-218; Strayhorn v. Blalock, 92-292; Surratt v. Crawford, 87-372; Simpson v. Hiatt, 35-470; State v. Vick, 25-491; Loftin v. Hugins, 13-10. **A return "executed by delivering copy" implies that he left copy with each party:** McDonald v. Carson, 94-497—**the word "executed" ex vi termini carrying with it the idea of full performance:** Isley v. Boon, 113-249.

XLVIII. Time.

887. How computed. The time within which an act is to be done, as provided by law, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Code, s. 596; C. C. P., s. 348. **Cases directly supporting section:** Burgess v. Burgess, 117-447; Glanton v. Jacobs, 117-427; Sondley v. Asheville, 110-89; Walker v. Scott, 104-481; Barcroft v. Roberts, 92-249; Keeter v. R. R., 86-346. **As to counting time in cases of delay in shipment of freight,** see Davis and Hooks v. R. R., 145-207; Branch v. R. R., 88-570, 77-347; Keeter v. R. R., 86-346—**in the service of process,** Taylor v. Harris, 82-25; Guilford v. Georgia, 109-310—**in the making of a tax deed to land within a year after sale,** Burgess v. Burgess, 117-447—**in the serving of case on appeal,** Mecke v. Mineral Co., 122-796; Guano Co. v. Hicks, 120-29; Arrington v. Arrington, 114-114; Walker v. Scott, 104-483; Turrentine v. R. R., 92-642; see section 591—**in filing application for a rehearing in supreme court,** Bird v. Gilliam, 123-63; Barcroft v. Roberts, 92-249—**in determining exact time court adjourns by limitation,** Taylor v. Ervin, 119-274—**in cases where act to be done "by" a certain time, or "within" a certain time,** In re Wittkowsky's Land, 143-247; Blalock v. Clark, 133-306; Cotton Mills v. Dunstan, 121-12; Burgess v. Burgess, 117-447—**in making tender to sheriff to redeem land sold for taxes,** Thomas v.

Nichols, 127-319—**in the filing of pleadings,** Howard v. R. R., 122-944; County Board v. State Board, 106-81—**in the defense of statute of limitations,** Johnston v. Lumber Co., 144-717; Cook v. Moore, 95-1—**in the filing of appeal bonds,** Chamblee v. Baker, 95-98—**in filing schedule of preferred debts where debtor has assigned,** Glanton v. Jacobs, 117-427.

Sunday not excluded in counting number of days delay of freight: Davis and Hooks v. R. R., 145-207; Branch v. R. R., 77-347; 88-570; Keeter v. R. R., 86-336—**or in counting time within which application for rehearing must be filed,** Davis and Hooks v. R. R., 145-207; citing Barcroft v. Roberts, 92-249.

888. Computation of, in publications. The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication.

Code, s. 602; C. C. P., s. 359.

See sections 443, 766, 770. See generally Guilford v. Georgia, 109-310.

CHAPTER 13.

CLERK OF SUPERIOR COURT.

I. Office of.

889. Includes judge of probate, which is abolished. The office or place of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court as clerks of said court, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court.

Code, s. 102. **For jurisdiction and general powers of clerk of superior court, see generally sections 352, 358, 710-725, 901. For special duties and powers with respect to different matters, see the chapters with reference to such matters. For liability on bond, see section 296.**

Although the office of probate judge is abolished, the powers and jurisdiction of that office are now exercised by the clerks of superior courts—not as the servant or ministerial officer, or acting as and for superior court, but as an independent tribunal of original jurisdiction: Edwards v. Cobb, 95-4.

The duties devolving upon the clerk under the old practice as probate judge are separate and distinct from his duties as clerk of the court: Brittain v. Mull, 91-498, referred to in Helms v. Austin, 116-753. **The exercise of judicial powers by ''clerk of court'' is the exercise of them by the ''court:''** Brittain v. Mull, 91-498.

Section referred to in McLaurin v. McLaurin, 106-333.

890. How elected; term of office. A clerk of the superior court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly. Clerks of the superior court shall hold office for four years.

Const., Art. IV, ss. 16, 17. **Appointee to fill vacancy holds till next election for members of general assembly:** Rodwell v. Rowland, 137-617; **overruling** Deloatch v. Rogers, 86-358.

891. How inducted into. The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county.

Code, s. 74; C. C. P., s. 139. **Acting before qualifying a misdemeanor, see section 3565. For liability on bond, see section 296. Deputy takes same oath of office as clerk:** Jackson v. Buchanan, 89-76.

892. When declared vacant. In case any clerk shall fail to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

Code, s. 76; C. C. P., s. 140. **Clerk can give security in lieu of bond, see section 268. See** Norfleet v. Staton, 73-546. **Appointee to fill vacancy holds until next election of members of general assembly:** Rodwell v. Rowland, 137-617, **overruling** Deloatch v. Rogers, 86-358.

The failure to give bond must be ascertained and declared by commissioners before judge can declare a vacancy: Buckman v. Comrs., 80-121. **Court not to interefere with discretion of commissioners in refusing bond tendered,** Ibid. **Where there are two claimants of a vacant clerkship, judge must act upon the prima facie title and admit the one possessing it, leaving the other to his remedy in quo warranto:** Clarke v. Carpenter, 81-309.

893. May be resigned. Any clerk of the superior court may resign his office to the judge of the superior court, residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy.

Const., Art. IV, s. 29; Code, s. 78.

894. When removed from. Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Code, s. 123; 1868-9, c. 201, s. 53.

895. How vacancies filled. In case the office of clerk of a superior court for a county shall become vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

Const., Art. IV, s. 29. **Appointee holds until next election for members of general assembly:** Rodwell v. Rowland, 137-617, **overruling** Deloatch v. Rogers, 86-358..

896. How furnished with stationery, etc. The requisite stationery, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person.

Code, ss. 82, 84, 113; C. C. P., s. 428.

897. Examined by solicitor. At every regular term of the superior court, the solicitor for the judicial district shall inspect the office of the clerk and report to the court in writing. If any solicitor shall fail or neglect to perform the duty hereby imposed on him, he shall be liable to a penalty of five hundred dollars to any person who shall sue for the same.

Code, s. 88; C. C. P., s. 147.

II. Deputies.

898. May be appointed. Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks.

Code, s. 75; R. C., c. 19, s. 15; 1777, c. 115, s. 86. **Deputy clerk can only be appointed in the mode here provided:** Shepherd v. Lane, 13-148. **Reason for creating the office stated** in Miller v. Miller, 89-405. **Deputy takes same oath as clerk:** Jackson v. Buchanan, 89-76. **Authority of deputy ceases upon death of clerk:** White v. Hill, 125-200. **Deputy may perform all duties of the office except such as are judicial, or where statute provides otherwise:** Miller v. Miller, 89-402. **He may issue warrant of attachment:** Jackson v. Buchanan, 89-74—**may issue executions,** Miller v. Miller, 89-402—**may probate deeds and other conveyances by force of statute,** Piland v. Taylor, 113-1; see section 989. **Clerk can not delegate deputy to discharge judicial functions:** Piland v. Taylor, 113-1. **The probate of a deed by a deputy is not the act of the principal but of the deputy, he having statutory authority:** Ibid; see section 938. **The certificate of a probate of a deed by a deputy clerk is of itself prima**

facie evidence of the deputy's appointment and qualification: Piland v. Taylor, 113-1. **The acts of a deputy who has not been properly qualified are void:** Sudderth v. Smyth, 35-452.

899. Record of appointment and discharge. Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index of the same, and shall furnish to the register of deeds of his county a transcript of such record; and such register of deeds shall record the same in the records of deeds in his office and make a cross-index thereof on the general index in his office. Whenever any such deputy clerk shall be removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "revoked" and the date of such revocation, and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts.

1899, c. 235, s. 3.

900. Clerk responsible for acts of. The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks.

1899, c. 235, s. 2. **Clerks are liable for the nonfeasance of a deputy, but deputy is not liable:** Coltraine v. McCain, 14-308 (this may be altered by this section). **For an unlawful act of deputy committed under color of the office, both clerk and deputy are liable:** Coltraine v. McCain, 14-308.

III. Powers.

901. Enumeration of. Every clerk has power—

1. To issue subpœnas to compel the attendance of any witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court.

2. To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office.

See section 989.

3. To issue commissions to take the testimony of any witness within or without this state.

See sections 1646, 1652.

4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

See Edwards v. Cobb, 95-9.

5. To enforce all lawful orders and decrees by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the state, and to be returned before him.

See sections 616, 618, 623, 627; also the sections as to the issuance of the different processes of the court.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state.

See section 1616.

7. To preserve order in his court and to punish contempts.

See In re Patterson, 99-418.

8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

See Wahab v. Smith, 82-229; Lovinier v. Pearce, 70-168.

10. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

11. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or if the justice be dead by his personal representative, of all records, papers dockets and books held by such justice by virtue or color of his office and to deliver the same to the successor in office of such justice.

12. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

See sections 989, 999, 1001.

13. To take proof of wills and grant letters testamentary and of administration.

See sections 16, 17, 3126.

14. To revoke letters testamentary and of administration.

See sections 34, 37, 38.

15. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

See sections 1758, 1766, 1767, 1770, 1771, 1774, 1782, 1783, 1806, 1890, 1891.

16. To bind out apprentices and to cancel the indentures in such cases.

See sections 184-189, 191.

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

As to auditing accounts of executors, administrators, etc., see sections 99, 103, 117, 118—commissioners to sell property, see section 725—guardians, see sections 1805, 1807.

18. To exercise jurisdiction conferred on him in every other case prescribed by law.

As to taking proofs and making orders in cases where clerk himself interested see Trenwith v. Smallwood, 111-134; Long v. Crews, 113-256; Lance v. Tainter, 137-249; Joines v. Johnson, 133-493; McAllister v. Purcell, 124-262; Blanton v. Bostic, 126-421; Land Co. v. Jennett, 128-3; Freeman v. Person, 106-251; see sections 989, 995, 1015. **Clerk has no common law or equity jurisdiction:** McCauley v. McCauley, 122-288. **For jurisdiction of clerk generally, see sections 352, 358, 710-725. For special duties and powers with respect to different specific matters, see chapters with reference to such matters.**

Code, ss. 103, 108; C. C. P., ss. 417, 418, 442; 1901, c. 614, s. 2.

902. When he can not exercise. No clerk can act as such in relation to any estate or proceeding—

1. If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

If clerk interested in commissions to executors, he is excluded from making allowances: Barlow v. Norfleet, 72-535. **It has been the practice for clerks to issue process either for or against themselves:** Evans v. Etheridge, 96-42. **No clerk can act as such in relation to any estate or proceeding if he has or claims to have an interest therein:** Land Co. v. Jennett, 128-3; Trenwith v. Smallwood, 111-134; Gregory v. Ellis, 82-225.

2. If he is so related to any person having or claiming such interest, that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases, unless the objection is made at the first hearing of the matter before him.

See Land Co. v. Jennett, 128-3; Trenwith v. Smallwood, 111-134.

3. If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

See Trenwith v. Smallwood, 111-134; also sections 989, 995.

4. If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

Action against administrator who was probate judge rightly transferred to district judge: Wilson v. Abrams, 70-324. **Clerk can not pass upon petition to sell land for assets filed by himself as executor:** Gregory v. Ellis, 82-225.

5. If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate.

Code, s. 104; C. C. P., s. 419; 1871-2, c. 196.

903. Exercise of, on waiver of disqualification. The parties may waive the disqualification specified in subdivisions one, two, three and five of the preceding section, and upon filing in the office such waiver in writing, the clerk shall act as in other cases.

Code, s. 105; C. C. P., s. 420.. **Waiver must be shown affirmatively. Questionable whether guardian ad litem can make such waiver:** Land Co. v. Jennett, 128-3; White v. Connelly, 105-71.

904. When can not exercise, cause removed. When any of the disqualifications specified in this chapter exist, and there is no waiver therof, or can be such waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district.

Code, s. 106; C. C. P., s. 421.

905. Exercised by judge, when. In all cases where the clerk of the superior court shall be executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it shall be his duty to order the proper record to be made by the clerk, and the accounts to be filed in court.

Code, s. 107; 1871-2, c. 197. **Should make summons returnable before him and then transfer to district judge:** Wilson v. Abrams, 70-324.

IV. Duties.

906. To receive official papers from predecessor. Immediately after he shall have given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books,

papers, moneys and property of his office, and give receipts for the same, and if any clerk shall refuse, or fail within a reasonable time after demand to deliver such records, books, papers, moneys and property, he shall be liable on his official bond for the value thereof.

Code, s. 81; C. C. P., s. 142. **Failure to deliver books, records, etc., misdemeanor, see sections 3576, 3592. After delivery of papers, liability ceases:** Gregory v. Morisey, 79-559. **Successor may sue on official bond for records, money, etc.., on ground of statutory requirements:** Peebles v. Boone, 116-57. **No order for delivery to duly elected clerk necessary;** Ibid.

907. To transfer records to successor, how compelled. Upon going out of office for whatever reason, any clerk of the superior, inferior, or criminal court, shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate), all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court, may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. And in case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, shall fail to transfer and deliver them as herein directed, he shall forfeit and pay to the state one thousand dollars, which shall be sued for by the prosecuting officer of that court.

Code, s. 124; R. C., c. 19, s. 14. **Remedy for failure to obey order for delivery of money, etc., to successor is by attachment and by suit for penalty:** O'Leary v. Harrison, 51-338. **This section concerns forfeitures only in case of refusal of clerk to do what is required of him in section 906:** Peebles v. Boone, 116-60. **No order necessary to compel former clerk to make transfer as directed unless he is in office temporarily by appointment:** Ibid.

908. Unperformed duties of outgoing clerk, how compelled. Whenever, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk shall have failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk; and such portion thereof as may be paid by the county, may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relation of the board of commissioners of the county.

Code, s. 87; R. C., c. 19, s. 19; 1844, c. 5, s. 6. **If retiring clerk failed to record a proceeding, judge may order it done as of proper date:** Foster v. Woodfin, 65-29.

909. When and where to keep office open. He shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock, a. m., to three o'clock, p. m., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit his office.

Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136. **One failure to keep office open on Monday for probate business is complete cause for forfeiture of office:** People v. Heaton, 77-18. **Quo warranto is proper remedy to enforce for forfeiture of office hereunder:** People v. Heaton, 77-18; State v. Norman, 82-687.

910. How leave of absence from office obtained. Upon application of any clerk of the superior court to the judge of the superior court, residing in the district in which said clerk resides, showing good and sufficient reason for said clerk absenting himself from his office, said judge may issue an order allowing said clerk to absent himself from his office for such time as said judge may deem proper: Provided, said clerk of the superior court shall at all times leave a competent deputy in charge of his office during his absence. The order of said resident judge granting relief shall be filed and recorded in the office of the clerk of the superior court of the county in which said clerk resides.

1903, c. 467. **Writs signed in blank by clerks and handed to attorneys for their use, if subsequently filled up by the latter, are regular and sufficient writs:** Croom v. Morrisey, 63-591.

911. To furnish blank process, bonds and undertakings. Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them.

Code, s. 3761; C. C. P., s. 559; 1868-9, c. 279, s. 558.

912. How papers must be filed. The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle,

and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment; and all such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor.

Code, ss. 86, 111; C. C. P., ss. 146, 426. **See sections 906, 907. Fee for "filing papers" is only for filing all papers after final judgment:** Guilford v. Comrs., 120-23.

913. To keep record; liable for records and papers. He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor.

Code, s. 82; C. C. P., s. 143; 1868-9; c. 159, s. 4.

914. To endorse date of issue on process. The clerk shall note on all precepts, process and executions the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do shall forfeit and pay one hundred dollars.

Code, s. 100.

915. Books to be kept. Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:

1. Summons docket, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

2. Judgment docket, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

3. Civil issue docket, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

Civil issue docket must contain the issues joined between parties, and only such notes and memoranda as are pertinent to such issues and their

preparation for trial: Walton v. McKesson, 101-428—**also all other matters for hearing before judge at a regular term,** Brown v. Rhinehardt, 112-776—**but if it conflicts with minute docket, latter prevails,** Walton v. McKesson, 101-428.

4. Cross-index to judgments, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket.

See Holman v. Miller, 103-120.

5. Criminal docket, which shall contain a note of every proceeding in each criminal action.

6. Minute docket, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

Minute docket is intended to and should contain a record of all proceedings of court in the order of occurrence, and such other entries as judge may direct: Walton v. McKesson, 101-428; Guilford v. Comrs., 120-28—**but if it fail to contain certain entries, those made on civil issue docket should not be disregarded; but if they conflict, the minute docket prevails,** Walton v. McKesson, 101-428.

7. Special proceedings docket, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

8. Minute docket, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

See Brittain v. Mull, 91-500; Edwards v. Cobb, 95-8.

9. Record of wills, which shall contain a record of all wills, with the certificates of probate thereof.

10. Record of appointments, which shall contain a record of appointments of executors, administrators, guardians, collectors and masters of apprentices, with revocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

Record is sufficient evidence of guardian's appointment: Topping v. Windley, 99-4.

11. Record of orders and decrees, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

12. Record of accounts, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of

executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

13. Record of settlements, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, commissioners, trustees under assignments for creditors, and guardians.

14. Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

15. Record of justices of the peace, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

16. Record of books, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records and books returned to him.

17. Cross-indexed of wills, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each devisor, and all deviseees as they are given in the will, together with the date of the probate of such will.

18. Cross-index of executors and administrators, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators made by the courts of their county, showing the name of the appointee, the name of the decedent, and date of appointment.

19. Cross-index of guardians, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

20. Record of fines and penalties, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

21. Lien docket, which shall contain a record of all notices of liens filed in his office, properly indexed showing the names of the lienor and lienee.

22. Record of appointment of receivers, which shall contain

a record of all appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

23. Record of corporations, which shall contain a record of the certificate of incorporation of all corporations chartered under general law, with principal office or place of business in his county.

24. Accounts of indigent orphans, which shall contain a record of all receipts from persons for money paid for indigent children.

25. Register of physicians and surgeons, which shall contain a list of the names and places of residence with date of registration of all persons registered by him as physicians and surgeons.

26. Register of dentists, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

27. Register of trained nurses, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

28. Permanent roll of registered voters, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

29. Record of payment of poll tax, which shall contain a list by townships of all persons certified to him by sheriff or tax collector as having paid their poll tax by May first.

30. Lunacy docket, which shall contain a record of all examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

31. Record of county treasurer's report, which shall contain an itemized statement of all fines and penalties paid to the county treasurer; which said itemized statement of fines and penalties received by the county treasurer shall be by him reported to the clerk on the first day of January, April, July and October, respectively, of each and every year.

Record prima facie correct and competent evidence against sureties: Davenport v. McKee, 98-500.

32. Nol. pros. with leave record, which shall contain a record of all cases in which a nolle prosequi with leave is entered in criminal actions, with the term of court at which the order is made, and which shall be cross-indexed.

Code, ss. 83, 95, 96, 97, 112, 1789; 1893, c. 52; 1899, c. 110; 1903, c. 51; 1901, c. 2, s. 9; 1899, c. 82; 1889, c. 181, s. 4; 1887, c. 178, s. 2; 1903, c. 359, s. 6; 1901, c. 550, s. 3; 1901, c. 89, s. 13; 1899, c. 1, s. 17; 1905, c. 360, s. 2. **For record of official reports, see section 919.**

V. Reports.

916. List of justices to secretary of state. The clerk of the superior court of each county in which justices of the peace are not elected by the qualified voters thereof on the first Monday in January preceding each regular session of the general assembly shall certify to the secretary of state a correct list of all justices of the peace in office in his county, the township in which each resides, the term of office of each, time of election or appointment, and when the respective terms of office of each expires. He shall also report the names of those elected or appointed justices of the peace, but who have failed to qualify, and when their terms of office began and the length thereof.

Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326.

917. Criminal statistics to attorney general. Within twenty days after the adjournment of any term of the superior court at which criminal causes were triable, the clerk thereof shall transmit to the office of the attorney general of the state a duly certified statement of the number of indictments finally disposed of at such court, specifying the number for each separate offense, the number on which convictions were had and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial, and also the name, age, occupation, sex, race and offense of every person convicted at such court, or pleading guilty of any offense, together with such other items of information in relation to such convicts and their offenses as the attorney general shall require, on a form prescribed by him. For every neglect of any clerk of said court he shall forfeit the sum of fifty dollars, to be adjudged in the superior court of Wake county on the motion of the attorney general, whose duty it is hereby made to make such motion at the first term of said court held after such neglect of any clerk.

1889, c. 341, ss. 1, 2, 3.

VI. Money in Hands of.

918. Of funds in hand of county commissioners. Clerks of the superior courts shall make an annual report of all public funds which may be in their hands on the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority, which report shall include a statement of all funds in the hands of said clerks by virtue or color of their office, and which may belong to persons or corporations. The said report shall be made to the board of county commis-

sioners and shall be addressed to the chairman thereof, and the said report shall give an itemized statement of said funds so held, with the date and source from which they were received, and the person to whom due, how invested and where, and in whose name deposited, giving the date of any certificate of deposit, or other evidence of investment of said fund, and the rate of interest the same is drawing, and said report shall be subscribed and verified by the oath of the party making the same before any person allowed to administer oaths.

1891, c. 580. **Failure to report or swearing falsely to same a misdemeanor, see section 3605.**

919. How approved, recorded, and published. The board of commissioners shall refer all itemized statements made by the clerks of the superior courts to a special committee of their board, who shall compare the same with the records of the clerk's office from which said report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which books shall be styled "Record of Official Reports," with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the date of registration, the page of the "Record of Official Reports" upon which the same is registered, sign the same and file it in his office. The said register shall also cause a copy of said report to be published one time in some newspaper of general circulation published in the county of said register and also posted at the courthouse door within twenty days after filing said reports; and if no newspaper is published in the county the posting of said report at the courthouse door shall be a sufficient publication. The cost of publishing said report shall be paid by the county.

Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; 1874-5, c. 151; 1876-7, c. 276.

920. Compelled by commissioners. If any clerk shall fail to report, or if after a report has been made, the board of county commissioners shall have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action.

Code, s. 92; 1891, c. 580, s. 2; 1874-5, c. 151, s. 3; 1876-7, c. 276.

921. Paid to persons entitled. The said clerks shall, on or before the first day of January in every year after the statements required in the foregoing sections are made, account with and pay to the persons entitled to receive the same all such balances reported as aforesaid to be in their hands.

Code, s. 1865; R. C., c. 73, s. 2; 1823, c. 1186, s. 2; 1831, c. 3, ss. 1, 3; 1893, c. 14, s. 1. **"Account" means written statement of receipts and payments; when settlement is intended, additional words are used:** State v. Dunn, 134-668.

922. Fees of jurors and witnesses, when paid to treasurer. All moneys due jurors and witnesses which shall remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it shall be the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports.

1891, c. 580, s. 4; 1893, c. 14, s. 3.

923. Used by public till called for. The money aforesaid, while held by the clerks, shall be paid on application, to the persons entitled thereto; and after it shall cease to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner.

Code, s. 1869; R. C., c. 73, s. 6; 1828, c. 41, s. 1.

924. Paid indigent children, when. Whenever any moneys less in amount than twenty dollars shall be paid into court for indigent or needy children for whom no one will become guardian, upon satisfactory proof of their necessities, the clerk may pay the same upon his own motion or order to the mother or other person who has charge of said minor or to some discreet neighbor of said minor to be used for the benefit or maintenance of said minor. Such person shall be solvent and shall faithfully apply any money so paid to him or her. The clerk shall take a receipt from the person to whom the same is paid and record it in a book entitled record of amounts paid for indigent children, and the same shall be a valid acquittance for said clerk.

1899, c. 82.

A 1409
P 1078

CHAPTER 14.

COMMISSIONERS OF AFFIDAVITS.

925. Clerks and notaries authorized to take affidavits. The clerks of the supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the state; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notorial seal.

Code, s. 631. **Clerks of courts in other states as commissioners:** Barcello v. Hapgood, 118-712. **Courts take judicial knowledge of their seals:** Ibid. **For probates generally, see sections 989-1030.**

926. Governor appoints; term of office; powers. The governor is hereby authorized to appoint and commission one or more commissioners in any foreign country, state or republic; and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. And such acknowledgement or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner shall have the same force and effect for all purposes, as if the same had been made or taken before any competent authority in this state.

Code, s. 632. **General powers of commissioner:** Barcello v. Hapgood, 118-712; Buggy Co. v. Pegram, 102-540; Maphis v. Pegram, 107-505.

PROBATE OF DEEDS BY. Distinction between probate by clerk and by commissioner: Evans v. Etheridge, 99-43. **Commissioner need not affix seal,** Johnson v. Duvall, 135-642. **A judicial or quasi judicial act:** Long v. Crews, 113-256. **Where commissioner not authorized to take probates, clerk's order to register invalid, when:** Long v. Crews, 113-256; Robinson v. Willoughby, 70-358. **Acknowledgment by resident or nonresident allowed before commissioner:** Buggy Co. v. Pegram, 102-540; Maphis v. Pegram, 107-505.

Old cases under former statutes: Simmons v. Gholson, 50-401; Smith v. Castrix, 27-518.

927. How qualify; may administer oaths, take depositions, affidavits, etc. Every commissioner appointed by the governor aforesaid, before he shall proceed to perform any duty by virtue of this chapter, shall take and subscribe in oath before a justice of the peace in the city or county in which such commissioner shall reside well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. And thereupon he shall have full power and authority to administer an oath or affirmation to any person, who shall be willing or desirous to make such oath or affirmation before him, and to take depositions and to examine the witnesses under any commission emanating from the courts of this state, relating to any cause depending, or to be brought in said courts, and every deposition, affidavit, or affirmation made before him shall be as valid as if taken before any proper officer in this state.

Code, s. 633. **Commissioner not required to affix seal, when:** Johnson v. Duvall, 135-642. **Verification of pleadings before commissioner:** Hinton v. Ins. Co., 116-22; Young v. Rollins, 85-485.

928. Appointments, where recorded; certified copies evidence. It shall be the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner shall be filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the state, who shall record the certificate of the secretary at length; and all removals of commissioners by the governor, and all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner; and a certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the secretary of state, shall be sufficient evidence of the appointment or removal of such commissioner.

Code, s. 634.. **See** Evans v Etheridge, 99-46.

929. Secretary of state to prepare and publish list in public laws. The secretary of state shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the states, territory or district or foreign country for which

such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death.

Code, ss. 635, 636, 637, 639. **See** Evans v. Etheridge, 99-46.

930. Published list conclusive evidence. The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof.

Code, s. 638. **See** Evans v. Etheridge, 99-46.

931. Clerks of courts of record in other states are commissioners of deeds. Every clerk of a court of record in any other state shall have full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this state.

Code, s. 640. **For powers as to probate of deeds, see sections 989-991. See** Barcello v. Hapgood, 118-727; Hinton v. Ins. Co., 116-22.

CHAPTER 15.

COMMON LAW.

932. Common law declared to be in force. All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state.

Code, s. 641; R. C., c. 22; 1715, c. 5, ss. 2, 3; 1778, c. 133. **The laws of our state rest for a foundation on the common law of England:** In re Bryan, 60-38. **Presumed that common law of other states the same as of this state:** Lassiter v. R. R., 136-89; Hall v. Rwy., 146- ; see also Brown v. Pratt, 56-202; Griffin v. Carter, 40-413.

PREVAILS. As to probate of wills, except as statute changes: Crump v. Morgan, 38-98—**as to no allowance of alimony in divorce a vinculo,**

Duffy v. Duffy, 120-346—**as to Jews, infidels, etc., taking oaths,** Shaw v. Moore, 49-25—**presumptively in states that were formerly English colonies,** Gooch v. Faucett, 122-270; Cade v. Davis, 96-139; Jones v. Reddick, 79-292; Brown v. Pratt, 56-202; Griffin v. Carter, 40-213.

DOES NOT PREVAIL. As to rules of practice in deciding issues of fact in probate of wills: Downey v. Murphey, 18-92—**as to outlawry,** Sherrod v. Davis, 2-282—**as to fines and recoveries,** Barfield v. Combs, 15-516—**as to the demurring of the parol,** Baker v. Long, 2-1—**as to forfeiture of property for crime,** White v. Fort, 10-264—**as to special customs,** Jones v. Allen, 27-473; Winder v. Blake, 49-336; Morehead v. Brown, 51-370.

This section cited but not construed in Greenleaf v. Bank, 133-295.

CHAPTER 16.

CONSTABLES.

933. How elected. In each township there shall be a constable, elected by the voters theerof, who shall hold his office for two years.

Const., Art. IV, s. 24. **As to town constables, see sections 2938, 2939. The constitutional provision that officers shall hold until successors are qualified does not apply to constables:** King v. McLure, 84-153.

934. Oath of office to be taken. All constables, before they shall be qualified to act, shall take before the board of county commissioners the oaths prescribed for public officers, and also an oath of office.

Code, s. 642; R. C., c. 24, s. 8. **For bond of, see section 302.**

935. Special constables appointed by justices. For the better executing any precept or mandate in extradordinary cases, any justice of the peace may direct the same in the absence of, or for want of a constable, to any person not being a party, who shall be obliged to execute the same, under like penalty that any constable would be liable to.

Code, s. 645. **Justice can appoint a special constable hereunder:** State v. Wynne, 118-1206; State v. Armistead, 106-639; State v. Dula, 100-424—**and his decision is conclusive as to when case "extraordinary,"** State v. Wynne, 118-1206; State v. Armistead, 106-639; State v. Dula, 100-423—**yet justice should state in special deputations that it is done for want of regular officer,** State v. Dula, 100-423. **Powers of special constable set forth** in State v. Armistead, 106-639. **Legality of prisoner's custody depends upon validity of deputation and not on sufficiency of mittimus:** Ibid. **Special officer must show warrant if demanded when making arrest:** State v. Dula, 100-423.

150-805

936. Vacancies filled by board of commissioners. Upon the death, failure to qualify or removal of any constable out of the township in which he was elected or appointed constable, the board of commissioners may appoint another person to fill the vacancy, who shall be qualified and act until the next election of constables.

Code, s. 646; R. C., c. 24, s. 6. **Vacancy filled by commissioners:** King v. McLure, 84-153.

937. Powers and duties. Constables are hereby invested with, and may execute the same power and authority as they have been by law heretofore vested with, and have executed; and, in discharge of their duties, they shall execute all precepts and processes of whatever nature to them directed by any justice of the peace or other competent authority within their county or upon any bay, river, or creek adjoining thereto; and the said precepts and processes shall be returned to the magistrate, or other proper authority.

Code, s. 643; R. C., c. 24, s. 9.

For powers and duties of town constables, see section 2939. For liability upon official bond, see section 302.

A township constable has power to summons appraisers to lay off exemptions where execution issues from justice's court: McAuley v. Morris, 101-369—**and to administer to them the oath,** Ibid. **Process addressed "to any constable" can be served by any constable of the county:** Baker v. Brem, 127-324 (in dissenting opinion). **A special constable appointed as a "special constable" in writing, has general powers of a regular constable with reference to that case:** State v. Armistead, 106-639.

Township constable has no power to serve process not directed to him: McGloughan v. Mitchell, 126-682—**nor to inquire into regularity of criminal process where jurisdiction exists and warrant otherwise valid:** State v. Furguson, 76-197; Welch v. Scott, 27-72—**nor to serve case on appeal to supreme court,** Forte v. Boone, 114-176.

Judgment not rendered invalid by failure of constable to sign return, McElrath v. Butler, 29-398.

938. Shall execute notices within justice's jurisdiction. Constables shall likewise execute, within the places aforesaid, all notices tendered to them, which are required by law to be given for the commencement, or in the prosecution of any cause before a justice of the peace; and the service thereof shall be made by delivering a copy to the person to be notified or by leaving a copy at his usual place of abode, if in the jurisdiction of the constable, which service, with the time thereof, he shall return on the notice, and such return shall be evidence of its service. On demand they shall deliver the notice to the party at whose instance it was issued.

Code, s. 644; R. C., c 24, s. 10.

See also section 439. Constable can not serve case on appeal to supreme court: Forte v. Boone, 114-176.

CHAPTER 17.

CONTEMPT.

939. What constitutes; common law repealed; appeals; duty of solicitor and attorney general. Any person guilty of any of the following acts may be punished for contempt:

Power to commit or fine for contempt is essential to the existence of every court: Ex parte McCown, 139-104; Scott v. Fishblate, 117-265; State v. Woodfin, 27-199. **Contempt itself and the history of punishment for contempt reviewed** in Ex parte McCown, 139-104. **Whenever the law affords any other adequate remedy, proceeding by attachment for contempt is in discretion of the court:** Murray v. Berry, 113-46. **Advice of counsel no excuse for contempt:** Green v. Griffin, 95-55—**except where it is directed at the interpretation of the court's mandate,** Ibid. **Punishment for contempt no bar to indictment:** In re Griffin, 98-225; State v. Woodfin, 27-199. **Practice explained and sufficiency of defense considered:** Kane v. Haywood, 66-1. **One prima facie guilty may be required to pay costs though rule discharged:** Bond v. Bond, 69-97. **Proceeding for contempt can not be withdrawn in superior court after appeal nor in supreme court by one creditor where there are other creditors with rights to be protected:** Bristol v. Pearson, 109-718. **Where motion to attach for contempt refused it is a bar to further proceedings upon same facts:** Wilson v. Craige, 113-463. **Officer sending person to jail for contempt not civilly liable even though he did it maliciously and erroneously:** Scott v. Fishblate, 117-265. **Receiver not punishable for contempt for refusing to turn over property to appointee of another court until question of priority decided:** Worth v. Bank, 121-343. **Where respondent appeared before judge outside of the district and answered, he will be deemed to have waived venue:** Herring v. Pugh, 126-852.

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

Judge assaulted while away from courthouse during term of court: Ex parte McCown, 139-95. **Disorderly behavior in court:** State v. Mott, 49-449. **Fighting in presence of court:** State v. Woodfin, 27-199. **What constitutes "in presence of court" discussed** in Ex parte McCown, 139-95.

2. Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

Contempt before referee punished by court appointing him: LaFontaine v. Underwriters, 83-132.

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

Fighting in presence of court: State v. Woodfin, 27-199. **Disorderly behavior:** State v. Moot, 49-449.

4. Wilful disobedience of any process or order lawfully issued by any court.

Disobedience by party or person other than officer: In re Scarborough Will, 139-423; Green v. Green, 130-578, 140-651, 143-406; Williamson v. Pender, 127-481; Herring v. Pugh, 126-852; Delozier v. Bird, 123-689; Shooting Club v. Thomas, 120-334; Childs v. Wiseman, 119-497; Wilson v. Craige, 113-463; Zimmerman v. Zimmerman, 113-432; Murray v. Berry, 113-46; Bristol v. Pearson, 109-718; Fleming v. Patterson, 99-404; Kron v. Smith, 96-386; Thompson v. Onley, 96-9; Green v. Griffin, 95-50; Young v. Rollins, 90-128; Boyett v. Vaughan, 89-27; Baker v. Cordon, 86-116; In re Walker, 82-95; In re Davis, 81-72; Pain v. Pain, 80-322; Daniel v. Owen, 72-340; Phillips v. Trezevant, 70-176; Bond v. Bond, 69-97; Morris v. Whitehead, 65-637; Wood v. Wood, 61-538; Pritchard v. Oldham, 53-439—**by county commissioners,** Cromartie v. Comrs., 87-134—**by officer,** In re Patterson, 99-407; Ex parte Summers, 27-149—**by public administrator,** In re Brinson, 73-278. **Disobedience of mandamus,** Cromartie v. Comrs., 87-134—**of subpoena,** State v. Aiken, 113-651. **The act abolishing imprisonment for debt does not embrace cases of attachment for failure to obey order of court:** Wood v. Wood, 61-538. **Where language in order is plain, it is no defense to charge of disobedience of same, that language was not understood:** Baker v. Cordon, 86-116.

5. Resistance wilfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory.

Witness refusing to answer questions in superior court: In re Briggs, 135-118—**before commissioner to take examination,** Fertilizer Co. v. Taylor, 112-145—**before referee,** LaFontaine v. Underwriters, 83-132.

7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.

Inaccurate report of proceedings of court, or criticism by newspaper: In re Robinson, 117-533; In re Deaton, 105-59; Ex parte Biggs, 64-202. **Libelous matter by attorney about court:** In re Moore, 63-398; Ex parte Biggs, 64-202. **As to publications made by an attorney in his own newspaper,** Ibid. **Sworn answer is conclusive as to intent with which publication made:** In re Robinson, 117-533; Ex parte Biggs, 64-202; In re Moore, 63-397.

8. Misbehavior of any officer of the court in any official transaction.

Attorney's failure to pay over money collected for client: Kane v. Hay-

wood, 66-1. **Negligence of attorney in conduct of case:** Robins ex parte, 63-312. **Where justice of the peace defaces appeal bond and refuses to make return, held misdemeanor but not contempt:** Weaver v. Hamilton, 47-343. **Refusal of clerk superior court to send up record:** Te-Gan-Tossee v. Rogers, 9-567.

The several acts, neglects and ommissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there be any parts of the common law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled.

Any person adjudged to be guilty of contempt under this section shall have the right to appeal to the supreme court in the same manner as is provided for appeals in criminal actions: Provided, that such right of appeal shall not apply to the contempt described and defined in subsections one, two, three and six: Provided further, that such right of appeal shall not apply to the contempt described and defined in subsections four and five; if such contempt shall be committed in the presence of the court: Provided further, that in all cases where a rule for contempt is issued by any court, referee or other officer the solicitor shall appear for the court or other officer issuing the rule, and in case of appeal to the supreme court the attorney general shall appear for the court or other officer by whom the rule was issued.

Legislature can not deprive courts of inherent right to punish for contempt committed in presence of court: Ex parte McCown, 139-95; In re Robinson, 117-533; In re Patterson, 99-418; In re Oldham, 89-26; Ex parte Schenck, 65-366—**but constitutional inhibition is not infringed by legislature in specifying what acts shall constitute contempt:** In re Oldham, 89-23. **Where contempt not committed in presence of court legislature may regulate power of court:** In re Robinson, 117-538; In re Oldham, 89-23. **Appeal does not lie where offense committed in presence of court:** Ex parte McCown, 139-95; In re Deaton, 105-59; Scott v. Fishblate, 117-265; Young v. Rollins, 90-131; In re Davis, 81-75; Biggs ex parte, 64-202; State v. Mott, 49-449; State v. Woodfin, 27-199; Ex parte Summers, 27-153.

Appeal lies where offense not committed in presence of court: Ex parte McCown, 139-95; In re Deaton, 105-59; Cromartie v. Comrs., 85-211; In re Davis, 81-74; Ex parte Robins, 63-319.

Code, s. 648; 1905, c. 449.

940. Punishment. Punishment for contempt for matters set forth in the preceding section shall be by fine not to exceed two hundred

and fifty dollars, or imprisonment not to exceed thirty days or both, in the discretion of the court.

Code, s. 649. **Punishment according to statute:** Ex parte McCown, 139-122; Scott v. Fishblate, 117-265; Zimmerman v. Zimmerman, 113-432; State v. Aiken, 113-651. **Punishment contrary to statute:** In re Deaton, 105-59; In re Patterson, 99-407; In re Walker, 82-95. **Distinction between imprisonment to compel obedience to order of court and punishment for contempt in disobeying order pointed out:** In re Patterson, 99-417; Cromartie v. Comrs., 85-211. **Fine can not be paid to party aggrieved but must go to state:** Morris v. Whitehead, 65-637; In re Rhodes, 65-518.

941. Court may punish summarily. Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

Code, s. 650. **Right of court to punish summarily:** Ex parte McCown, 139-95; In re Briggs, 135-141 (concurring opinion); Baker v. Cordon, 86-120; State v. Mott, 49-449; Ex parte Summers, 27-152; State v. Yancey, 4-133—**without giving respondent a jury trial,** In re Deaton, 105-64; Baker v. Cordon, 86-120 and cases cited.

Facts found must be set out by judge: Ex parte McCown, 139-99; In re Deaton, 105-59; Young v. Rollins, 90-131; State v. Mott, 49-449—**and such facts found by superior court judge are conclusive,** Ex parte McCown, 139-99; In re Deaton, 105-59; Young v. Rollins, 90-125—**and are not reviewable except for purpose of passing upon sufficiency to warrant judgment,** Green v. Green, 130-578—**but facts found by inferior court may be reviewed on appeal by superior court,** In re Deaton, 105-59; State v. Aiken, 113-653. **Where court finds facts, revising tribunal on habeas corpus may say whether they constitute contempt:** Ex parte Summers, 27-149.

942. Who may punish. Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or corporation commissioner, shall have power to punish for contempt while sitting for the trial of causes or engaged in official duties.

Code, ss. 651, 652. **Cases where punishment was properly within power of supreme court:** In re Moore, 63-397—**of judge of superior court,** Ex parte McCown, 139-95; In re Briggs, 135-118; Williamson v. Pender, 127-487; Herring v. Pugh, 126-852; Shooting Club v. Thomas, 120-334; Childs v. Wiseman, 119-498; Murray v. Berry, 113-46; In re Patterson, 99-407; Thompson v. Onley, 96-10; Green v. Griffin, 95-50; Cromartie v. Comrs., 85-211; In re Walker, 82-95; In re Davis, 81-72; Bond v. Bond, 69-97; Morris v. Whitehead, 65-637; In re Rhodes, 65-518; Ex parte Biggs, 64-

202; Ex parte Robins, 63-319; Ex parte Schenck, 65-353; State v. Mott, 49-449; State v. Woodfin, 27-199—**of clerk superior court,** In re Scarborough, 139-423; In re Brinson, 73-278—**of mayor of town,** Scott v. Fishblate, 117-265; State v. Aiken, 113-651; In re Deaton, 105-59.

Contempt committed before referee punished by court ordering reference: LaFontaine v. Underwriters, 83-132. **Contempt before commissioner punished by court appointing same:** Fertilizer Co. v. Taylor, 112-141.

943. Order to show cause when not committed in presence of court. Whenever the contempt shall not have been committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order, the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter.

Code, s. 653. **Procedure under this section:** Ex parte McCown, 139-122; Bristol v. Pearson, 109-718; In re Deaton, 105-62; In re Davis, 81-72. **Where answer negatives under oath intentional contempt, rule discharged:** In re Robinson, 117-533; Kron v. Smith, 96-386; Boyett v. Vaughan, 89-27; Baker v. Cordon, 86-120; In re Walker, 82-95; Ex parte Biggs, 64-217; In re Moore, 63-398—**but where it is in the power of party to obey order of court he can not purge himself of contempt by answer disclaiming intention to commit:** Herring v. Pugh, 126-852; see Smith v. Smith, 92-304. **Inability to comply with order of court, when made to appear, discharges rule:** Boyett v. Vaughan, 89-27; Pain v. Pain, 80-325; Kane v. Haywood, 66-1.

Where tax is up to full constitutional limit, county commmissioners are not in contempt for failure to pay debt as ordered: Cromartie v. Comrs., 87-134. **Sufficiency of return of respondent to rule in order that it be discharged:** Smith v. Smith, 92-304.

944. What constitutes offense punished as for contempt. Every court of record shall have power to punish as for contempt, when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

Proceedings should be based on affidavits: In re Odum, 133-250; In re Deaton, 105-59. **Failure to base proceedings on affidavits is waived by contemnor being and making answer to rule:** In re Odum, 133-250. **Judge must find facts and file same:** Ibid. **Disavowal of imputed intent relieves respondent only when intention is gravamen of offense:** In re Gorham, 129-489; In re Young, 137-552. **Respondent has no right to jury trial:** In re Gorham, 129-481—**and no right to have findings of fact of judge,**

there being evidence, reviewed on appeal: In re Young, 137-552; In re Gorham, 129-481. **Proceedings as for contempt apply only to civil actions, except subsections 4, 5 and 6:** In re Deaton, 105-59.

1. Any clerk, sheriff, register, solicitor, attorney, counsellor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed or prejudiced for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

2. Parties to suits, attorneys, and all other persons for the nonpayment of any sum of money ordered by such court, in cases where execution can not be awarded for the collection of the same.

3. All persons for assuming to be officers, attorneys or counsellors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

Unlawful interference with proceedings by party: In re Young, 137-552; In re Odum, 133-250; In re Oldham, 89-23—**by attorney,** In re Gorham, 129-481.

4. All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

Witness refusing to answer question before commissioner: Fertilizer Co. v. Taylor, 112-141.

5. Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom.

Juror conversing with party: In re Odum, 133-251; In re Gorham, 129-489.

6. All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

7. All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state to enforce the civil remedies or protect the rights of any party to an action.

Right of court to punish under this section: Cromartie v. Comrs., 85-215. **Any person disobeying order of court, guilty, see section 684.** Code, ss. 654, 656.

945. Proceedings as for contempt, how prosecuted. Proceedings

as for contempt shall be prosecuted and carried on, as provided in provisional remedies.

Code, s. 655. **For refusal to produce books of corporations, see sections 1215 et seq.**

CHAPTER 18.

CONVEYANCES.

I. Construction.

946. Construed to be in fee, when. When real estate shall be conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heirs" shall be used or not, unless such conveyance shall, in plain and express words, show, or it shall be plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

Code, s. 1280; 1879, c. 148. **Deed and registry of conveyance destroyed, presumed to convey fee-simple, see section 1602.**

149-223
149-394
152-225

This section provides same rule of construction for deeds as for devises: Vickers v. Leigh, 104-257. **Word "heirs" not necessary to create fee:** Gray v. Hawkins, 133-5; Jarvis v. Davis, 99-40—**and conveyances without word "heirs" construed to be in fee,** Fulbright v. Yoder, 113-457; Starnes v. Hill, 112-25—**unless contrary intention plainly appears,** Fulbright v. Yoder, 113-457.

AS TO CONVEYANCES PRIOR TO THIS ENACTMENT. The word "heirs" indispensable to convey fee: Smith v. Proctor, 139-314; Allen v. Baskerville, 123-127; Ray v. Comrs., 110-171; Batchelor v. Whitaker, 88-350; Stell v. Barham, 87-66; Register v. Rowell, 48-312; Snell v. Young, 25-379; Wiggs v. Saunders, 20-618; Roberts v. Forsythe, 14-26—**exempt in devises and equitable estates where clear intent to pass fee,** Smith v. Proctor, 139-314 and cases cited; Vickers v. Leigh, 104-248; Holmes v. Holmes, 86-205. **For cases wherein question arises as to whether word "heirs" is so located in deed as to comply with rule creating fee simple,** see Smith v. Proctor, 139-314; Mitchell v. Mitchell, 108-542; Anderson v. Logan, 105-266; Winborne v. Downing, 105-20; Staton v. Mullis, 92-623; Graybeal v. Davis, 95-508; Hicks v. Bullock, 96-164; Bunn v. Wells, 94-67; Ricks v. Pulliam, 94-225; Stell v. Barham, 87-62; Phillips v. Thompson, 73-543; Phillips v. Davis, 69-117; Waugh v. Miller, 75-127; Allen v. Bowen, 74-155; Armfield v. Walker, 27-580. **Intention of grantor to be considered in interpretation:** Smith v. Proctor, 139-314; Fulbright v. Yoder, 113-456; Vickers v. Leigh, 104-248; Hicks v. Bullock, 96-164; Ricks v. Pulliam, 94-225; Winborne v. Downing, 105-20; Bunn v. Wells, 94-67. **For cases where no words of inheritance but deed or will shows on its face intention to**

convey fee, and it is sought to show that word of inheritance omitted by mistake, see Anderson v. Logan, 105-266.

This section merely referred to in Griffin v. Thomas, 128-317; Jenkins v. Daniels, 125-170.

947. Attornment unnecessary, conveyance of reversions, etc. Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance.

Code, s. 1764; 4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17.

948. Vagueness of description. No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing.

1891, c. 465, s. 2. **For vagueness of description in pleadings, see section 1605. Section does not act retrospectively:** Hemphill v. Annis, 119-514—**but if it did word "description" used therein imports such description as can be aided by parol proof,** Ibid. **A deed failing to describe land is as void as it was prior to this enactment:** Moore v. Fowle, 139-53.

949. Conveyances to slaves. Whenever it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same shall have been conveyed by deed or parol, and the bargainee or donee has been placed into actual possession of the same, then and in that case such gift or conveyance shall have the force and effect of transferring the legal title to the said lands and tenements to such bargainee or donee: Provided, such possession shall have continued for the term of ten years prior to the ninth day of March, one thousand eight hundred and seventy: Provided further, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty-six, shall not be held as an abandonment or discontinuance of the possession: Provided also, that this section shall not affect the interest of a bona fide purchaser for value from the grantor or bargainor of the lands or tenements in dispute.

Code, s. 1278; 1869-70, c. 77. **Section not applicable to case where person having no title himself made parol conveyance of land to slave and put slave in possession more than ten years prior to passage of section:** Buie v. Carver, 75-559—**but section only applies to cases where alleged donor or vendor had title himself,** Ibid. **See** Jervis v. Lewellyn, 130-617; McCanless v. Reynolds, 74-301.

949a. Conveyances by certain officers where seal not affixed validated. Any deed executed prior to the first day of January, one thousand eight hundred and ninety-five, by any sheriff, commissioner or other officer authorized to execute a deed, by virtue of his office or appointment, and said sheriff, commissioner or other officer shall have omitted to affix a seal after his signature, the said deed shall be good and valid, notwithstanding that the seal has been omitted: Provided, said deed be sufficient in other respects to pass the title to the land therein described.

1907, c. 807.

II. Officer Not in Office.

950. Executed by ex-officer, when. Whenever any sheriff, coroner, constable or tax collector by virtue of his office shall have sold any real or personal estate, and shall go out of office before executing a proper conveyance therefor, he may execute the same after his term of office shall have expired.

Code, s. 1267; R. C., c. 37, s. 30. **Tax deed may be executed by ex-sheriff hereunder:** Mfg. Co. v. Rosey, 144-370. **This section gives no power to ex-clerks to execute deeds:** Shew v. Call, 119-450.

153-517

Recitals in sheriff's deed are prima facie evidence of sale and execution, and rule not varied by fact that deed was made by sheriff after he had gone out of office when recitals correspond with return upon execution made while in possession of office: Curlee v. Smith, 91-172.

Section merely referred to in Stewart v. Pergusson, 133-284; Millsaps v. McCormick, 71-533.

951. Executed by successor, when. Whenever any sheriff, coroner, constable or tax collector, by virtue of his office shall have sold any real or personal estate, and such officer shall die or remove from the state before executing a proper conveyance therefor, or whenever a sheriff or tax collector shall die having a tax list in his hands for collection, and his personal representative or surety, in collecting such taxes, shall make sale according to law, his successor in such office shall execute conveyances for the property so sold to the person entitled.

Code, s. 1267; 1891, c. 242. **See also section 2905. Deed made by succeeding sheriff or coroner operates to pass title to what was sold:** Edwards

v. Tipton, 77-222—**but is not evidence to show what was sold, as its recitals are only hearsay:** Edwards v. Tipton, 77-222; see McPherson v. Hussey, 17-323. **Before succeeding officer conveys property to purchaser, he can require clear and conclusive evidence that sale was made by predecessor:** Isler v. Andrews, 66-552—**and that price was paid to him,** Ibid; Harris v. Irwin, 29-432.

III. By Husband and Wife.

952. Of wife's land; how proven. Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided and executed by her husband also, shall be valid in law to pass, bind or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby.

153-443

Code, s. 1256; 1899, c. 235, s. 9; C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15. **See chapter entitled "Married Women." This section not in conflict with constitutional guaranty to wife of her separate estate:** Southerland v. Hunter, 93-310; Ferguson v. Kinsland, 93-337. **Married woman can be bound as to her land only by her deed, duly executed with the written assent of her husband and with her privy examination:** Smith v. Bruton, 137-79; Tillery v. Land, 136-541; Lineberger v. Tidwell, 104-506; Ferguson v. Kinsland, 93-337; Towles v. Fisher, 77-443; Green v. Branton, 16-500; see under paragraph below on "Private Examination, etc."—**or by judgment of court of competent jurisdiction,** Smith v. Bruton, 137-79; Green v. Branton, 16-500—**and she can not bind herself by agreeing to arbitrate title to land owned by her,** Smith v. Bruton, 137-79. **Deeds executed by married woman in another state to lands in this state must be acknowledged or proven according to law of this state:** Smith v. Ingram, 130-100; Armstrong v. Best, 112-59; Taylor v. Sharp, 108-377; Jones v. Gerock, 59-190. **Deed executed by married woman with her husband and delivered is color of title even though no private examination taken:** Perry

v. Perry, 99-270; but see Cook v. Pittman, 144-530. **Deed without private examination is no estoppel to married woman:** Smith v. Ingram, 130-107, citing Miller v. Bumgardner, 109-412. **Where husband of married woman does not join in conveyance of her land and she is not privily examined as to her assent to deed, attempted conveyance is nullity:** Scott v. Battle, 85-184; Holmes v. Holmes, 86-205. **Mortgage deed of husband and wife properly executed, conveying wife's land to secure payment of debt, is binding upon wife:** Newhart v. Peters, 80-166. **Contract to pay for labor and material contracted for dwelling on wife's land, describing it, signed by husband and wife, acknowledged by them, and with privy examination of wife, is binding upon her separate real estate by necessary implication, though she does not expressly charge it upon her estate:** Ball v. Paquin, 140-83. **Delivery of deed will not be presumed from acknowledgment of husband and acknowledgment of privy examination of wife:** Tarlton v. Griggs, 131-216. **As between parties, married woman may, with written consent of husband, charge her land with payment of debt without executing mortgage:** Bank v. Ireland, 122-571.

Husband's assent to wife's conveyance is necessary: Walton v. Bristol, 125-419; Loan Asso. v. Black, 119-323; Farthing v. Shields, 106-289; Wood v. Wheeler, 106-512; Harris v. Jenkins, 72-183—**and such assent is expressed by his signing and acknowledging deed with wife,** Jennings v. Hinton, 126-51; Brinkley v. Ballance, 126-397; Bank v. Ireland, 122-571; Green v. Bennett, 120-394; Jones v. Craigmiles, 114-613; Farthing v. Shields, 106 289; Flaum v. Wallace, 103-296; Harris v. Jenkins, 72-186.

PRIVATE EXAMINATION OF WIFE. For form of examination, see sections 1003 and 1004. For officer before whom taken, see section 955. Necessary to convey her interest in land and to charge her separate real estate with payment of debts: Ball v. Paquin, 140-92; Smith v. Bruton, 137-79; Harvey v. Johnson, 133-352; Bank v. Howell, 118-271; Bank v. Ireland, 122-571; McCaskill v. McKinnon, 121-214; Bates v. Sultan, 117-94; McMillan v. Gambill 106-359; Thompson v. Smith, 106-357; Farthing v. Shields, 106-289; Thurber v. LaRogue, 105-301; Holmes v. Holmes, 86-205; Scott v. Battle, 85-184; Newhart v. Peters, 80-166; see section 2094—**and this is so as to her equitable estate in lands vested in her,** Clayton v. Rose, 87-106—**unless power is given her in instrument creating trust to convey as feme sole,** Ibid. **Though certificate of examination regular on its face, wife may show that in fact no examination took place:** Davis v. Davis, 146-;—**but the burden is upon her to do so by clear, strong and convincing proof,** Ibid; also Lumber Co. v. Leonard, 145-339; Benedict v. Jones, 129-470. **Cases in which it is sought to set aside private examination as void, or where attacked collaterally:** Davis v. Davis, 146-; Lumber Co. v. Leonard, 145-339; Benedict v. Jones, 129-470; Edwards v. Bowden, 107-58; Hall v. Castleberry, 101-153; Ware v. Nesbit, 94-664. **If the acts and language of a married woman at time of private examination are of the same legal effect as the words used in statute, deemed sufficient:** Benedict v. Jones, 129-470. **Husband need not leave room, but wife must be so separated from him as to leave her at liberty to express freely to officer her will and desire:** Hall v. Castleberry, 101-153. **Where examination states that deed was signed of her own free will**

and accord and without any compulsion of her husband but does not add ''and doth voluntarily assent thereto,'' held sufficient: Robbins v. Harris, 96-557; see Benedict v. Jones, 129-472. **Private exammination failing to state that it was taken separate and apart from her husband is insufficient:** Cook v. Pittman, 144-531, and cases cited. **The words ''privy examination of the wife'' construed** in Benedict v. Jones, 129-472; see also Skinner v. Fletcher, 23-313. **For duty of officer in taking private examination,** see McCaskill v. McKinnon, 121-214. **Privy examination not necessary to bind her separate personal estate:** Harvey v. Johnson, 133-352. **As to presumption of the truth of the recitals in a certificate of private examination,** see Lumber Co. v. Leonard, 145-339. **Fact of separate examination must appear in certificate of officer before whom taken:** Cook v. Pittman, 144-531; Wynne v. Small, 102-133; Pierce v. Wanett, 32-446; Etheridge v. Ashbee, 31-353; Jones v. Lewis, 30-70; Fenner v. Jasper, 18-34; Robinson v. Barfield, 6-391. **The deed of a married woman without privy examination is so entirely void as to her that even if an agreement be incorporated in it for her benefit she can not obtain specific performance:** Askew v. Daniel, 40-321. **As to private examinations taken under chapter 35, acts of 1868-69,** see Spivey v. Rose, 120-163. **Other cases of interest hereunder, not exactly within scope of section:** Miller v. Bumgardner, 109-412; Hinton v. Ferrebee, 107-154; McGlennery v. Miller, 90-215; Whitehurst v. Hunter, 3-401.

Cases under obsolete statutes: Malloy v. Bruden, 88-305; Woodbourne v. Gorrel, 66-82.

953. Acknowledgment by, at different times and places; before different officers. In all cases of deeds or other instruments executed by husband and wife and requiring registration, the probate of such instrument as to the husband and acknowledgment and private examination of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this state or only one in this state and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, including the private examination of the wife, it shall not be material whether the execution of the instrument was proven as to or acknowledged by the husband before or after the acknowledgment and private examination of his wife.

1899, c. 235, s. 9; 1895, c. 136. **For probates prior to this enactment where husband and wife acknowledged at different times and before different officers validated, see sections 1017, 1018. Cases where question as to acknowledgment of, and private examination as to conveyances by husband and wife at different times or before different officers arose as to deeds executed prior to this enactment:** Barrett v. Barrett, 120-127; Lineberger v. Tidwell, 104-506; Southerland v. Hunter, 93-310; McGlennery v. Miller, 90-215.

954. Husband's deed registered though no private examination of wife. When an instrument purports to be signed by a husband

and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, whether the private examination of the wife is properly taken or not, but no such instrument shall be the act or deed of the wife, unless her private examination is taken according to law.

1899, c. 235, s. 8; 1901, c. 637. **As to wife's deed and private examination, see sections 952, 1003, 1004. Where probate of deed recites acknowledgment and private examination of wife of grantor only, it is insufficient and does not authorize registration:** Hatcher v. Hatcher, 127-200. **As to right of husband to convey land without wife's joinder in deed,** see Shackleford v. Morrill, 142-221; Joyner v. Sugg, 132-581; Cawfield v. Owens, 129-286; Wittkowsky v. Gidney, 124-437; Scott v. Lane, 109-154; Hughes v. Hodges, 102-236; Simpson v. Houston, 97-344.

Where land of husband is to be sold under first and second mortgages, and wife joined in execution of first mortgage only, proper for court to protect contingent right of dower of wife in case land sells for more than enough to pay first mortgage and costs: Shackleford v. Morrill, 142-221.

955. What officers can take private examinations of femes covert. When the private examination of any married woman is necessary to be taken, the officials authorized by law to take proofs and acknowledgments of the execution of any instrument are each and every one of them hereby empowered to take the private examination of any married woman touching her free and voluntary assent to the execution of such instrument to which her assent is or may be necessary, and to certify the fact of such private examination.

1899, c. 235, s. 6. **See sections 952, 989, 1003, 1004. Probate and private examination taken before an officer not invalid simply because he is related to parties:** McAllister v. Purcell, 124-262—**or because he is an employee or grantee,** Bank v. Ireland, 122-571. **Omission by justice of the peace to attach seal to certificate will not invalidate it:** Lineberger v. Tidwell, 104-506. **Justice of the peace can not correct his certificate after term of office expired:** Cook v. Pittman, 144-530. **As to how private examination should be conducted** see McCaskill v. McKinnon, 121-214. **Private examination taken by provost marshall of Newbern, while city in possession of federal military authorities is good:** Paul v. Carpenter, 70-502.

Officer's certificate of acknowledgment and private examination of married woman, in due form, precludes inquiry as to fraud, duress or undue influence in treaty, unless participated in by grantee or agent: Lumber Co. v. Leonard, 145-339—**also precludes inquiry into fraud or falsehood in private examination itself, unless feme covert shows by clear and convincing evidence that no examination was had,** Ibid—**or that she refused before officer to voluntarily assent to execution of instrument,** Ibid; see also annotations under section 952.

Clerk not allowed to take acknowledgment and probate deed to which he is a party, or in which he is interested, see sections 995, 999.

956. Private examination procured by fraud, deed good as to innocent purchaser for value. No deed of conveyance for lands nor instrument of writing of whatever nature or kind which is required or allowed by law to be registered executed by a husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, or which may be hereafter executed by a husband and wife, if the private examination of the wife shall have been certified in the manner prescribed by law, shall be deemed or declared invalid in any case because its execution was procured by fraud, duress or other undue influence, unless it shall be shown that the grantee or person or persons to whom such instrument was or shall be made participated in the fraud, duress or other undue influence or had notice thereof before the delivery of the instrument, and where the grantee or person or persons to whom such instrument has been or shall be made is shown to have had notice of such fraud, duress or undue influence or to have participated therein, an innocent purchaser for a valuable consideration from or under such grantee or person to whom such instrument has been or shall be made shall not be affected by any fraud, duress or other undue influence practiced or exercised in procuring the execution and acknowledgment of such instrument.

1889, c. 389; 1899, c. 235, s. 10. **See under section 952. Where privy examination properly certified it will not be held invalid because procured by fraud, duress or undue influence, unless grantee had notice thereof or participated therein:** Davis v. Davis, 146- ; Johnson Lumber Co., v. Leonard, 145-339; Marsh v. Griffin, 136-333; Butner v. Blevins, 125-585; Benedict v. Jones, 129-472; Bank v. Ireland, 122-571; Riggan v. Sledge, 116-87—**and even if grantee did have notice, an innocent purchaser from him would be protected,** Butner v. Blevins, 125-585. **Where private examination of wife not taken or taken in manner insufficient to fulfill requirements of law, though grantee had no knowledge thereof, matter is open to judicial investigation:** Benedict v. Jones, 129-470. **Omission of justice to attach his seal to certificate will not invalidate his action otherwise regular:** Lineberger v. Tidwell, 104-506.

For cases prior to enactment of section, see Edwards v. Bowden, 107-58; Ware v. Nesbit, 94-664.

957. Under power of attorney from. All conveyances which may be made by any person under a power of attorney from any feme covert by her freely executed with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments as are mentioned or included in such power of attorney.

Code, s. 1257; R. C., c. 37, s. 11; 1798, c. 510. **See** Lineberger v. Tidwell, 104-506.

958. Wife need not join in purchase-money mortgage or trust deed. The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title, may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage deed or deed of trust.

Code, s. 1272; 1868-9, c. 204; 1907, c. 12.

959. By husband, wife a lunatic. Every man whose wife is a lunatic or insane and is confined in any asylum for lunatics and insane persons in the state of North Carolina shall have the right to sell and convey any of his real estate by deed, except his homestead, without the signature and private examination of his wife: Provided, the superintendent of the asylum in which said feme covert shall be confined shall certify that she is confined in the asylum of which he is superintendent, and that she is of insane mind and memory, which certificate shall be subscribed and sworn to before the clerk of the superior court of the county in which said asylum shall be situated, which certificate shall be attached to the deed, together with the certificate of the clerk, under his hand and official seal. When the deed of a married man whose wife is insane or a lunatic shall be executed, probated and registered in accordance with law, it shall convey all the estate and interest of the grantor in the land conveyed free and exempt from the dower rights and all other interests of his wife: Provided, this section shall not apply to the homestead of the husband.

1905, c. 138, ss. 1, 3.

IV. Fraudulent.

960. Void as to creditors. For avoiding and abolishing feigned, covinous and fradulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fradulent

devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded), to be utterly void and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fradulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead.

Code, s. 1545; 1893, c. 78; R. C., c. 50, s. 1; 50 Edw. III., c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4. **The law will not aid one party to a fraud as against another:** Shener v. Spear, 92-151; Bank v. Adrian, 116-537; and cases cited; York v. Merritt, 80-285; Jones v. Gorman, 42-21; Ellington v. Currie, 40-21. **Fraud is a question of law upon facts and circumstances found and admitted:** Hodges v. Lassiter, 96-351; Hardy v. Simpson, 35-132; Foster v. Woodfin, 33-339; Rea v. Alexander, 27-644. **Where deed fraudulent and void as to one creditor it is void as to all:** Savage v. Knight, 92-493; Hoke v. Henderson, 14-12. **Fraudulent conveyance good as against grantor and all others except creditors:** Saunders v. Lee, 101-3. **Bond given as a pretext to enable a person to set up a claim against property of maker, so as to defraud maker's creditors, is void:** Powell v. Inman, 53-436; see also Hawkins v. Alston, 39-137.

As to badges of fraud, see Helms v. Green, 105-251; Bank v. Bridgers, 128-322, 114-383; Messick v. Fries, 128-451; Wittkowsky v. Baruch, 126-747; Howard v. Early, 126-170; Royster v. Stallings, 124-55; Stoneburner v. Jeffreys, 116-78; Clement v. Cozart, 109-173, 112-412; Booth v. Grant, 107-405; Booth v. Carstarphen, 107-400 and cases cited; Woodruff v. Bowles, 104-197; Phifer v. Erwin, 100-59; Norfleet v. Hawkins, 93-392; Cannon v. Young, 89-264; Boone v. Hardie, 83-470; Hillard v. Phillips, 81-99; Cheatham v. Hawkins, 76-335; Grimsley v. Hooker, 56-4; Peebles v. Horton, 64-373; Jessup v. Johnston, 48-335; Jenkins v. Peace, 46-413; Black v. Sanders, 46-67; Gilmer v. Earnhardt, 46-559; Gibson v. Walker, 33-327; Brannock v. Brannock, 32-428; Foster v. Woodfin, 33-339; Sturdivant v. Davis, 31-365; Rea v. Alexander, 27-644; Worth v. Northam, 26-102; O'Daniel v. Crawford, 15-197; Howell v. Elliott, 12-76. **Where deed of trust to secure feigned debt was made after but registered before deed covering same property, held that Connor act does not apply, deed of trust being fraudulent and void:** Tyner v. Barnes, 142-110.

Purchaser from trustee under conveyance containing upon its face evidence of fraudulent purpose to defeat creditors takes with notice of such

evidence: Eigenbrun v. Smith, 98-207—**and although purchaser may have paid full price for property, yet if he purchased with intent to aid vendor to defeat his creditors, purchase will be void,** Ibid—**and conveyance to trustee for use of creditors, if made with intent to defraud any one of vendor's creditors, is void, though trustee be ignorant of such intent, and his conduct is bona fide,** Ibid; Hoke v. Henderson, 14-12.

Party making fraudulent conveyance, if such conveyance set aside, can claim his homestead: Dortch v. Benton, 98-190; Rankin v. Shaw, 94-405; Arnold v. Estis, 92-162; Comrs. v. Riley, 75-146; Gaster v. Hardie, 75-460; Crummen v. Bennet, 68-494. **When sole purpose of maker of deed of trust to secure creditors was to discharge honest debt, deed does not come within operation of section:** Moore v. Hinnant, 89-455. **Conveyance, if made with the intent to hinder creditors, is void, although upon sufficient consideration, if vendee had knowledge of purpose for which made:** Perry v. Hardison, 99-21; see Cox v. Wall, 132-730 and cases cited. **As to the part the "intent" plays in making a conveyance or assignment void,** see Royster v. Stallings, 124-55; Wolf v. Arthur, 118-890; Clement v. Cozart, 109-173; Peeler v. Peeler, 109-628; Booth v. Carstarphen, 107-395 and cases cited; Phifer v. Erwin, 100-59; Savage v. Knight, 92-493; Beasley v. Bray, 98-266; Worth v. Brady, 91-265; Cansler v. Cobb, 77-30; Lassiter v. Davis, 64-498; Rose v. Coble, 61-517; Reiger v. Davis, 67-185. **Fraudulent conveyances are not deemed void as to creditors when only collaterally attacked:** Boyd v. Turpin, 94-137. **If any part of the consideration in a deed be feigned or fraudulent as to creditors, the whole deed is void as to them:** Johnson v. Murchison, 60-286; Hafner v. Irwin, 23-490; but see Woodruff v. Bowles, 104-197.

Other cases of interest: Arrington v. Arrington, 102-491; Walton v. Parish, 95-259; Cowles v. Coffey, 88-342; Powell v. Ivey, 88-256; Boyd v. Turpin, 94-137; Southerland v. Harper, 83-200; Cannon v. Young, 89-264; Rencher v. Wynne, 86-269; Cansler v. Cobb, 77-30; Holmes v. Marshall, 78-262; McCanless v. Reynolds, 74-301; Young v. Lathrop, 67-63; McNeill v. Riddle, 66-290; Salms v. Martin, 63-608; Palmer v. Giles, 58-75; Thigpen v. Pitt, 54-49; London v. Parsley, 52-313; Newlin v. Osborne, 51-128; Felton v. White, 49-301; McCorkle v. Hammond, 47-444; Bridges v. Moye, 45-170; McAuley v. Earnhart, 46-502; Flynn v. Williams, 29-32; Buie v. Kelly, 27-169; Patterson v. Bodenhamer, 31-96; Gowing v. Rich, 23-553; Purcell v. McCallum, 18-221.

SPECIFIC CONVEYANCES, TRANSFERS, ETC., ATTACKED FOR FRAUD HEREUNDER. Conveyances, gifts, assignments, transfers, etc., by debtor to child: Webb v. Atkinson, 124-447; Clement v. Cozart, 109-173, 112-412; Helms v. Green, 105-251; McCanless v. Flinchum, 89-373; Tredwell v. Graham, 88-208; Carr v. Fearrington, 63-560; Brown v. Godsey, 55-417; Winchester v. Reid, 53-377; Black v. Caldwell, 49-150; Jenkins v. Peace, 46-413—**to wife,** Howard v. Early, 126-170; Webb v. Atkinson, 124-447; Pender v. Mallett, 123-57; Brisco v. Norris, 112-671; Peeler v. Peeler, 109-628; Woodruff v. Bowles, 104-197; Battle v. Mayo, 102-413; Brown v. Mitchell, 102-347; Walton v. Parish, 95-259; Taylor v. Eatman, 92-601—**to parent,** Boyd v. Turpin, 94-137; McGill v. Harman, 55-179—**to brother or brother-in-law,** Bank v. Bridgers, 114-383; Allen v. McLendon,

113-321; Dewey v. Littlejohn, 37-495—**to father-in-law,** Vick v. Flowers, 5-321—**to nephew,** Reiger v. Davis, 67-185—**to attorney,** York v. Merritt, 80-285. **Conveyances to debtor's wife where property bought with debtor's money, or his work or skill:** Ritch v. Oates, 122-631; Markham v. Whitehurst, 109-307. **Conveyance to debtor's daughters, they buying the property in at execution sale of debtor's land with money furnished by debtor:** Sharpe v. Williams, 76-87. **Conveyance to one of several creditors,** Devries v. Phillips, 63-53. **Assignment for benefit of creditors:** Fisher v. Bank, 132-769; Bank v. Bridgers, 128-322; Friedenwald v. Sparger, 128-446; Mitchell v. Eure, 126-77; Jordan v. Newsome, 126-553; Commission Co. v. Porter, 122-692; Goldberg v. Cohen, 119-59; Stoneburner v. Jeffreys, 116-78; Davis v. Smith, 113-94; Barber v. Buffaloe, 111-206; Banking Co. v. Whitaker, 110-345; Booth v. Carstarphen, 107-395; Hancock v. Wooten, 107-9; Stephenson v. Felton, 106-114; Bobbitt v. Rodwell, 105-236; Woodruff v. Bowles, 104-197; Eigenbrun v. Smith, 98-207; Savage v. Knight, 92-493; Guggenheimer v. Brookfield, 90-232; Bynum v. Miller, 86-560. **Deeds of trust or mortgages to secure debts:** Tyner v. Barnes, 142-110; Messick v. Fries, 128-450; Cowan v. Phillips, 122-70; Mining Co. v. Smelting Co., 119-417; Wolf v. Arthur, 118-890; Allen v. McLendon, 113-321; Nadal v. Britton, 112-180; Battle v. Mayo, 102-413; Phifer v. Erwin, 100-59; Morris v. Pearson, 79-253; Cheatham v. Hawkins, 76-335; Johnson v. Murchison, 60-286; Stone v. Marshall, 52-300; Hawkins v. Alston, 39-137. **Bills of sale of goods or chattels:** Cox v. Wall, 132-730; Kelly v. Fleming, 113-133; Brown v. Mitchell, 102-347; Rea v. Alexander, 27-644; Foster v. Woodfin, 33-339; Newsom v. Roles, 23-179. **Conveyance of land on ground of fraud upon marital rights of wife:** Brinkley v. Brinkley, 128-503; Tate v. Tate, 21-22—**on ground of its having been made to prevent plaintiff from collecting judgment for damages,** Helms v. Green, 105-251.

PRACTICE IN SETTING ASIDE SALES AND CONVEYANCES HEREUNDER. See generally: Clement v. Cozart, 109-172, 112-412; Smith v. Summerfield, 108-284; Peeler v. Peeler, 109-628; Booth v. Carstarphen, 107-395; Woodruff v. Bowles, 104-197; Rencher v. Wynne, 86-269; Hardy v. Simpson, 35-132. **Trustee in bankruptcy may bring action to set aside fraudulent sales and conveyances if creditor of bankrupt entitled to same:** Cox v. Wall, 132-730. **Burden is on purchaser to show he bought for valuable consideration and without notice:** Cox v. Wall, 132-730; Morgan v. Bostic, 132-743; Stephenson v. Felton, 106-114; Odom v. Riddick, 104-521 and cases cited; Brown v. Mitchell, 102-347; Saunders v. Lee, 101-3; Eigenbrun v. Smith, 98-215; Davis v. Council, 92-725; Taylor v. Eatman, 92-601; Tredwell v. Graham, 88-214; Savage v. Knight, 92-493; Cheatham v. Hawkins, 76-335—**and where purchaser was the insolvent grantor's wife, she must show valuable consideration passed,** Peeler v. Peeler, 109-628. **Creditors bringing action to set aside assignment for creditors made by bank have no first lien unless it increases assets of bank:** Fisher v. Bank, 132-769. **Where it is shown that insolvent sons assigned, preferring their father, burden upon defendant to show fairness of transaction:** Mitchell v. Eure, 126-77. **Where deed of trust adjudged fraudulent as to creditors, court may order land sold after allotting homestead to defendant:** Benton v. Collins, 125-83. **Party who alleges fraud in execution of deed must**

prove it: Saunders v. Lee, 101-3—**and where prima facie evidence is given of bona fides of debts, burden of proof is upon party attacking deed to show fraud,** Hodges v. Lassiter, 96-357. **While creditor can issue execution and sell property disposed of in fraud of creditors this does not prevent court of equity from restraining donee until question of fraud tried:** Frank v. Robinson, 96-28. **As to proof of fraud in deed by evidence of fraud in one subsequently made,** see Winborne v. Lassiter, 89-1. **For what is and what is not evidence of fraud in conveyance,** see Eigenbrun v. Smith, 98-207; Beasley v. Bray, 98-266; Hodges v Lassiter, 96-351; Frank v. Robinson, 96-28; Walton v. Parish, 95-259; Moore v. Hinnant, 89-455; Jessup v. Johnston, 48-335; Hardy v. Skinner, 31-191; see cases "as to badges of fraud" hereunder.

As to when fraudulent purpose in conveyance is question for court and when for jury, see Woodruff v. Bowles, 104-197; Beasley v. Bray, 98-266; Hodges v. Lassiter, 96-351; Black v. Sanders, 46-67; Moore v. Hinnant, 89-455; Reiger v. Davis, 67-185; Hardy v. Simpson, 35-132; Young v. Booe, 33-347, O'Daniel v. Crawford, 15-197. **Proof of near relationship between grantor and grantee named in deed does not make a prima facie case of fraud:** Bank v. Bridgers, 114-383. **Several creditors may unite in action against common debtor to obtain judgment for respective claims and set aside alleged fraudulent conveyance of debtor's property, and parties so uniting may acquire preference over other general creditors:** Smith v. Summerfield, 108-284. **Property conveyed to wife in fraud of creditors may be recovered in her hands:** Pender v. Mallett, 123-57—**and if she has sold it and invested proceeds in other property, the fund can be followed,** Ibid; also Edwards v. Culberson, 111-342; Brown v. Godsey, 55-417.

Section merely referred to in Carpenter v. Duke, 144-293; **Bank** v. Spurling, 52-403.

961. When void as to purchasers. Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person as hath purchased or shall purchase in fee-simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or incumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same.

Code, s. 1546; R. C., c. 50, s. 2; 27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2.

Although same facts which made deed fraudulent under 13th Elizabeth

as to creditors may, generally speaking, render it fraudulent also under 27th Elizabeth as against purchaser, yet it is clear that deed is not fraudulent as against purchaser, merely because it was so as against creditors: Harris v. DeGraffenreid, 33-92; Fullenwider v. Roberts, 20-420.

This section and sections 980 and 981, being the Connor act, must be construed together with the view of preventing fraud: Austin v. Staten, 126-788. Registration is required for purpose of notice: Austin v. Staten, 126-788; Patterson v. Mills, 121-267; Hooker v. Nichols, 116-157; Barber v. Wadsworth, 115-29; Quinnerly v. Quinnerly, 114-145; Maddox v. Arp, 114-585 (rendering obsolete many cases in the reports which treat of constructive notice)—but it only has reference to the notice of a former conveyance and carries with it no taint or knowledge of actual intent to defraud, which vitiates the deed when it exists and is so found: Austin v. Staten, 126-783.

As to who is a purchaser for value, see Carpenter v. Duke, 144-293; Brinkley v. Spruill, 130-48; Wallace v. Cohen, 111-103; Southerland v. Fremont, 107-565; Brem v. Lockhart, 93-191; Day v. Day, 84-408; Potts v. Blackwell, 56-449, 57-59; Harris v. DeGraffenreid, 33-89; Freeman v. Lewis, 27-91; Fullenwider v. Roberts, 20-420. Second purchaser, in order to avoid prior fraudulent deed, must show now, as before act of 1885, that he is bona fide purchaser for full value: Austin v. Staten, 126-788—and this does not mean every dollar it is worth, but a reasonably fair price, Ibid. To render deed fraudulent as to subsequent purchaser, such purchaser must have paid full value for land, and must also have purchased without notice of prior voluntary conveyance: Taylor v. Eatman, 92-601; Hiatt v. Wade, 30-340—but registration of prior voluntary deed is notice to subsequent purchaser, Ibid. Bona fide purchaser of personal property, without notice, acquires good title as against prior fraudulent conveyance of same: Plummer v. Worley, 35-423. When bona fide purchaser for valuable consideration, without notice has acquired legal title, equity will not deprive him of this advantage: Crump v. Black, 41-321. Possession by fraudulent donee can not operate as notice of conveyance to him of any land except such tract or parcel as may be occupied by him at time of second purchase: Wade v. Hiatt, 32-302—and especially it can not so operate as to any parcel continuing in possession of donor, Ibid. One is not a purchaser for full value who gives for land not more than one-half or two-thirds of value: Harris v. DeGraffenreid, 33-89; see Austin v. Staten, 126-788; Worthy v. Caddell, 76-82; Fullenwider v. Roberts, 20-420. Deed in trust to sell property and pay creditors is valid as against prior deed of gift as being subsequent sale to purchaser for valuable consideration: Ward v. Wooten, 75-413. When one purchases land which he knows to be in possession of person other than vendor, he is affected with legal notice and must inquire into title of possessor: Bost v. Setzer, 87-187; see also Webber v. Taylor, 55-9. Section being intended for benefit of purchaser, first bona fide purchaser, whether from fraudulent vendor or vendee, is within its operation: Hoke v. Henderson, 14-12. Though conveyance voluntary it is not necessarily fraudulent as to subsequent purchasers: Bell v. Blaney, 6-171. Word "purchaser" under section defined: Fullenwider v. Roberts, 20-420. Purchaser of land with notice at time of

former fraudulent conveyance is not protected in purchase, though paid full value therefor: Triplett v. Witherspoon, 70-589; Hiatt v. Wade, 30-340.

Old cases prior to amendment which may be of some service: Bell v. Blaney, 6-171; Garrison v. Brice, 48-85; Long v. Wright, 48-290; Freeman v. Eatman, 38-81; Jones v. Hall, 58-26; Bynum v. Miller, 86-560 and cases there cited.

962. Gifts, indebtedness evidence of fraud. No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.

Code, s. 1547; R. C., c. 50, s. 3; 1840, c. 28, ss. 3, 4. **Voluntary conveyance is fraudulent in law as to existing creditors when grantor does not at time of conveyance retain property fully sufficient and available for satisfaction of his then creditors:** Clement v. Cozart, 112-412; McCanless v. Flinchum, 89-376; Warren v. Makely, 85-14. **Evidence that grantor retained $11,625 to pay debts to amount of $11,500 not sufficient to show that grantor retained property sufficient to pay debts:** Williams v. Hughes, 136-58—**neither is evidence that 22 negroes and 2 small tracts of land valued at $7,250 retained to pay debts amounting to $6,848,** Black v. Sanders, 46-67. **The amendment of 1840 is only applicable to voluntary conveyances made after act went into effect:** Houston v. Bogle, 32-496. **Husband can make valid voluntary conveyance to wife if not made with fraudulent intent and he retains property sufficient and available to pay all of his debts:** Woodruff v. Bowles, 104-197; Walton v. Parish, 95-259; Taylor v. Eatman, 92-601. **Voluntary conveyance to child valid if not made with fraudulent intent and grantor retains property sufficient and available to pay all his debts:** Worthy v. Brady, 91-265; McCanless v. Flinchum, 89-376; Thacker v. Sanders, 45-145. **Conveyance providing that grantee shall support invalid brothers and comply with conditions imposed is not voluntary under section, but rests upon valuable consideration:** Worthy v. Brady, 91-265. **Evidence of value of tract of land adjoining that retained by donor in deed of gift incompetent to show that donor did not retain property sufficient and available to satisfy existing debts:** Warren v. Makely, 85-12. **Section qualifies maxim that a man must be just before he is generous in cases where donor at the time of gift retains property fully sufficient and available to satisfy his then creditors:** Pullen v. Hutchins, 67-428—**but modification confined to gifts inter vivos,** Ibid. **Amendment of 1840 only requires that question of fraud be submitted to jury where property**

152-183

fully sufficient and available to pay all creditors is reserved: Black v. Sanders, 46-67; Clement v. Cozart, 112-418. **Deed of gift may be fraudulent though donor at time of gift honestly believed that she had property sufficient to satisfy all debts then existing, when in fact she was mistaken,** Black v. Sanders, 46-67. **Voluntary conveyance by insolvent ipso facto void as to pre-existing debts:** Morgan v. McLelland, 14-82.

See as bearing upon section: Markham v. Whitehurst, 109-307; Peeler v. Peeler, 109-628; Jones v. Young, 18-352. **Section merely referred to** in Cox v. Wall, 132-733; Credle v. Carrawan, 64-424.

963. Marriage settlements, as to existing creditors. Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage, if the same is antenuptial, or at the time of making such contract or settlement, if the same is postnuptial.

Code, ss. 1270, 1820; 1871-2, c. 193, s. 11; R. C., c. 37, s. 25; 1785, c. 238, s. 2. **See section 2108;** also Credle v. Carrawan, 64-422; Teague v. Downs, 69-280. **This section applies to instruments entered into since enactment:** Walton v. Parish, 95-264.

964. Bona fide conveyances to innocent purchaser for value, valid. Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud.

Code, s. 1548; R. C., c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6. **This section was intended to act as a proviso to the other sections as to fraudulent conveyances, and one claiming the benefit of it must bring himself within it by competent evidence:** Cox v. Wall, 132-734 and cases there cited. **Purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor:** Cox v. Wall, 132-730—**or from donee or vendee who has himself taken with knowledge of fraud,** Wallace v. Cohen, 111-103; Odum v. Riddick, 104-515; Saunders v. Lee, 101-3; Davis v. Council, 92-725; Wade v. Saunders, 70-270; Young v. Lathrop, 67-63; King v. Cantrel, 26-251; King v. Trice, 38-568; Martin v. Cowles, 18-29—**but the burden is on him to show that he is such purchaser for value and without notice,** Morgan v. Bostic, 132-743; Cox v. Wall, 132-730 and cases there reviewed; Stephenson v. Felton, 106-114; Odum v. Riddick, 104-521 and cases cited; Saunders v. Lee, 101-3; Tredwell v. Graham, 88-208.

As to who is innocent purchaser for value hereunder, see Carpenter v. Duke, 144-293; Cox v. Wall, 132-730; Brinkley v. Spruill, 130-48; Wallace v. Cohen, 111-103; Southerland v. Fremont, 107-565; Brem v. Lockhart, 93-191; Day v. Day, 84-408; Worthy v. Caddell, 76-82; Sharpe v. Williams, 76-87; Potts v. Blackwell, 56-449; 57-59; Harris v. DeGraffenreid, 33-89;

Freeman v. Lewis, 27-91; Fullenwider v. Roberts 20-420. **Bona fide purchaser of land from child to whom father had conveyed land after having promised to convey same land to intended wife in consideration of marriage, acquired good title:** Brinkley v. Spruill, 130-46. **Purchaser of land with notice of prior fraudulent conveyance not protected in purchase although paid value therefor:** Triplett v. Witherspoon, 70-589; Hiatt v. Wade, 30-340. **Where person made fraudulent deed of trust of property to one to whom he subsequently conveyed the property in good faith and for a fair price, grantee acquired good title:** White v. White, 35-265. **"Good consideration" means "valuable consideration:"** Arrington v. Arrington, 114-167. **As to what is meant by "for value,"** see Austin v. Staten, 126-788; Worthy v. Caddell, 76-82; Harris v. DeGraffenreid, 33-89; Fullenwider v. Roberts, 20-420.

Cases bearing upon subject matter of section: Newlin v. Osborne, 51-128; Dobson v. Erwin, 20-341; Wall v. White, 14-105.

Cases referring to section: Peeler v. Peeler, 109-633; Glenn v. Bank, 70-205.

964a. Sale of merchandise in bulk presumed fradulent, when; how presumption removed. The sale in bulk of a large part of the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be prima facie evidence of fraud, and void as against the creditors of the seller, unless the seller, at least seven days before the same, make an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall within said time notify the creditors of the proposed sale, and the price, terms and conditions thereof: Provided, if the owner or owners of said stock of goods shall at any time before the said sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of said stock of goods and conditioned that the seller of said stock of goods will apply the proceeds of said sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, so far as it will go in payment of debts actually owing by said owner or owners, then the provisions hereof shall not apply. Nothing herein shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process.

1907, c. 623, ss. 1, 2.

965. Innocent purchaser for value protected against illegal consideration. No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement,

shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement shall be forbidden by law, if such purchaser, at the time of his purchase, shall not have had notice of the unlawful consideration of such debt, contract or agreement.

Code, s. 1549; R. C., c. 50, s. 5; 1842, c. 70. **Purchaser for value without notice under deed in trust in which some of debts secured are fictitious or usurious gets good title:** McNeill v. Riddle, 66-290; McCorkle v. Earnhardt, 61-300. **This section does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate of property" at sale under mortgage who buys without notice of the usurious taint in debt secured:** Ward v. Sugg, 113-494.

966. Purchasers entitled to remedy of creditors. Purchasers of estates previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase.

Code, s. 1550; R. C., c. 50, s. 6. **Section merely referred to in Kenner v Mfg. Co., 91-425.**

V. Assignments for Creditors.

967. Debts mature on execution of; schedule of preferred debts filed. Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once; a schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the superior court of the county in which such assignment is made, stating the name of preferred creditors, the amount due each, when the debt was made, and the circumstances under which said debt was contracted, and said schedule shall be filed within five days of the registration of such deed of assignment.

153-52

1893, c. 453. **Requirements of section mandatory:** Cooper v. McKinnon, 122-447; Pearre v. Folb, 123-241. **Note of assignor, with sureties, not yet due becomes due upon assignment being executed and sureties are bound to pay at once:** Pritchard v. Mitchell, 139-54. **When schedule of preferred debts affirmed to before justice of peace who is one of the trustees in deed of assignment, assignment void:** Martin v. Buffaloe, 128-305, and cases cited.

Failure to file the schedule of preferred debts within the time and in the manner prescribed will render assignment void: Taylor v. Lauer, 127-161; Cooper v. McKinnon, 122-447; Bank v. Gilmer, 116-684, 117-416; Frank v. Heiner, 117-79; Glanton v. Jacobs, 117-427—**but if schedule is filed in time and there are preferred debts insufficiently described or stated, it will not vitiate the assignment entirely, but these debts will be**

eliminated from the schedule, leaving it in full force as to those debts properly stated, Brown v. Nimocks, 127-417, approved in Friedenwald v. Sparger, 128-448; Hall v. Cottingham, 124-402; Sutton v. Bessent, 133-563.

As to how to file the schedule, see Friedenwald v. Sparger, 128-446; Hall v. Cottingham, 124-402; Brown v. Nimocks, 124-417. **The five days for filing is computed from the actual filing of the deed for registration and not from actual registration:** Glanton v. Jacobs, 117-427.

An assignment for benefit of creditors omitting creditors is invalid as a preference: Taylor v. Lauer, 127-157. **Where mortgage made of entirety of large estate for pre-existing debts omitting only insignificant remnants of property, mortgage is in effect assignment for benefit of creditors secured therein and subject to regulations of this subchapter:** Bank v. Gilmer, 116-684, 117-416.

968. Inventories filed within ten days. Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, an inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or to the hands of any person for him, by virtue of such deed of trust, and whenever further property of any kind not included in any previous return shall come to the hands or knowledge of such trustee he shall return the same as hereinbefore prescribed within ten days after the possession or discovery thereof.

1893, c. 453, s. 2.

153-52

969. Insolvent trustee without bond removed by clerk. Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging under oath that the trustee named therein is insolvent and asking that he be required to give bond or be removed, it shall be the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear said complaint; and if upon such hearing said clerk shall be satisfied that such trustee is insolvent, it shall be his duty to remove such trustee and to appoint some competent person to execute the provisions of such deed of trust, unless such insolvent trustee shall file with said clerk a good and sufficient bond, to be approved by said clerk, in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such trustee shall faithfully execute and carry into effect the provisions of said deed of trust.

1893, c. 453, s. 3. **Insolvent trustee required to give bond upon proper application to clerk:** Preiss v. Cohen, 112-282.

153-52

970. Substituted trustee to give bond. Upon the removal of such insolvent trustee it shall be the duty of the clerk to require the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by the clerk in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust.

1893, c. 453, s. 3.

971. Only perishable property sold within ten days from registration. It shall be unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust.

1893, c. 453, s. 4.

972. Creditors to file verified statements with trustee. All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file with the clerk of the superior court a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief.

1893, c. 453, s. 6. **Creditors who claim under deed of trust, and file claim to share in proceeds of sale, can not be heard to impeach its provisions:** Chard v. Warren, 122-75.

973. Trustee to file quarterly accounts; close trust in twelve months. The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and at each succeeding period of three months he shall file a like account, and within twelve months he shall file his final account of his administration of his trust. The clerk of the superior court shall have power upon good cause shown to extend the time within which the quarterly and final account herein provided for are to be filed.

1893, c. 453, s. 5. **For violation of duty by trustee, see section 3689.**

VI. Contracts to be Written.

974. Charging executor personally, or one with debt of another. No action shall be brought whereby to charge an executor, admin-

istrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Code, s. 1552; R. C., c. 50, s. 15; 1826, c. 10; 29 Charles II., c. 3, s. 4. 147-106

PROMISES BY PERSONAL REPRESENTATIVES. A promise (not in writing) by an administrator that he would see a debt of his testator paid, or would pay it, is void hereunder: Smithwick v. Shepherd, 49-196—for such a promse to bind administrator or executor personally must be in writing and supported by a consideration, McLean v. McLean, 88-396—and the consideration must be a benefit to the executor, or an injury to the creditor, one founded on forbearance or the possession of assets, Williams v. Chaffin, 13-333; Sleigheter v. Harrington, 6-332; McLean v. McLean, 88-396; Banking Co. v. Morehead, 122-318.

A personal representative who executes a note, without qualification or reservation as to personal liabilty, for a debt of deceased, is personally liable even though signing note as "executor" or "administrator:" Banking Co. v. Morehead, 124-622, 122-318, 116-410; McLean v. McLean, 88-396 and cases cited. Agreement of administrator to pay debt of intestate out of assets of intestate's estate is not within this section: Norton v. Edwards, 66-369.

PROMISES TO ANSWER FOR DEBT OF ANOTHER. As to whether words used amount to a promise to answer for debt, default or miscarriage of another, or amount to an original obligation on the part of promisor, see Jenkins v. Holley, 140-379; Sheppard v. Newton, 139-535; Garrett-Williams Co. v. Hamill, 131-57; White v. Tripp, 125-523; Rowland v. Barnes, 81-234; Morrison v. Baker, 81-76; Neal v. Bellamy, 73-384; Smithwick v. Shepherd, 49-196. Promise to answer for debt, default or miscarriage of another must be in writing: Sheppard v. Newton, 139-535; Garrett-Williams Co. v. Hamill, 131-57; Rowland v. Barnes, 81-234; Scott v. Bryan, 73-582; Britton v. Thrailkill, 50-330. Promise based upon new and original consideration moving between creditor and party agreeing to pay debt, whereby creditor releases debtor, does not come within section: Deaver v. Deaver, 137-240; Whitehurst v. Hyman, 90-487; Mason v. Wilson, 84-51; Rowland v. Rorke, 49-339; Stanly v. Hendricks, 35-86; Shaver v. Adams, 32-14; Ashford v. Robinson, 30-114; Cooper v. Chambers, 15-261. Where promise made to A. to pay him $100 if he will buy B's land, and A. buys the land, in action by A. against promisor to recover $100 this section has no application: Little v. McCarter, 89-233. Section does not forbid oral contract to assume debt of another who is thereupon discharged of all liability to creditor, promisor becoming sole debtor in his place: Jenkins v. Holley, 140-379; Sheppard v. Newton, 139-533; White v. Tripp, 125-523; Draughan v. Bunting, 31-10. New parol contract to pay debt of another superadded to original cause of action which remains in force and is not substituted therefor is void: Haun v. Burrell, 119-544; Horne v. Bank, 108-109; Combs

v. Harshaw, 63-198; Stanly v. Hendricks, 35-86; Rogers v. Rogers, 51-309; Britton v. Thrailkill, 50-330; Draughan v. Bunting, 31-10—**and this is so even though it be founded upon a consideration,** Combs v. Harshaw, 63-198, approved in Haun v. Burrell, 119-544. **Consideration of new promise to pay debt of another may be proved by parol:** Haun v. Burrell, 119-544; Ashford v. Robinson, 30-116; Nichols v. Bell, 46-32. **Where plaintiff declares upon verbal promise, void under statute, which defendant either denies or sets up another contract or admits promise and specially pleads statute, testimony to prove promise is incompetent:** Jordan v. Furnace Co., 126-143; Browning v. Berry, 107-231. **Parol promise to pay debt of another out of property placed by debtor in hands of promisor who converts same into money, not within section:** Mason v. Wilson, 84-51; Threadgill v. McLendon, 76-24; Stanly v. Hendricks, 35-86. **Guaranty of note upon assignment of it is not engagement to pay debt of another within the section:** Adcock v. Fleming, 19-225. **Where land of one of two sureties of third person was sold under execution for the debt and other surety bid it off, agreement of owner of land to pay debt and take assignment of bid to him not within section:** Hockaday v. Parker, 53-16. **Where A. sold tract of land to B. and B., as price of land, promised orally to pay specific amount to C. to whom A. was indebted, such promise not within section:** Rice v. Carter, 33-298. **Where one had claim against three distributees on account of assets received from intestate's estate, and they jointly promised verbally to pay debt, such promise being to answer for liability of another is void:** Hill v. Doughty, 33-195. **Where purchaser of real estate agrees in payment of its price to discharge debt of another, agreement does not come within meaning of section:** Satterfield v. Kindley, 144-455. **Oral promise by married woman to answer for debt of husband can not be enforced against her separate personal estate:** Coffey v. Shuler, 112-622. **Parol promise by husband to pay for lands settled by third persons on his wife and children void under section:** Bagley v. Sasser, 55-350. **Where plaintiff sues upon contract the existence of which defendant denies, defendant can avail himself of statute of frauds without specially pleading same:** Winders v. Hill, 144-614; Haun v. Burrell, 119-544—**and if statute requires that contract shall be in writing, it must be established by contract itself:** Winders v. Hill, 144-614; Morrison v. Baker, 81-76—**hence defendant may object to any evidence of contract not in writing without pleading statute:** Morrison v. Baker, 81-76.

Section merely referred to: Hemphill v. Annis, 119-515; Kelly v. McNeill, 118-354; Miller v. Irvine, 18-105.

975. With Indians. All contracts and agreements of every description made with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same: Provided, this section shall not apply to any person of Cherokee Indian blood

or any Cherokee Indian who understands the English language and who can speak and write the same intelligently.

Code, s. 1553; R. C., c. 50, s. 16; 1907, c. 1004. **Section applies as well where contract between two Indians as when one of parties white:** State v. Tachanatah, 64-615; Lovingood v. Smith, 52-601. **As bearing upon section,** see Rogers v. Kimsey, 101-561; Rollins v. Cherokees, 87-248.

976. For sale or lease of land. All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Code, ss. 1554, 1743; R. C., c. 50, s. 11; 29 Ch. II., c. 3, ss. 1, 2, 3; 1819, c. 1016; 1844, c. 44; 1868, c. 156, ss. 2, 33. See section 878. **Cases directly supporting section:** Hall v. Misenheimer, 137-186; Neaves v. Mining Co., 90-413; Massey v. Holland, 25-197. **Legislature has power to modify or repeal the whole of the statute of frauds in so far as it relates to future contracts for sale of land; it has no authority to give repealing statue a retroactive operation so as to affect or destroy vested rights:** Lowe v. Harris, 112-472. **Where contract may not be sufficiently executed under the statute, defendant may still be estopped to plead it:** Alston v. Connell, 140-485. **Real estate may be sold by parol and title is good between the parties unless statute of frauds pleaded:** Cowell v. Ins. Co., 126-684; Loughran v. Giles, 110-423—**and this can not be pleaded by strangers to transaction,** Cowell v. Ins. Co., 126-684; Davis v. Inscoe, 84-396. **Requirement that contract for sale of land shall be put in writing applies only to "the party to be charged therewith:"** Green v. R. R., 77-95; see also Mizell v. Burnett, 49-249; also in paragraph of annotations hereunder "What is sufficient memorandum." **Statute does not avoid written contract concerning land because of defective description merely:** Imp. Co. v. Guthrie, 116-381. **Action for damages for the non-performance of a parol contract for purchase of land can not be sustained:** McCracken v. McCracken, 88-272; Wade v. Newbern, 77-460. **Where plaintiff declares upon verbal promise, void under statute of frauds, and defendant either denies that he made promise or sets up another and different contract, or admits promise and pleads specially the statute, testimony offered to prove promise is incompetent and should be excluded on objection:** Jordan v. Furnace Co., 126-143; North v. Bunn, 122-768; Williams v. Lumber Co., 118-928; Hall v. Lewis, 118-509; Browning v. Berry, 107-231; Fortescue v. Crawford, 105-29; Thigpen v. Staton, 104-40; Hollar v. Richards, 102-549, and cases there cited; Barham v. Craig, 80-224; Allen v. Chambers, 39-125; Dunn v. Moore, 38-364; Ellis v. Ellis, 16-341. **Doctrine of part performance not sufficient to prevent operation of statute of frauds:** Rhea v. Craig, 141-602; Hall v.

Misenheimer, 137-183; Kivett v. McKeithan, 90-108; Barnes v. Teague, 54-277; Plummer v. Owen's Admrs., 45-254; Allen v. Chambers, 39-125; Dunn v. Moore, 38-364; Albea v. Griffin, 22-9. **A parol contract is not void, but voidable at the election of party charged therewith:** Gordon v. Collett, 104-381; Dail v. Freeman, 92-351; Syme v. Smith, 92-338; Imp. Co. v. Guthrie, 116-381; see also paragraph of annotations hereunder "Effect of statute, etc." **Auctioneer at sale of realty is agent of seller and becomes agent of last and highest bidder to complete sale by signing such contract or memorandum thereof as will meet requirements of section:** Proctor v. Finley, 119-536; Cherry v. Long, 61-466. **Contract of vendee may be established by his obligation to pay, though it contains no reference to contract of sale:** Hargrove v. Adcock, 111-166. **Receipt contaning no descripton of land, but simply reciting that money was balance, or on account of land, will not be sufficient under section to admit parol evidence in support of agreement:** Fortescue v. Crawford, 105-29—Murdock v. Anderson, 57-77—**and survey of plat of land made under direction of alleged vendor, containing no reference to receipt given for purchase money, will not be sufficient to uphold same, nor will parol evidence be received to connect it with such receipt,** Fortescue v. Crawford, 105-29. **Under parol contract to convey real estate person who is to receive conveyance can not plead section if other party able and willing to perform his contract:** Taylor v. Russell, 119-30; McNeill v. Fuller, 121-209; Green v. R. R., 77-95; Foust v. Shoffner, 62-242.

Section merely referred to in Smith v. Smith, 60-583; Higdon v. Rice, 119-625; Edwards v. Kelly, 53-69; Brown v. Comrs., 63-515; Hinsdale v. Thornton, 75-382.

CONTRACTS WITHIN THE STATUTE. Must be executory: Brinkley v. Brinkley, 128-503; McManus v. Tarleton, 126-790; Hall v. Fisher, 126-205. **Lease of land for mining purposes:** Lea v. McKenzie, 56-235; Briles v. Pace, 36-279. **Conveyance of timber and contract to cut:** Tremaine v. Willams, 144-114; York v. Westall, 143-281, and numerous cases there cited; Ives v. R. R., 142-131; Lumber Co. v. Corey, 140-462; Ward v. Gay, 137-399; Drake v. Howell, 133-165; Green v. R. R., 73-524; Mizell v. Burnett, 49-249. **Conveyance of nine specific walnut trees standing:** Carpenter v. Medford, 99-499. **Leases of land for more than three years:** Jordan v. Furnace Co., 126-143; Kridar v. Ramsey, 79-359; Briles v. Pace, 35-279. **A grant of an easement:** Kivett v. McKeithan, 90-106. **Contract of sale of expectancy in land:** Vick v. Vick, 126-123, and cases cited; see Boles v. Caudle, 126-352. **Conveyances of real estate or any interest in or concerning same:** Hall v. Misenheimer, 137-186; Drake v. Howell, 133-165; Presnell v. Garrison, 121-366; Buckner v. Anderson, 111-577; Cox v. Ward, 107-511; Neaves v. Mining Co., 90-413; Young v. Young, 81-92; Daniel v. Crumpler, 75-184. **Partition of land between tenants in common:** Rhea v. Craig, 141-602; Fort v. Allen, 110-183; Medlin v. Steele, 75-154. **Agreement as to dividing line between two tracts:** Presnell v. Garrison, 121-366. **Agreement by husband with wife that proceeds of sale of wife's lands should be invested in other lands:** Cade v. Davis, 96-139. **Agreements made after sale of land that land should be held in trust:** Kelly v. McNeill, 118-349; Hamilton v. Buchanan, 112-463. **Conveyance of an equitable estate**

in land: Wilkie v. Womble, 90-254; Holmes v. Holmes, 86-205; Shields v. Whitaker, 82-516; Shelton v. Shelton, 58-295; Maxwell v. Wallace, 45-251; Simms v. Killian, 34-252; Rice v. Carter, 33-298. **Agreement that third person should be substituted for one of the original parties to a contract of sale of land:** Love v. Cobb, 63-324. **Contract for sale of fixtures:** Bond v. Coke, 71-97. **Agreement by parties to covenant for conveyance of land that title to land should be held by covenanter as indemnity against loss as surety for covenantee:** Harper v. Spainhour, 64-629. **Promise by vendee of land as consideration therefor to pay purchase money to another to whom vendor indebted:** Rice v. Carter, 33-298. **Sale of land by trustee under deed of trust made for purpose of satisfying debts secured by deed:** Ingram v. Dowdle, 30-455.

CONTRACTS NOT WITHIN THE STATUTE. **Executed contracts:** Brinkley v. Brinkley, 128-503; McManus v. Tarleton, 126-790; Hall v. Fisher, 126-205; Smith v. Arthur, 110-400; Farmer v. Willard, 71-284; Massey v. Holland, 25-197; Bridges v. Purcell, 18-494; Choat v. Wright, 13-289. **Parol agreement made before or at time of sale to hold land purchased in trust:** Kelly v. McNeill, 118-349; Cobb v. Edwards, 117-244; Hamilton v. Buchanan, 112-463; see also cases in this paragraph under "Declarations of trusts, etc." **A contract to withdraw claim to cut standing timber, which claim was acquired by parol, in consideration of a release of all damages for trespass alleged:** York v. Westall, 143-276. **Contract by which plaintiff agreed with defendant to cut and deliver a certan number of cords of wood along defendant's right-of-way, some to be cut off plaintiff's and some off of defendant's land:** Ives v. R. R., 142-131; Green v. R. R., 73-524. **Contracts concerning growing crops:** Flynt v. Conrad, 61-190; Walton v. Jordan, 65-170; Bond v. Coke, 71-100; Brittain v. McKay, 23-265. **Agreements made at time of execution of deed that vendor would make good any deficiency in acreage:** Currie v. Hawkins, 118-593; McGee v. Craven, 106-351—**or would refund pro rata part of purchase money if acreage fell short,** Sherrill v. Hagan, 92-345. **Declarations of trusts, resulting trusts and constructive trusts in land:** Russell v. Wade, 146- ; Avery v. Stewart, 136-426; Owens v. Williams, 130-165; Gorrell v. Alspaugh, 120-367; Kelly v. McNeill, 118-349; Cobb v. Edwards, 117-244; Hamilton v. Buchanan, 112-463; Blount v. Washington, 108-231; Dover v. Rhea, 108-88; Pittman v. Pittman, 107-159; Cohn v. Chapman, 62-92; Riggs v. Swann, 59-118; Shelton v. Shelton, 58-292; Hanff v. Howard, 56-440; Cousins v. Wall, 56-43; Cloninger v. Summit, 55-513. **Contract to reimburse one for improvements put upon land:** Houston v. Sledge, 101-640. **Promise made to person to pay him specific sum if he will buy another's land:** Little v. McCarter, 89-233. **Agreement to release a mortgage:** Hemmings v. Doss, 125-400, and cases cited. **Agreement to rescind a contract as to land:** Taylor v. Taylor, 112-27; Miller v. Pierce, 104-389; Faw v. Whittington, 72-321. **Contract to make bricks on land of another, title to bricks to remain in owner of soil until paid for clay and wood used in manufacture:** Brown v. Morris, 83-251. **Authority given a real estate dealer to sell land:** Smith v. Browne, 132-365; Neaves v. Mining Co., 90-412; Blacknall v. Parish, 59-70. **Contract between real estate dealer and landowner as to sales by dealer:** Lamb v. Baxter, 130-67; Abbott v. Hunt, 129-403.

Judicial sales: Hudson v. Coble, 97-260. Execution sales: Tate v. Greenlee, 145-149.

WHAT IS SUFFICIENT MEMORANDUM. There must be a writing signed by party to be charged therewith or by his agent thereto lawfully authorized containing expressly or by implication all material terms of contract: Hall v. Misenheimer, 137-186, and cases there cited. **A draft signed by an agent given in payment for mineral for which deed was delivered, binds principal though not named:** Neaves v. Mining Co., 90-412. **A note or other personal security given for purchase money by vendee is sufficient:** Ibid. **Recitals in a letter where proof could be made without resort to parol testimony is sufficient:** Ibid; also Mizell v. Burnett, 49-254. **Paper-writing signed and sealed by owner of land, with blanks as to name of bargainee, and left with agent who was authorized by parol to fill out blanks with name of purchaser and price is sufficient as a contract and can be enforced:** Blacknall v. Parish, 59-70. **Receipt by vendor reciting that purchaser had made payment, receipt being drawn at instance of purchaser, binds purchaser:** Hall v. Misenheimer, 137-183. **A valid contract may be one or many pieces of paper, provided they are so connected physically or by internal reference that there can be no uncertainty as to their meaning and effect when taken together:** Mfg. Co. v. Hendricks, 106-492, citing Mayer v. Adrian, 77-83; Gordon v. Collett, 102-532. **As to description of land contracted or conveyed,** see Imp. Co. v. Guthrie, 116-381; Lowe v. Harris, 112-472; Fortescue v. Crawford, 105-29; Gordon v. Collett, 102-532; Thornburg v. Masten, 88-293; Capps v. Holt, 58-153; Murdock v. Anderson, 57-77. **A memorandum or note of a contract may be signed by one in the name of his principal or by agent in his own name without being thereunto authorized in writing:** Blacknall v. Parish, 59-70; Neaves v. Mining Co., 90-415; Washburn v. Washburn, 39-311; Oliver v. Dix, 21-165; Phillips v. Hooker, 62-191. **The memorandum must be signed by party to be charged or he can not be held to specific performance:** Lumber Co. v. Corey, 140-462; Hall v. Misenheimer, 137-183; Love v. Atkinson, 131-544; Davidson v. Land Co., 126-704; Hall v. Fisher, 126-205; MaGee v. Blankenship, 95-563; Mizell v. Burnett, 49-249; Edwards v. Kelly, 53-69. **The price to be paid must be inserted or purchaser not bound:** Hall v. Misenheimer, 137-183—**but where vendor is defendant and party to be charged, it is not necessary that consideration be in writing,** Ibid, and cases cited on page 188 of case; also Tunstall v. Cobb, 109-325; Mfg. v. Hendricks, 106-493. **As to what is sufficient signing,** see Hall v. Misenheimer, 137-185; Proctor v. Finley, 119-556; Hargrove v. Adcock, 111-166; Devereux v. McMahon, 108-134; Cherry v. Long, 61-466; Plummer v. Owens' admrs., 45-254; Washburn v. Washburn, 39-306; Oliver v. Dix, 21-165. **Parol contract to convey land is not void ipso facto, and if afterwards contract put in writing, same imparts to contract original efficacy:** MaGee v. Blankenship, 95-563. **Memorandum of contract of sale of realty must show not only person to be charged, but also bargainor:** Mayer v. Adrian, 77-83—**and when such memorandum was not attached to printed advertisement of sale nor otherwise referred to it, parol testimony not admissible to connect them,** Ibid.

AS TO PLEADING THE STATUTE. The statute can only be taken

advantage of by pleading it: Williams v. Lumber Co., 118-928, and cases there cited; Jordan v. Furnace Co., 126-143. **It must be done by answer and never by demurrer:** Hemmings v. Doss, 125-400; Loughran v. Giles, 110-423. **Defendant may admit the oral contract set up in complaint, and then plead the statute:** Barnes v. Teague, 54-277. **A plea of this section is bad where plaintiff has not asked for specific performance but treats contract as a nullity and seeks other relief:** Clancy v. Craine, 17-363.

EFFECT OF STATUTE UPON SPECIFIC PERFORMANCE. Executed contracts within the statute may, in proper cases, be corrected, but executory contracts for sale of land can not be reformed by enlarging subject matter and then be enforced with the variation: Davis v. Ely, 104-16. **Where plaintiff sued for balance purchase money of land and defendant defended on ground that plaintiff could not perform, having no title to part of land, plaintiff could not set up in reply in attempt to show his title perfect an oral contract as to location of a dividing line between him and adjoining landowner:** Presnell v. Garrison, 121-366. **Memorandum must be sufficient under the statute before specific performance can be had:** Mayer v. Adrian, 77-86; Lumber Co. v. Corey, 140-462; Hall v. Misenheimer, 137-183; Love v. Atkinson, 131-544; Vick v. Vick, 126-126; Davidson v. Land Co., 126-704; Wooten v. Walters, 110-251; Hall v. Fisher, 126-205; Fortescue v. Crawford, 105-29; MaGee v. Blankenship, 95-563; Capps v. Holt, 58-153; Campbell v. Campbell, 55-364; Plummer v. Owens' Admrs., 45-254; Allen v. Chambers, 39-125; Ledford v. Ferrell, 34-285—**provided defendant pleads statute:** Davis v. Yelton, 127-348—**but oral contract can be enforced if statute not pleaded,** Hall v. Lewis, 118-510; Thigpen v. Staton, 104-40; Pitt v. Moore, 98-85; Clancy v. Craine, 17-365. **Contract in writing to sell land signed by vendor is good against him although the correlative obligation of buyer to pay price is not in writing and can not be enforced:** Mizell v. Burnett, 49-249; Lumber Co. v. Corey, 140-462; Imp. Co. v. Guthrie, 116-381; Hargrove v. Adcock, 111-166; Love v. Welch, 97-200; Kelly v. Edwards, 53-71. **A parol waiver of a written contract within statute of frauds amounting to complete abandonment and clearly proven will bar specific performance:** Holden v. Purefoy, 108-167, and cases cited; Miller v. Pierce, 104-389.

977. Sales of liquors on credit. No retail liquor dealer shall sell to any person, on credit, liquors to a greater amount than ten dollars, unless the person credited sign a book or note, in the presence of a witness, in acknowledgment of the debt, under the penalty of losing the money so credited; and in any action brought for recovery of such debt the matter of defense allowed by this section may be set up in answer and given in evidence.

Code, s. 1555; R. C., c. 79, s. 4; 1798, c. 501, s. 6. **Penalty demanded by section against person selling liquor on credit in violation of statute not limited to forfeiture of excess over sum of ten dollars, but extends to whole amount of money credited:** Covington v. Threadgill, 88-186. **Champagne wine is included under denomination of "liquor" in section:** Kizer v. Randleman, 50-428.

978. Promise to revive debt of bankrupt. No promise to pay a debt discharged by any decree of a court of competent jurisdiction, in any proceeding in bankruptcy, shall be received in evidence unless such promise shall be in writing and signed by the party to be charged therewith.

1899, c. 57. **For requirement that new promise bars statute of limitations, see section 371. Promise to pay debt discharged in bankruptcy does not revive original contract so as to reinvest it with actionable quality, but only recognzes it as consideration to support new promise:** Fraley v. Kelly, 88-227. **As plea of discharge in bankruptcy is personal defense to be set up by debtor or his representative, it may be withdrawn at any time:** Lee v. Eure, 93-5.

VII. Registration Required.

979 Probate and registration supplies livery of seizin All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessor or the person executing the same, or their signatures proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony whatever.

Code, s. 1245; 1885, c. 147, s. 3; 29 Ch. II., c. 3; R. C., c. 37, s. 1; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; 1905, c. 277. **Section not applicable to grants:** Janney v. Blackwell, 138-440; Wyman v. Taylor, 124-426; Ray v. Stewart, 105-472; see section 1729.

Necessity of acknowledgment or proof of execution before registration of instrument set forth in Duke v. Markham, 105-137, and cases cited; Todd v. Outlaw, 79-237 and cases cited; Williams v. Griffin, 49-31.

Proper probate and registration of deed necessary to pass legal title: Respass v. Jones, 102-5; Anderson v. Logan, 99-474; Southerland v. Hunter, 93-310; Phifer v. Barnhart, 88-333; Triplett v. Witherspoon, 74-475; Wilson v. Sparks, 72-209—**and this without livery of seizin, attornment or other ceremony,** Rowland v. Rowland, 93-221; Hinton v. Moore, 139-47; Edwards v. Dickinson, 102-522; Savage v. Lee, 90-320; Mayo v. Jones, 78-404; Hogan v. Strayhorn, 65-283; Ivey v. Granberry, 66-223.

It is necessary that instrument be probated and registered in order that it may be competent as evidence: Avent v. Arrington, 105-389; Jennings v. Reeves, 101-450; White v. Holly, 91-68; Phifer v. Barnhart, 88-333; Triplett v. Witherspoon, 74-476; Wilson v. Sparks, 72-209; Walker v. Coltraine, 41-79—**but this does not apply to use of deeds in evidence to show color of title, notwithstanding recent decisions that an unregistered deed is no longer color,** Janney v. Robbins, 141-403; Collins v. Davis, 132-111; Allen v. Burch, 142-528; Avent v. Arrington, 105-377; Hunter v. Kelly, 92-285.

The registration of a deed is presumed to be correct: Cochran v. Imp. Co., 127-386. **From the fact of registration it is presumed that delivery of**

deed was made and that maker meant to part with title: Smithwick v. Moore, 145-110; Wetherington v. Williams, 134-276; Helms v. Austin, 116-751; Avent v. Arrington, 105-377—**also presumed that deed was probated** Cochran v. Imp. Co., 127-386—**and that the probate was regular,** Ibid.

Unregistered deed passes only equitable title which may be converted into legal title by registration: Phillips v. Hodges, 109-248; Austin v. King, 91-286; Davis v. Inscoe, 84-403.

Title of grantor is divested from time of delivery of deed which is subsequently regstered: Gadsby v. Dyer, 91-311; Phifer v. Barnhart, 88-333—**the registration relating back to the delivery,** Wilson v. Sparks, 72-209; King v. Portis, 81-384; Isler v. Foy, 66-551.

Section merely referred to: Haire v. Haire, 141-89; Jordan v. Furnace Co., 126-143; Presnell v. Garrison, 122-597; Linker v. Long, 64-298.

980. Conveyances, contracts to convey, and leases of land. No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth: Provided, the provisions of this section shall not apply to contracts, leases or deeds executed prior to March first, one thousand eight hundred and eighty-five, until the first day of January, one thousand eight hundred and eighty-six; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his tenant at the time of the execution of such second deed, or when the person, claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder.

Code, s. 1245, 1885, c. 147, s. 1. **Meaning of term "unregistered deed" in the proviso:** see McNeill v. Allen, 146- .

Effect of this section upon equities and equitable titles arising out of parol trusts or attaching to legal titles discussed in Wood v. Tinsley, 138-514. **Section merely applies to deeds, leases and contracts to convey, the law applicable to mortgages and deeds of trust being section 982, but being similarly construed:** Hinton v. Moore, 139-47; Wood v. Tinsley, 138-509; Collins v. Davis, 132-109; Hooker v. Nichols, 116-160; Allen v. Bolen, 114-565; Love v. Crews, 113-258. **This section and section 961 were both intended to prevent fraud and must be construed together with that view:** Austin v. Staten, 126-783. **Section will be construed in accordance with principles adopted in construction of sections 982 and 983:** Francis v. Herren, 101-497.

REGISTRATION GENERALLY. Unregistered deed of conveyance or

mortgage of land is good between parties and their heirs in absence of intervening rights of creditors or purchasers: Morton v. Lumber Co., 144-31; Hinton v. Moore, 139-46; Wallace v. Cohen, 111-103; Leggett v. Bullock, 44-283—and same principle applies to unregistered assignment of mortgages, Morton v. Lumber Co., 144-31. Conveyances and contracts hereunder good as against creditors and purchasers for value from date of their registration: Bell v. Couch, 132-350; Collins v. Davis, 132-109; Hallyburton v. Slagle, 130-485; Weaver v. Chunn, 99-433; Ijames v. Gaither, 93-361; Blevins v. Barker, 75-436; Robinson v. Willoughby, 70-358—and the filing of same in register's office is registration, Smith v. Lumber Co., 144-47; Glanton v. Jacobs, 117-428; Davis v. Whitaker, 114-279; Parker v. Scott, 64-118; McKinnon v. McLean, 19-79; Metts v. Bright, 20-311. Deeds not registered in proper time only postponed or subordinated as to creditors and purchasers for value: Tyner v. Barnes, 142-113—but as against volunteers or donees, older deed, though not registered, will, as a rule, prevail, Ibid. Where man executed and delivered deed to tract of land prior to marriage, which was not recorded until after his death, his widow not entitled to dower: Haire v. Haire, 141-88. Principle that under section unregistered deed does not constitute color of title does not extend to claim by adverse possession held continuously for requisite time under deeds foreign to true title or independent of title under which plaintiff claims: Janney v. Robbins, 141-400; Collins v. Davis, 132-111; Avent v. Arrington, 105-377; Utley v. R. R., 119-720. Unregistered deed is not color of title where both plaintiff and defendant claims under same grantor, and as against deed which though subsequent in date has been registered first: Austin v. Staten, 126-790, as explained in Janney v. Robbins, 141-404. By implication section 1245 of the Code of 1883, which was repealed by this section was continued in force until Jan. 1, 1886, so as to authorize registration until then of deeds previously executed: Cowen v. Withrow, 116-771. Section not applicable to registration of grants: Wyman v. Taylor, 124-426; and cases under section 1729. Where probate and registration of deed under which defendant's claim was defective, reprobate and reregistration after plaintiff's title accrued, and after institution of action, can have no effect: Bernhardt v. Brown, 122-587. Deed executed prior to passage of section, but not registered until after registration of mortgage from same grantor, competent evidence to show title in grantee, he being in possession before passage of section: Laton v. Crowell, 136-377. Decree in suit for specific performance directing conveyance and reciting that its effect should be to convey title need not be recorded under this section: Skinner v. Terry, 134-305. Section applicable where grantee in deed fails to have same recorded until after probate of will of grantor devising same lands and the registration of deed for same land from devisee to purchaser for value: Bell v. Couch, 132-346. No limitation as to time within which instrument shall be registered: Hallyburton v. Slagle, 130-484; Sellers v. Sellers, 98-13. When conveyance or contract to convey not registered until after docketing of judgment against grantor, though executed prior to same, grantee takes subject to lien of judgment: Tarboro v. Micks, 118-162; Bostic v. Young, 116-766; Francis v. Herren, 101-507. Sheriff's deed for land duly registered takes precedence of similar deed which, though dated first and

made in pursuance of prior sale, was registered later: Hooker v. Nichols, 116-157. Contracts to convey land as between parties thereto may be read in evidence without being registered: Hargrove v. Adcock, 111-166. Conveyance of land made prior to passage of section, not valid against creditors or bona fide purchasers, unless registered before January 1, 1886: Phillips v. Hodges, 109-248. Purchaser at execution sale who registers deed before deed executed prior to his, will acquire title to land: Cowen v. Withrow, 109-636. Failure to register instrument does not invalidate same so that creditors, merely as such, may treat it as nullity in collateral proceedings: Francis v. Herren, 101-507—but it is void against proceedings instituted by them and prosecuted to sale of property or acquirement of lien as against all who derive title thereunder, Ibid. Unrecorded release of timber interest in land by mortgagee of no validity as against registered conveyance to purchaser under mortgage sale: Barber v. Wadsworth, 115-33. Where proof of execution of deed or other instrument requiring registration has been duly made in this state not necessary that fact of probate should be registered, unless statute so directs: Perry v. Bragg, 111-159. Where acknowledgment of deed void, registration thereof also void: Lance v. Tainter, 137-249; Long v. Crews, 113-256; Southerland v. Hunter, 93-310—as is registration upon unauthorized or essentially defective probate, Allen v. Burch, 142-524; Barrett v. Barrett, 120-129; Anderson v. Logan, 99-474. Section applicable both to lost and unlost deeds executed after Dec. 1, 1885: Hinton v. Moore, 139-44. Where plaintiff is purchaser for value under registered conveyance, his title can not be defeated by proof of prior conveyance lost before registration: Hinton v. Moore, 139-44—and parol evidence of such unregistered conveyance inadmissible, Ibid.

NOTICE. Registration of deed showing probate, including private examination of wife, and order of registration, and names of grantors, but omitting copy of signatures at end of instrument, is sufficient notice under section: Smith v. Lumber Co., 144-47—as is also case where seal not recorded, and record represents in any way that instrument sealed, Heath v. Cotton Mills, 115-202. Filing for registration is in law the registration and is sufficient notice: Smith v. Lumber Co., 144-47; Glanton v. Jacobs, 1117-428; Davis v. Whitaker, 114-279; Parker v. Scott, 64-118; Metts v. Bright, 20-311; McKinnon v. McLean, 19-79—and failure of register to index deed actually registered can not impair its efficacy, Davis v. Whitaker, 114-279. Purchaser for value under sufficient and registered deed is not affected with notice by possession of those under prior deed if invalid or registered upon invalid probate: Tremaine v. Williams, 114-114. No notice, however full and formal, can supply notice by registration as required by this section: Tremaine v. Williams, 144-114; Collins v. Davis, 132-106; Blalock v. Strain, 122-283; Patterson v. Mills, 121-267, and cases cited; Hinton v. Leigh, 102-28; Blevins v. Barker, 75-436. Recorded option on lands given by duly empowered executors is notice of its terms only, and time within which should be exercised: Trogden v. Williams, 144-192—and unregistered waiver of time limit by executors in consenting to execute deed thereafter is inoperative against purchaser for value under sufficiently and subsequently registered conveyance made by proper persons, Trogden v. Williams, 144-192. Provisions of section that no pur-

chase from bargainor or lessor shall pass title as against unregistered deed executed before Dec. 1, 1885, of which purchaser had actual or constructive notice, applies to purchase at sale under execution: Cowen v. Withrow, 116-771, 112-736, 111-306, 109-636. One who goes into possession of land under parol contract to convey can not hold land until repaid purchase money and for improvements as against purchaser for value from vendor, holding under duly registered conveyance, although purchaser had notice of contract: Wood v. Tinsley, 138-507.

Proviso in section making actual possession notice to subsequent purchasers applies only to deeds executed prior to Dec. 1, 1885: Collins v. Davis, 132-106; Allen v. Bolen, 114-560. Person who purchases land with notice of uncancelled mortgage thereon, executed prior to Dec. 1, 1885, is charged with notice of all rights of mortgagee and those claiming under him: Collins v. Davis, 132-112. Where plaintiff claims under deed executed after defendant's deed, but registered before said deed (which was executed prior to Dec. 1, 1885), and plaintiff had no notice of actual or constructive possession of land, plaintiff acquires title as against defendant: Allen v. Bolen, 114-560. In absence of fraud actual notice of prior unregistered mortgage or contract to convey executed since Dec. 1, 1885, can not affect the rights of subsequent purchaser for value whose deed or mortgage duly registered: Maddox v. Arp, 114-585; Wallace v. Cohen, 111-103; Bank v. Mfg. Co., 96-298; Fleming v. Burgin, 37-584. Actual notice to agent of unregistered deed executed prior to Dec. 1, 1885, is actual notice to principal: Cowan v. Withrow, 111-306. Registration of prior voluntary deed is notice to subsequent purchaser: Taylor v. Eatman, 92-601. Where one purchases land knowing same to be in possession of person other than vendor, he is affected with notice and must inquire into title of possessor: Bost v. Setzer, 87-187 (note this is only applicable where conveyance executed before Dec. 1st, 1885).

Section merely referred to: Janney v. Blackwell, 138-440; Wainwright v. Bobbitt, 127-274; Fortescue v. Crawford, 105-30.

981. Deeds executed prior to January first, one thousand eight hundred and seventy. Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and seventy, may have the same registered without proof of the execution thereof: Provided, that such person shall make an affidavit before the officer having jurisdiction to take probate of such deed that the grantor, bargainor or maker of such deed, and the witnesses thereto are dead or can not be found, and that he can not make proof of their handwriting: Provided, that it shall also be made to appear by affidavit that affiant believes such deed to be a bona fide deed and executed by the grantor therein named: And provided further, that this section shall not interfere with vested rights nor shall a deed so admitted to record be used as evidence in any action now pending. Said affidavit shall be written upon or attached to such deed, and the same,

together with such deed, shall be entitled to registration in the same manner and with the same effect as if proven in the manner prescribed by law for other deeds.

1885, c. 147, s. 2; 1905, c. 277. **Probate of deed dated prior to January 1st, 1870, defective where does not appear by affidavit that affiant believes such deed to be a bona fide deed and executed by grantor named therein:** Allen v. Burch, 142-524.

982. Mortgages and deeds of trust. No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth; or in case of personal estate where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor shall reside out of the state, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides.

Code, s. 1254; R. C., c. 37, s. 22; 1829, c. 20. **Words "at law" defined** in Hooker v. Nichols, 116-157; Fleming v. Burgin, 37-584. **Deeds of trust and mortgages are of no validity as against purchasers for value and creditors unless registered; and have effect only from registration:** Dew v. Pyke, 145-303; Bostic v. Young, 116-770; Robinson v. Willoughby, 70-358; McCoy v. Lassiter, 95-88; Deal v. Palmer, 72-582; Dukes v. Jones, 51-14; Fleming v. Burgin, 37-584; Cowan v. Green, 9-384. **Registration of mortgage upon proper probate is notice to the world of existence thereof and of nature and extent of charge created by it:** Harper v. Edwards, 115-246; Woody v. Jones, 113-253; Ijames v. Gaither, 93-358; Weathersbee v. Farrar, 97-106; Parker v. Banks, 79-480—**and no notice, however full and formal, will dispense with such notice by registration,** Blalock v. Strain, 122-283; Hooker v. Nichols, 116-160; Quinnerly v. Quinnerly, 114-145; Killebrew v. Hines, 104-182; Hinton v. Leigh, 102-28; Blevins v. Barker, 75-436; Dewey v. Littlejohn, 37-495; Fleming v. Burgin, 37-584.

152-712

Mortgage or trust deed duly proven and registered is good against a prior mortgage not registered: Quinnerly v. Quinnerly, 114-145; Allen v. Bolen, 114-565; Wallace v. Cohen, 111-103; Hinton v. Leigh, 102-28; Bank v. Mfg. Co., 96-298; Moore v. Ragland, 74-343; Robinson v. Willoughby, 70-358; Fleming v. Burgin, 37-584—**even though second mortgagee knew of existence of first mortgage,** Bank v. Mfg. Co., 96-298; Quinnerly v. Quinnerly, 114-145—**unless, however, second mortgagee prevented by fraud the registration of first mortgage,** Bank v. Mfg. Co., 96-298; Fleming v. Burgin, 37-584. **Where mortgage registered before prior trust deed securing purchase money recites the prior encumbrance, such purchase money must be paid by mortgagee from proceeds of land:** Bank v. Vass, 130-590; Hinton v. Leigh, 102-28.

A registry of mortgage is not void because of clerical mistakes made by register in transcribing which do not affect sense and provision as to amount secured, description of property, etc., or obscure meaning of in-

strument: Royster v. Lane, 118-156. A reference in a mortgage to note secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry and to charge them with notice: Harper v. Edwards, 115-246. Duly registered mortgage passes legal title to mortgagee and levy and sale of property for taxes due by mortgagor do not carry title to purchaser divested of lien of mortgage: Woody v. Jones, 113-253. As between parties mortgage is valid without registration: Leggett v. Bullock, 44-283; Wallace v. Cohen, 111-103; Deal v. Palmer, 72-582. Cancelled mortgages as against creditors are inoperative and creditor secured thereby can claim no liens or priorities thereunder: Bank v. Mfg. Co., 96-298. Deeds in trust and mortgages are, as between parties thereto, when registered, effectual from their delivery: Brem v. Lockhart, 93-191. Conveyance of chose in action in trust to pay debt is within section: Smith v. Washington, 16-318. As to sufficiency of instrument as a mortgage under this section, see Skinner v. Cox, 15-59; Chemical Co. v. Johnson, 98-123; Harris v. Jones, 83-317.

Registration deemed to be done on day of delivery to register, as noted by him on deed: McKinnon v. McLean, 19-79—deemed to be complete from time when register commences same, Metts v. Bright, 20-311. Where deed in trust delivered to register, who immediately commenced registration of same, and justice's execution obtained two hours later, trust deed has priority over levy under execution: Metts v. Bright, 20-311.

Section embraces only those deeds of trust which are intended as securities for debts: Saunders v. Ferrell, 23-96—and not to deeds of settlement between husband and wife in which property is conveyed to trustee in trust for wife, such instruments being embraced under section 985: Ibid; also Green v. Kornegay, 49-66. In contest between trustee under deed and creditor of maker in attachment proceedings, lien of former begins from time at which deed delivered to register, that of latter from time when summons personally served upon debtor: Parker v. Scott, 64-118. Deed in trust duly executed by husband, but not registered until after death, operates to defeat widow's claim of dower: Norwood v. Marrow, 20-578—for widow in respect to such claim is neither creditor nor purchaser for value under section, Ibid.

Mortgage deed conveying land which it not registered in county where land lies is not valid against creditors or purchasers: King v. Portis, 77-25—and where purchaser at foreclosure sale obtains deed for tract of land lying in two counties, and mortgage under which sold was registered only in one, such deed conveys no title as against creditors or purchasers for value as to part of land lying in other county, Ibid.

CHATTEL MORTGAGES. Agreement between parties to chattel mortgage for substitution of other property for that conveyed in mortgage, while good as between parties, is not mortgage so as to give lien in preference to creditors and purchasers for value: Blalock v. Strain, 122-283. When mortgagee of personal property agreed that mortgagor might exchange same for other property, which should stand as security in place of former, and mortgagor executed to another mortgagee a mortgage upon property so exchanged, such latter mortgage is superior to prior mortgage, although second mortgagee had notice of agreement: Blalock v. Strain, 122-283.

Contract creating lien upon stock and prospective products of business to secure capital for operation of business is valid chattel mortgage: Brown v. Dail, 117-41. **Where mortgage upon personalty was registered in county in which mortgagor resided, not necessary, in case of his removal to another, to register mortgage in such other county:** Harris v. Allen, 104-86.

As to sufficiency of language of chattel mortgage to convey property, see Harris v. Allen, 104-86. **Deeds in trust and mortgages of personal property must be registered in county where maker resides:** Weaver v. Chunn, 99-431—**except where he is nonresident, in which case must be registered in county where property or some part thereof is situated,** Ibid—**otherwise are void against creditors for value,** Ibid. **For fertilizer contract held not to be within section,** see Chemical Co. v. Johnson, 98-123. **Where two mortgages on personalty, and first mortgagee advances money in excess of mortgage to save property and prepares same for market, he is not entitled to amount of such excess against second mortgagee:** Weathersbee v. Farrar, 97-106.

No particular words of conveyance necessary to the execution of mortgage of personal property: Frick v. Hilliard, 95-117—**for at common law mortgages of personal property were not required to be reduced to writing,** Butts v. Screws, 95-215—**and section only requires them to be reduced to writing and registered as affecting creditors and purchasers for value,** Ibid—**but same are good inter partes without registration,** Williams v. Jones, 95-504.

Mortgage both of land and personal property may be registered after death of mortgagor: Williams v. Jones, 95-504.

Where duly enrolled, a vessel used entirely in the state was mortgaged and recorded as required by act of congress, but was not registered as required by section, such recording is valid: Lawrence v. Hodges, 92-672.

Pledge of personal property not included within words or meaning of section: Doak v. Bank of State, 28-309. **Distinction between pledge and mortgage of personal property pointed out** in Doak v. Bank of State, 28-309; McCoy v. Lassiter, 95-88.

Mortgage upon crop registered in county in which land lies and to which mortgagor contemplated removing, and subsequently removed after registration of instrument, is properly registered: Harris x. Jones, 83-317.

For a general discussion of the section, see Wood v. Tinsley, 138-509; Collins v. Davis, 132-107; McKinnon v. McLean, 19-79.

Section merely referred to: Hinton v. Moore, 139-47; Lance v. Tainter, 137-250; Barrington v. Skinner, 117-52; Love v. Crews, 113-258; Harrell v. Godwin, 102-351; Francis v. Herren, 101-497; Evans v. Etheridge, 99-46; Brem v. Lockhart, 93-193; Todd v. Outlaw, 79-235; Barrett v. Cole, 49-41; McCoy v. Wood, 70-128; Edwards v. Thompson, 71-181; Starke v. Etheridge, 71-244; Womble v. Battle, 38-190.

983. Conditional sales of personal property. All conditional sales of personal property in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for

the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the state, then in the county where the said personal estate or some part thereof is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides.

Code, s. 1275; 1891, c. 240; 1883, c. 342. **For definition of conditional sale,** see Mfg. Co. v. Gray, 121-170.

Unless registered a conditional sale is invalid as to creditors and purchasers for value: Clark v. Hill, 117-11; Blalock v. Strain, 122-283; Glascock v. Hazell, 109-148; Foreman v. Drake, 98-311; Butts v. Screws, 95-215; Brem v. Lockhart, 93-191. **Instrument constituting a conditional sale of personal property is properly registered in county where purchaser resides:** Barrington v. Skinner, 117-47—**and if he remove to another county with the property, it need not be recorded in latter county,** Ibid. **Conditional sale of personalty valid inter partes notwithstanding same not registered:** Kornegay v. Kornegay, 106-190; Butts v. Screws, 95-215—**nor in writing,** Butts v. Screws, 95-215. **Section places conditional sales on same footing as chattel mortgages, and only protects creditors and purchasers:** Thomas v. Cooksey, 130-151; Butts v. Screws, 95-215. **Conditional sale of personal property made to husband, registered after his death, takes precedence over allotment of year's allowance to widow which included such property, made after registration:** Hinkle v. Green, 125-489. **Where contract put in shape of lease for purpose of evading registration laws, or with other unlawful intention, same will not be upheld as such to prejudice of innocent purchasers:** Wilcox v. Cherry, 123-79, **overruling upon this point** Foreman v. Drake, 98-311.

AS TO WHETHER CONTRACT A CONDITIONAL SALE. A conditional sale is a sale upon condition, in which purchaser sustains relation of mortgagor and seller the relation of mortgagee: Mfg. Co. v. Gray, 121-170. **As to whether contract a conditional sale or lease depends upon purpose of parties as expressed in instrument:** Hamilton v. Highlands, 144-279; Empire Drill Co. v. Allison, 94-548. **Where firm agrees to sell goods for part of profits, it is not a conditional sale:** Lance v. Butler, 135-419. **Contract for lease of personal property, upon payment of rent, property to belong to lessee upon last payment of rent, is conditional sale:** Clark v. Hill, 117-11; Mfg. Co. v. Gray, 121-170; Barrington v. Skinner, 117-47; Puffer v. Lucas, 112-377. **In order to constitute conditional sale, essential that title to property should remain in vendor:** Frick v. Hilliard, 95-117. **Where title to property retained until purchase money paid, no title to property passes, although description of chattel in instrument is wrong:** Harris v. Woodard, 96-232.

For contracts construed to be conditional sales, see Whitlock v. Lumber Co., 145-120; Hamilton v. Highlands, 144-279; Wilcox v. Cherry, 123-82, overruling Foreman v. Drake, 98-311; Blalock v. Strain, 122-283; Block v. Dowd, 120-402; Tufts v. Griffin, 107-49; Vasser v. Buxton, 86-335; Clayton v. Hester, 80-275; Parris v. Roberts, 34-268; Ellison v. Jones, 26-48. **Where transaction doubtful as to whether parties intended mortgage**

or conditional sale, courts will construe same as mortgage: Watkins v. Williams, 123-170; Poindexter v. McCannon, 16-373. **For contracts held not to be conditional sales** see Lance v. Butler, 135-419; Frick v. Hilliard, 95-117; Millhiser v. Erdman, 98-292; Chemical Co. v. Johnson, 98-123.

984. Conditional sales of railroad property. Whenever any railroad equipment and rolling stock shall hereafter be sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with; such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice unless—

1. The same shall be evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing shall be registered as mortgages are registered in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.

3. Each locomotive or car so sold, leased or loaned shall have the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three.

Code, s. 2006; 1883, c. 416; 1907, c. 150.

985. Marriage settlements. All marriage settlements and other marriage contracts, whereby any money or other estate shall be secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration.

Code, ss. 1269, 1270, 1821; 1885, c. 147; R. C., c. 37, ss. 24, 25; 1785, c. 238; 1871-2, c. 193, s. 12. **As to what is and what is not a marriage settlement,** see Sullivan v. Powers, 100-27; Walton v. Parish, 95-259; Teague v. Downs, 69-287. **Deeds of settlement in trust for wife and children proved and registered three years after execution, valid as against creditors, whose debts contracted after such registration:** Johnston v. Malcolm, 59-120—**and invalid only against creditors whose debts were in existence at time when instrument registered,** Johnston v. Malcom, 59-123. **Registration of marriage settlement, embracing personal property of married woman, properly made in county where such woman resided and the property was at time of execution of instrument:** Latham v. Bowen, 52-337.

Antenuptial contract between husband domiciled in this state and wife domiciled in another state securing property in such state to wife, and there duly recorded, is good against creditors of husband, although property subsequently removed to this state: Hicks v. Skinner, 71-539.

As bearing upon section, see Smith v. Garey, 22-46. **Section merely referred to:** Dew v. Pyke, 145-303; Credle v. Carrawan, 64-425.

986. Deeds of gift. All deeds of gift of any estate of whatever nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration.

Code, s. 1252; 1885, c. 147; R. C., c. 37, s. 18; 1789, c. 315, s. 2. **Registration of prior voluntary deed is notice to subsequent purchaser:** Taylor v. Eatman, 92-601. **For discussion of section,** see Dew v. Pyke, 145-303. **Case under an old section:** Hancock v. Hovey, 1-152.

987. Powers of attorney. Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted.

Code, s. 1249; 1899, c. 235, s. 15. **As to sufficiency of power of attorney to convey realty,** see Caddell v. Allen, 99-542. **Power of attorney given by feme covert to dismiss action concerning her land need not be registered to give it validity:** Hollingworth v. Harman, 83-153.

988. Certified copies may be registered; used as evidence. A duly certified copy of any deed or writing, required or allowed to be registered, may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state.

Code, s. 1253; 1858-9, c. 18, s. 2. **For records of court to prove deed, see sections 337, 338.**

Certified copy of deed is evidence of its probate and registration: Strickland v. Draughan, 88-315; Love v. Harbin, 87-249—**but same may be rebutted by evidence to contrary,** Love v. Harbin, 87-249.

Conveyances can not be introduced in evidence until proved and registered: Jennings v. Reeves, 101-450; Avent v. Arrington, 105-389; White v. Holly, 91-68; Phifer v. Barnhardt, 88-333; Triplett v. Witherspoon, 74-475; Wilson v. Sparks, 72-209; Walker v. Coltraine, 41-79. **When certificate of probate is not sufficient to entitle instrument to registration, if**

one make it part of his pleadings, he waives question of admissibility. Avent v. Arrington, 105-377.

Fact that deed has been three times probated and registered does not affect its competency as evidence: Bell v. Couch, 132-346.

Deed improperly proven and registered was, on trial, attempted to be proven as at common law, but held could not be so proven unless deed was in court: Hatcher v. Hatcher, 127-201.

VIII. Probate.

989. Before what officers. The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proven or acknowledged before any one of the following officials of this state: The several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the governor of this state, the clerk of the supreme court, the several clerks of the superior court, the deputy clerks of the superior courts, the several clerks of the criminal courts, notaries public, and the several justices of the peace.

Code, s. 1246; 1899, c. 235; 1895, c. 161, ss. 1, 3; 1897, c. 87. **For powers of commissioners of affidavits, see section 926—of clerks of courts of other states, see section 931. For forms of acknowledgment and proof, see sections 1001-1007.**

The taking of acknowledgment of a deed by a justice of the peace, commissioner or notary public is a judicial, or at least a quasi judicial, act: Long v. Crews, 113-256; Piland v. Taylor, 113-1; Paul v. Carpenter, 70-502. **Registration upon an acknowledgment before an officer not authorized to take it is not even notice to creditors and subsequent purchasers:** Long v. Crews, 113-256 and cases cited. **Commissioner of deeds of this state is not required to affix seal to certificate acknowledging execution of deed conveying land in this state:** Johnson v. Duvall, 135-642—**nor is it necessary for seal to be affixed to certificate by any officer unless at the time the statute required it,** Westfelt v. Adams, 131 379; but see section 993.

Cases of interest hereunder where acknowledgment or proof of execution taken before judge of superior court: Wright v. Player, 72-94—**before commissioner of affidavits,** Johnson v. Duvall, 135-642; Barcello v. Hapgood, 118-712; Buggy Co. v. Pegram, 102-540; Simmons v. Gholson, 50-401—**before clerk of superior court,** Trenwith v. Smallwood, 111-132; Ferebee v. Hinton, 102-99; see section 995—**before deputy clerk of superior court,** Tatom v. White, 93-453 (this decision made before amendment, 1895, c.

161, ss. 1, 3)—**before clerk of county court,** Strickland v. Draughan, 88-315; Starke v. Etheridge, 71-240; Johnson v. Pendergrass, 49-479—**before deputy clerk of county court,** Piland v. Taylor, 113-1; Coltrane v. Lamb, 109-209,—**before justice of the peace,** Hatcher v. Hatcher, 127-200; Gaskins v. Allen, 137-426; Williams v. Kerr, 113-309—**before notary public,** Smith v. Lumber Co., 144-47; Lance v. Tainter, 137-249; Long v. Crews, 113-256; Hughes v. Long, 119-52—**before old court of pleas and quarter sessions or county court,** Coltrane v. Lamb, 109-209; Sellers v. Sellers, 98-13; Robbins v. Harris, 96-557—**before provost marshal of Newbern while city under federal authority,** Paul v. Carpenter, 70-502—**before commissioner authorized by old county court,** Skinner v. Fletcher, 23-313; Fenner v. Jasper, 18-34.

Certificate of probate by proper officer must be accepted as true when comes up collaterally, and recitals can not be disproved nor omissions supplied by extraneous proof: Wynne v. Small, 102-133. **Distinction between probates by clerks of courts and commissioners of affidavits pointed out** in Evans v. Etheridge, 99-43. **Justice of peace can not correct certificate to deed after term of office has expired:** Cook v. Pittman, 144-530.

AS TO DISQUALIFICATIONS TO TAKE ACKNOWLEDGMENT OR PROOF. An officer interested in a deed, either as party, trustee or cestui que trust, is disqualified to take acknowledgment of its execution: Long v. Crews, 113-256; Lance v. Tainter, 137-249; Joines v. Johnson, 133-487; McAllister v. Purcell, 124-262; Blanton v. Bostic, 126-421; Land Co. v. Jennett, 128-3; Freeman v. Person, 106-251; but see Trenwith v. Smallwood, 111-132. **The fact that officer taking acknowledgment or proof is employed by grantee does not invalidate unless such officer has an interest in it himself:** Smith v. Lumber Co., 144-47; Bank v. Ireland, 122-571. **Clerk of court can not take proofs outside of state:** Ferrebee v. Hinton, 102-99; see section 994. **Deputy clerks of superior court could not take proof of execution, or make orders concerning registration of instruments prior to enactment of chapter 161, acts of 1895:** Tatom v. White, 95-453.

990. Before what nonresident officers. The execution of all such instruments and writings as are permitted or required by law to be registered may be proven or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, vice-consul general, or commercial agent of the United States. And the execution of all such instruments may be proven or acknowledged before any justice of the peace of any state or territory of the United States. If the proof or acknowledgment of the execution of an instrument be had before a justice of the peace of any state of the United States other than this state or of

any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate.

1899, c. 235; s. 5; 1905, c. 451. **See sections 926, 931, 2350 2351.**

991. By commissioner appointed by clerk, maker nonresident. Whenever it shall appear to the clerk of the superior court of any county that any person nonresident of this state is desirous of acknowledging a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he shall issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved, and that such examination is in due form, and shall order the same to be registered.

Code, s. 1258; 1869-70, c. 185.

992. Before justice of county other than where land lies; clerk's certificate. If the proof of acknowledgment of any instrument shall be had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal.

1899, c. 235, s. 4. **Consult Lineberger v. Tidwell, 104-506.**

993. Seal of probating officer, when. When proof or acknowledgment of the execution of any instrument by any maker of such

instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment and such official has an official seal he shall set his official seal to his certificate. If the official before whom the instrument is proven or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proven or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered the official seal shall not be necessary.

1899, c. 235, s. 8.

Omission by justice to attach seal to certificate of proof of execution of deed and of privy examination of wife will not invalidate his action otherwise regular: Lineberger v. Tidwell, 104-506. **Certificate of probate need not have seal if same not required by statute at date of execution or registration of deed:** Westfelt v. Adams, 131-379. **Seal of justice of the peace not essential to validity of assignment for creditors:** Friendenwald Co. v. Sparger, 128-446. **Seal of commissioner of affidavit not essential to valid probate in the instance referred to** in Johnson v. Duvall, 135-642.

994. Taken anywhere. The execution of any and all instruments required or permitted by law to be registered may be proven or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this state in which the subject matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made.

1899, c. 235, s. 13.

Consult the following decisions prior to this enactment: Dixon v. Robbins, 114-102; Lewis v. Roper, 109-19; Darden v. Steamboat Co., 107-437; Davis v. Higgins, 91-382.

995. When clerk is a party. All instruments required or permitted by law to be registered to which clerks of the superior court are parties or in which such clerks are interested, may be proved or acknowledged and privy examination of any married woman, when necessary, taken before any justice of the peace of the county of said clerk, which clerk may then, under his hand and official seal, certify to the genuineness thereof, or before any judge of the superior court or justices of the supreme court, and the said instrument probated and ordered to be registered by such judge or justice in like manner as is provided by law for probates by clerks of the superior court in other cases.

1891, c. 102; 1893, c. 3. **See proviso, section 999. Probate of deed by officer who is party thereto or interested therein is a nullity:** Land Co. v.

Jennett, 128-3; Lance v. Tainter, 137-249; Long v. Crews, 113-256; Freeman v. Person, 106-251; McAllister v. Purcell, 124-262; Blanton v. Bostic, 126-421; Joines v. Johnson, 133-487; Gregory v. Ellis, 82-225—**but probate and private examination taken before officer not invalid simply because he is related to one of the parties,** McAllister v. Purcell, 124-262—**or is subscribing witness to deed,** Trenwith v. Smallwood, 111-132.

Decisions prior to enactment of section which are not now the law: White v. Connelly, 105-65; Turner v. Connelly, 105-72.

996. Subscribing witness or maker subpœnaed, when. The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpœna for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. Such subpœna shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpœna he shall be liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses.

Code, s. 1268; 1899, c. 235, s. 16; 1897, c. 28. **Where there is subscribing witness to deed, its execution may be proved by such witness without the acknowledgment of maker:** Shaffer v. Hahn, 111-1. **Law attaches peculiar importance to testimony of subscribing witnesses:** Smith v. Smith, 108-365.

997. Proof of witness's handwriting, when. If an instrument required or permitted by law to be registered have a subscribing witness and such witness be dead or out of the state, or of unsound mind, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, but this shall not be proof of the execution of instruments by married women.

1899, c. 235, s. 12. **Consult the following decisions prior to enactment of section:** Simpson v. Simpson, 93-373; Howell v. Ray, 92-510; Davis v. Higgins, 91-382; Black v. Justice, 86-504; Miller v. Hahn, 84-226; Burnett v. Thompson, 35-379.

As to how to prove handwriting hereunder and as to who is competent to prove it, see Ratliff v. Ratliff, 131-425; Bivings v. Gosnell, 141-341; Abernethy v. Yount, 138-337; State v. DeGraff, 113-688; Anderson v. Logan, 99-474; Tuttle v. Rainey, 98-513; Hussey v. Kirkman, 95-63; Angier v. Howard, 94-27; Howell v. Ray, 92-510; State v. Gay, 94-814; Davis v.

Higgins, 91-382; Black v. Justice, 86-504; Yates v. Yates, 76-142; Barwick v. Wood, 48-306; McKonkey v. Gaylord, 46-94; Carrier v. Hampton, 33-307; Black v. Wright, 31-447; Pope v. Askew, 23-16; Beverly v. Williams, 20-378; State v. Allen, 8-6.

998. Proof of maker's handwriting, when. If any instrument required or permitted by law to be registered have no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker, but this shall not apply to proof of execution of instruments by married women.

1899, c. 235, s. 11. **As to proving handwriting, see cases cited under section 997. Where parties to instrument having no subscribing witness are nonresidents except one, instrument may be probated upon proof of handwriting of nonresident by resident party:** Leroy v. Jacobosky, 136-443. **Consult following decisions prior to this enactment:** Love v. Harbin, 87-249; Black v. Justice, 86-504.

999. Clerk or deputy must pass on certificate of other officer. Whenever the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration shall, before the same shall be registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it shall appear that the instrument has been duly proven or acknowledged and the certificate or certificates to that effect are in due form he shall so adjudge and shall order the instrument to be registered together with the certificates: Provided, that if the clerk of the superior court is a party to or interested in such instrument such adjudication and order of registration shall be made by his deputy or by the clerk of the superior court of some other county of this state, or by some justice of the supreme court of this state or some judge of the superior court of this state: Provided further, the acknowledgment of such instruments may also be made before a justice of the peace of said county, and the adjudication of the sufficiency of the certificate of said justice may be made by said clerk or his deputy.

1899, c. 235, s. 7; 1905, c. 414. **Adjudication by clerk of court that certificate of probate is correct and sufficient is presumptively true:** Hughes v. Long, 119-52—**but such presumption may be rebutted by competent evidence,** Ibid. **When proof of execution of instrument duly made within state, not necessary that fact of probate should be registered, unless statute so requires:** Perry v. Bragg, 111-159.

147-249
180-635

Provision that clerk of court where land lies shall pass upon acknowledg-

ment taken before other officials is directory merely: Darden v. Steamboat Co., 107-437; Ferrabee v. Hinton, 102-99; Young v. Jackson, 92-144; Holmes v. Marshall, 72-37—**and it is not essential to validity of registration that clerk should add adjudication or order of registration to certificate and fiat of officer taking probate:** Darden v. Steamboat Co., 107-437. **Registration of instrument upon proof of execution before commissioner of affidavits, without adjudication of clerk of superior court having jurisdiction, is invalid as against creditors and purchasers for value:** Evans v. Etheridge, 99-43.

For decisions prior to enactment of section, see White v. Connelly, 105-65; Turner v. Connelly, 105-72; Tatom v. White, 95-453.

1000. Of deed by husband whose wife is insane. When a deed executed by a married man whose wife is insane or a lunatic, together with the certificate of the superintendent of the asylum and the certificate of the clerk taken as prescribed in section nine hundren and fifty-nine, shall be offered for probate before the clerk of the superior court of the county in which the land conveyed is situated, and the execution of such deed shall be acknowledged or proved, the clerk shall adjudge whether the certificates of the superintendent and the clerk are in due form, and if adjudged to be in due form he shall order the registration of the deed and certificates.

1905, c. 138, s. 2.

IX. Forms.

1001. Adjudication and order of registration. The form of adjudication and order of registration required by section nine hundred and ninety-nine shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This....day of....., A. D.....

.....

(Signature of officer.)

1899, c. 235, s. 7. **See annotations under section 999. Where proof of execution of instrument duly made within the state, not necessary, that certificate or fact of probate should be registered, unless statute at that time otherwise directed:** Perry v. Bragg, 111-159; Cochran v. Imp. Co., 127-386; Freeman v. Hatley, 48-115; Love v. Harbin, 87-253; Starke v. Etheridge, 71-243.

147-249
150-635

1002. Acknowledgment by grantor. Where the instrument shall be acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the.... day of..... (year).

(Official seal.) .....

(Signature of officer.)

As to probating officer affixing his seal, see section 993.

1003. Private examination of wife. When an instrument purports to be signed by a married woman, the form of certificate of her acknowledgment and private examination before any officer authorized to take the same, shall be in substance as follows:

North Carolina, ... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this.... (day of month, A. D.....(year).

(Official seal.) .....

(Signature of officer.)

1899, c. 235, s. 8; 1901, c. 637. **See under section 952. Private examination of married woman which sets out that she signed deed of her own free will and accord, and without any compulsion of her husband, is sufficient without adding words "and doth voluntarily assent thereto:"** Robbins v. Harris, 96-557.

1004. Private examination and acknowledgment by husband. Where the instrument shall be acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give name of official and his official title), do hereby certify that (here give name of the grantors whose acknowledgment

is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed instrument, and the said (here give name of the married woman or women), wife (or wives) of (here give name of husband or husbands), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this....(day of month), A. D.....(year).

(Official seal.) .....

(Signature of officer.)

1899, c. 235, s. 8; 1901, c. 299. **See cases under section 952. Omission of justice to attach seal to certificate of proof of execution of deed and privy examination of wife will not invaldiate his action otherwise regular, the section requiring him to attach seal being directory only,** Lineberger v. Tidwell, 104-506.

1005. Corporate conveyances. The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate, which would be deemed sufficient in law. If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This....day of ....., A. D. ...., personally came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this .... day of ....., (year).

(Official seal.) .....

(Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

(1)

North Carolina, ... County.

This .. day of ....., A. D. ...., personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument), in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the....day of.....(year).

(Official seal.) .....

(Signature of officer.)

(2)

North Carolina, ... County.

This is to certify that on the....day of.....19.., before me personally came ..... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that..... is the president (or vice-president), and..... is the secretary (or assistant secretary) of the..... the corporation described in, and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an

official seal is required by law) official seal, this the.... day of ..... (year).

(Official seal.)

.....

(Signature of officer.)

If the deed or other instrument is executed by the signature of the president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This .... day of ....., A. D. ....., personally came before me (here give name and official title of the officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (presiding member or trustee) of the..... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of the company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

.....,.....(Signature of officer).

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; 1907, c. 927.

For validation of all corporate probates prior to February 18, 1901, see sections 1027, 1028. Probate of deed of corporation by acknowledgment of individuals instead of its officers is void: Bernhardt v. Brown, 122-587.

As bearing on section: Clark v. Hodge, 116-761; Heath v. Cotton Mills, 115-202; Duke v. Markham, 105-131; Clayton v. Clagle, 97-302.

1006. Clerk's certificate upon probate by justice of peace. When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this state but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, ... County.

I, A. B. (here give name and official title of a clerk of a court of record) do hereby certify that C. D. (here give the name of the

justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of.....and state (or territory) of ....., and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this...day of ....., A. D. ....

(Official seal.) .....

(Signature of officer.)

1899, c. 235, s. 8.

1007. Clerk's certificate upon probate by nonresident officer without seal. When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official have no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

North Carolina, ... County.

I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer taking proof, etc.), in and for the county of ..... and state of ..... (or other political division of the state, territory or country as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this ....day of.....A. D.

(Official seal.) .....

(Signature of clerk.)

1899, c. 235, s. 8.

X. Probates Validated.

1008. Errors in registration corrected. Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing

the same before said clerk, it appears that errors have been committed the clerk shall order the register of the county to correct such errors and make the record conformable to the original: Provided, that such petitioner shall have notified his grantor and every person claiming title to, or having lands adjoining those mentioned in the petition, thirty days previous to perferring the same: Provided further, that any person dissatisfied with the judgment may appeal to the superior court as in other cases.

Code, s. 1266; R. C., c. 37, s. 28; 1790, c. 326, ss. 2, 3, 4. **Section provides for correction of errors in registration by petition and proceeding wherein interested persons and adjoining landowners are made parties, and in such cases statutory proceeding is exclusive:** Hopper v. Justice, 111-418. **Register of deeds has power and it is his duty to correct any error he may have made in registration of deed either by inserting any omitted matter, or by registration of entire instrument:** Sellers v. Sellers, 98-13. **Where by mistake or oversight of makers of deed, same incorrectly written, grantors have no equity to call upon grantee to correct mistake on books of register, as they have ample remedy under this section:** Oldham v. Bank, 85-240.

1008a. Clerk's certificate upon probate or order to registration lacking or defective. In every case where it appears from the record of the office of the register of deeds in any county in this state that a justice of the peace in this state has taken the proof or acknowledgment of the execution of a deed, or other instrument required by law to be registered, or has taken the privy examination of a married woman to any such instrument, and has certified to such proof, acknowledgment or privy examination, and such deed and certificate of the justice of the peace has been registered, prior to the first day of January, A. D. one thousand nine hundred and seven, in the county wherein the lands described in such deed or other instrument are located, without the certificate of the clerk of the superior court of the county of such justice of the peace, as to his being an acting justice of the peace, or as to the genuineness of his signature, or with a defective certificate of such clerk; or without the order of registration of the clerk of the superior court of the county in which such deed or other instrument is registered, or his adjudication that such deed or other instrument is proven, or as to the form of the certificate as to such proofs, or with a defective certificate of such adjudication, every and all such proofs, acknowledgment, privy examination, certificates and registration are validated: Provided, however, that such proof, acknowledgment, privy examination, certificates and registration shall be valid against creditors or purchasers from donor, bargainor or lessor, named in such deed or other instrument, only

from the first day of February, one thousand nine hundred and seven.

1907, c. 83.

1009. Taken by judges supreme or superior court, or deputy clerks. Wherever the judges of the supreme or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of deeds or any instrument required or allowed by law to be registered, and the privy examination of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations so taken and had are validated.

Code, s. 1260; 1871-2, c. 200, s. 1; 1889, c. 252; 1891, c. 484. **Section validates probates of deeds and privy examination taken before deputy clerk of superior court prior to Jan. 1, 1889, and it is immaterial whether deputy clerk, in making probate, signed as deputy clerk, or merely signed name of clerk thereto:** Gordon v. Collett, 107-362.

Section constitutional and valid if rights of third persons have not accrued, but it would not divest title of party acquired by subsequent deed from same grantor which is registered prior to enactment of curative statute: Gordon v. Collett, 107-362; Barrett v. Barrett, 120-127; Williams v. Kerr, 113-310.

Section does not validate probate of deed taken by clerk of superior court who is grantee in same: Freeman v. Person, 106-251; White v. Connelly, 105-71.

Power of legislature to enact statute as above unquestionable: White v. Connelly, 107-71—**and such legislation does not disturb vested rights,** Tatom v. White, 95-453.

Original section before amendment validated all probates of deeds before officers named therein prior to Feb. 12, 1872, and registration made in pursuance of such probates are embraced within operation of same, although made after that date, but before enactment of Code of 1883: Tatom v. White, 95-453.

1010. Defective order of registration. In all cases where any clerk of the superior courts or clerk of the inferior courts or clerk of any criminal courts of this state has passed, or shall hereafter pass, upon the certificate of an officer, taking the proof or acknowledgment of any deed, deed in trust, mortgage or other instrument required to be registered, and has then worded or shall word the order to registration substantially as follows: "Therefore, let the same with this certificate be registered," and the instrument has been admitted or shall hereafter be admitted to registration on such order, such registration shall be as good and valid as if the order

to registration had been as follows: "Therefore, let the instrument with the certificates be registered."

1905, c. 344.

1011. Where registered on order of judge, clerk being party. All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace, and ordered to registration by a judge of the superior court or justice of the supreme court to which clerks of the superior court are parties are hereby confirmed, and the probates and orders for registration declared to be valid.

1893, c. 3, s. 2.

1012. Notary having certified under his private seal. In every case, prior to the twenty-seventh day of January, one thousand nine hundred and five, where a notary public or clerk of a court of record, residing in this state or any other state, has taken the acknowledgment of any deed, mortgage or other instrument requiring registration or the privy examination of a married woman, or proof of the execution of such deed, mortgage or other instrument by witness, and has certified such acknowledgment, privy examination or proof, without the use of his official or notarial seal and although the term of said notary had expired, and the clerk of the court has adjudged such certificate to be in due form and has ordered such deed, mortgage or other instrument to be registered, and the same has been registered, every such certificate is hereby declared to be in all respects valid.

1899, c. 66; 1903, c. 513; 1905, c. 304; 1907, cc. 213, 665, 971.

1013. Before officer of state other than that of grantor. In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken or had by or before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate so had and taken is or was in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding: Provided, that this section shall apply to probates and acknowledgments of deputy clerks of other states when such

probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered: Provided, this section shall not affect any pending suit.

1905, c. 505.

1014. Where secretary of state instead of governor has certified to officer. In all cases, where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proven and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court, of any other state or territory of the United States, where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this state then in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid: Provided, that nothing herein contained shall affect the rights of third parties, who are purchasers for value, without notice from the grantor in such deed or other instrument.

1901, c. 39.

1015. Where clerks, notaries, or justices of the peace were interested. The probate and registration of all deeds, mortgages and other instruments requiring registration, prior to the fourth day of March, one thousand nine hundred and eight, to which the clerks of the superior courts are parties or in which they have an interest and which have been registered on the order of such clerks on proof of acknowledgment taken before such clerks, justices of the peace or notaries public be and the same are hereby declared valid. In all cases when acknowledgment or proof of any conveyance has

been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk of superior court, justice of the peace, notary public, shall be held valid, and are so declared.

1891, c. 102; 1899, c. 258; 1905, c. 427; 1907, c. 1003; 1908, c. 105, ss. 1, 2. **See sections 989 and 995.**

1015a. Where notary interested as attorney, or otherwise. The proof and acknowledgment of deeds, mortgages, deeds of trust or other papers or instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to any such deed, mortgage, deed of trust or other instrument which have been made, taken by or before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby in all respects declared to be valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in the said deeds, mortgages, deeds of trust or instruments.

1908, c. 105, s. 3.

1016. Where "previously" has been used instead of "privately." All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred and ninety-three, in which probates it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed.

1893, c. 130.

1017. Probate in wrong county; by wife before husband. The probate and registration of all deeds and other instruments requiring registration taken by a justice of the peace in the county other than that in which the grantor or subscribing witness resided, and all probates of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated.

1893, c. 293. **As to validity or invalidity of legislation validating such probates,** see Barrett v. Barrett, 120-127. **Section embraces cases where execution of deed by husband was proved by subscribing witness, and not by technical "acknowledgment" of husband,** Ibid. **Statute validates irregular probates as between parties, and as to third persons from passage of same:** Williams v. Kerr, 113-310; Barrett v. Barrett, 120-127; Gordon v. Collett, 107-362—**but does not validate such probates as to third persons whose rights had already accrued prior to enactment of section,** Williams v. Kerr, 113-310; Barrett v. Barrett, 120-127.

Section merely referred to in Cook v. Pittman, 144-531.

1018. Acknowledgments before different officers. Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds whether both officers reside in this state, or one in this state and the other in another state or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this state, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered and the word "probate," as used in this section, shall include privy examination of the wife.

1895, c. 120; 1907, c. 34.

1019. Acknowledgment by resident beyond state. In all cases, prior to the ninth day of March, one thousand eight hundred and ninety-five, when a deed or mortgage executed by a resident of this state has been proven or acknowledged by the maker thereof before a notary public of any other state of the United States, and said deed or mortgage has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed by such deed or mortgage is situated, and said deed or mortgage has been registered, such registration shall be valid and binding.

1895, c. 181.

1020. By clerks of criminal courts in Buncombe county. Wherever clerks of the criminal courts of Buncombe county have, prior to the second day of February, one thousand eight hundred and ninety-three, essayed to take the probate of any deed, letter of attorney or other instrument requiring registration, and the private examination of femes covert whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, private examinations and registrations so taken and had shall be valid and binding.

1893, c. 13.

1021. By clerks of inferior courts. All probates and orders of registration made by and taken before any clerk of any inferior, or criminal court, prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Halifax, Northampton, Hertford, Bun-

combe, Mecklenburg, Granville, Beaufort, Lenoir, Robeson, Cumberland, Ashe, Martin, Wayne, Greene, Iredell, Bertie, Edgecombe, Duplin and New Hanover.

1885, cc. 105, 108; 1889, c. 143; 1889, c. 463.

1022. Before notary or clerk of court of record of another state. All deeds and conveyances made for lands in this state, which have previous to February fifteenth, one thousand eight hundred and eighty-three, been proven before a notary public or clerk of a court of record of any other state, and such proof having been duly certified by such notary or clerk taking the proof as aforesaid, under the official seal of such notary public or court of record, and such deed or conveyance so proven and certified, with the certificate of having been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of the registration of such deed or conveyance, shall be sufficient registration of the same, and such proof and registration shall be adjudged good and valid in law. 146-378

Code, s. 1262; 1885, c. 11; 1883, c. 129, s. 1.

1023. Evidence under preceding section. All deeds and conveyances proven, certified and registered under the preceding section, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands shall come in controversy, and further registration of such deeds and conveyances so proven and registered shall not be necessary.

Code, s. 1263; 1883, c. 129, s. 2. **See under section 988.**

1024. Taken before vice-consul or vice-consul general. The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this state prior to January first, one thousand nine hundred and five, upon the certificate of any vice-consul or vice-consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consulate general of the same place and country where such vice-consul or vice-consul general resided and acted that he had taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations of married women by, and certificates as, such vice-consuls or vice-consuls generals, validated, and the same shall be valid and binding. 152-718

1905, c. 451, s. 2.

1025. Under form previously legal. Where deeds or other instruments have heretofore been acknowledged by husband and wife or by other grantors pursuant to any form of acknowledgment which was then lawful, such acknowledgment is hereby declared to be sufficient and valid.

1901, c. 299, s. 2. **See, as bearing incidentally upon section,** Robbins v. Harris, 96-557.

1026. Proof of handwriting of grantor refusing to acknowledge. All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated.

1897, c. 28.

1027. Proof of corporate articles of agreement. All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages are ratified and declared valid.

1901, c. 170. **See also section 1248.**

1028. Execution and proof of corporate deeds. All deeds and conveyances for lands in this state, made by any corporation of this state, which have heretofore been proven or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the state of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and confirmed and declared to be good and valid deeds for all purposes. Wherever any such deeds heretofore executed by any corporation of this state by the president thereof and attested by the treasurer of said corporation, and sealed with the common seal of said corporation, have been proven or acknowledged before any notary public of any state, or before any commissioner of deeds and affidavits for the state of North Carolina in any other state, and said acknowledgment or probation has been duly passed upon by any deputy clerk and adjudged to be correct and sufficient and in due form, and ordered to be registered, said acknowledgment, probate and registration are hereby ratified and confirmed, and said deed is declared to be legally executed and good and valid in law, and no further registration of such deeds shall be necessary. All such deeds and conveyances proven or acknowledged and registered

as aforesaid, or certified copies of the same, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this state where the title of said lands shall come in controversy.

1905, c. 307.

See also section 1248.

1029. By de facto officers in Greene. The probate of all instruments requiring registration made by Alexander Taylor while acting as and being the de facto clerk of the superior court of Greene county during the month of December, one thousand eight hundred and ninety-eight and during the year one thousand eight hundred and ninety-nine, are hereby declared valid; and the registration of all instruments requiring registration as made by W. E. Murphrey while acting as the de facto register of deeds of Greene county, during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are hereby declared valid.

1901, c. 369.

1030. By clerks of wrong county. All deeds acknowledged or proven, prior to January twenty-first, one thousand eight hundred and ninety-one, by the grantor, maker or subscribing witness before any clerk of the superior court or of the inferior or criminal court, or before a notary public or justice of the peace of a county within this state wherein the land conveyed did not lie, and where said grantor, maker or subscribing witness did not reside, are declared sufficiently proven and the registration valid.

1891, c. 12.

XI. Trustees.

1031. Trustee or mortgagee dead, personal representative executes power. When the mortgagee in a mortgage, or the trustee in a deed in trust executed for the purpose of securing a debt containing a power of sale, shall die before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee shall pass to and devolve upon the executor or administrator of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this state as prescribed for trustees or mortgagees, and in such action it shall not be necessary to make the heirs at law of such deceased mortgagee or trustee parties thereto.

1901, c. 186; 1887, c. 147; 1895, c. 431; 1905, c. 425. **When power of sale in mortgage is given to mortgagee and his executor, etc., and mortgagee**

dies leaving will under which executor qualifies, the power of sale upon default vests in executor by virtue of this section and also by virtue of the mortgage: Scott v. Lumber Co., 144-44—and if power had not been conferred upon executors by instrument they could still have exercised same under this section. Ibid. Section intended to confer power of sale upon executor or administrator of deceased mortgagee where power not given in instrument: Yount v. Morrison, 109-520. Where stipulated that vendor or lawful representatives might sell land and apply proceeds to payment of sum due, held that "lawful representatives" meant executors or administrators of vendor, and conferred upon them not only power to sell, but power to convey: Overman v. Jackson, 104-4.

Cases under section rendered inapplicable by amendment of same: Eason v. Dortch, 136-291; Hughes v. Gay, 132-50.

1032. Foreclosure by representative of deceased mortgagees validated. In all actions which may have been brought or prosecuted prior to the fourth day of March, one thousand nine hundred and five, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagor have been duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee shall have been a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee shall be estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust.

1905, c. 425, s. 2.

1033. Surviving mortgagee executes power. In all mortgages and deeds of trust wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons shall be dead, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding, as if the same had been done by all the persons on whom the power was conferred.

1885, c. 327, s. 2. **Where one of trustees in power of sale contained in mortgage dies, survivor may execute trust:** Cawfield v. Owens, 129-286.

1034. When succeeding guardian executes power. When a guardian to whom a mortgage has been executed has died or been

removed or resigned before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian.

1905, c. 433.

1035. Power executed by agent, appointed orally or by writing. All sales of property, real or personal, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, by such mortgagee or trustee, appointed orally or in writing, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee shall have been or shall be present at such sale.

1895, c. 117.

1036. Infant trustees convey, how. Whenever any infant shall be seized or possessed of any estate whatever in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age.

Code, s. 1265; R. C., c. 37, s. 27; 1821, c. 1116, ss. 1, 2.

1037. When clerk appoints a new trustee. When the sole or last surviving trustee named in a will or deed of trust has died, removed from the county where the will was probated or deed executed and from the state, or in any way become incompetent to execute the said trust, or is a nonresident of this state, the clerk of the superior court of the county wherein the said will was probated or deed of trust was executed is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition

of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings.

Code, s. 1276; 1901, c. 576; 1869-70, c. 183; 1873-4, c. 126.

See sections 156, 1032. Trustee dying or becoming incompetent to act, clerk empowered to appoint another: McAfee v. Green, 143-411; Wright v. Fort, 126-615—**who, when decree appointing is signed, succeeds to legal title upon same trusts as original trustee,** McAfee v. Green, 143-411; Wright v. Fort, 126-615—**and he can bring action for recovery of trust estate,** Warren v. Howard, 99-190. **All persons interested must be made parties, and application for appointment of trustee can not be ex parte,** Guion v. Melvin, 69-243. **Where clerk dismisses proceeding for want of jurisdiction, on appeal superior court can appoint:** Roseman v. Roseman, 127-494. **Upon death of last survivor of board of trustees named in deed for property to be used as "Baptist Church and for education of youths of colored race" their successors will be appointed by clerk of court under this section:** Thornton v. Harris, 140-498. **Not necessary in substituting trustee to require bond of substituted trustee, it being in court's discretion:** Strayhorn v. Green, 92-119. **Where executor is by will also appointed trustee and renounces or dies, administrator c. t. a. succeeds to trusteeship, and hence appointment hereunder void:** Clark v. Peebles, 120-31. **Where power to be exercised entirely at discretion of donee of powers, courts of equity have no jurisdiction to force him to act and if he has died without exercising power, can not confer it upon trustee appointed by court:** Young v. Young, 97-132.

Section merely referred to in Eason v. Dortch, 136-291; Etheridge v. Vernoy, 71-184.

1038. Executor of mortgagee may renounce; trustee appointed by clerk. The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed, and in every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered shall have power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. That the clerk of the superior court, in addition to recording his proceedings in his book of orders and decrees, shall enter the name of the substituted trustee or mortgagee on the margin of the deed in trust

or the mortgage in the book of the office of the register of deeds of said county.

1905, c. 128. **See annotations under section 1037.**

XII. Chattel Mortgage.

1039. Form of. Any person indebted to another in a sum to be secured, not exceeding at the time of executing the instrument herein provided for the sum of three hundred dollars, may execute a chattel mortgage in form substantially that which follows:

I, ..., of the county of..... in the state of North Carolina, am indebted to ....., of ..... county, in said state, in the sum of.....dollars, for which he holds my note to be due the....of....., A. D. 19....., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to-wit:..... .....but on this special trust, that if I fail to pay said debt and interest on or before the....day of..... A. D. 19...., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days' notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me. Given under my hand and seal, this....day of ....., A. D. 19.. .....[Seal.]

Code, s. 1273; 1870-1, c. 277.

No particular form essential to validity of chattel mortgage; it is sufficient if words employed express, in terms or by just implication, purpose to convey property as security for debt: Strouse v. Cohen, 113-349; Comron v. Standland, 103-207. **For instrument held to be sufficient as chattel mortgage,** see Strouse v. Cohen, 113-349; Weil v. Flowers, 109-212; Nichols v. Speller, 120-75; Comron v. Standland, 103-207; Millhiser v. Pleasants, 118-237; Brown v. Dail, 117-41; Harris v. Jones, 83-317; Cotten v. Willoughby, 83-75; Robinson v. Ezzell, 72-231. **For instrument held insufficient as chatel mortgage,** see Britt v. Harrell, 105-10; Chemical Co. v. Johnson, 98-123; Atkinson v. Graves, 91-99.

Mere informality will not vitiate a chattel mortgage Comron v. Standland, 103-207—**and no seal is necessary,** Ibid; also Foundry Co. v. Waltman, 114-178—**neither is a power of sale necessary,** Comron v. Standland, 103-207. **Valid chattel mortgage may be made by owner of land of crop sown thereon but not yet growing:** Cotten v. Willoughby, 83-75; Harris v. Jones, 83-317; Robinson v. Ezzell, 72-231; Atkinson v. Graves, 91-101; Gwathney v. Etheridge, 99-571.

As bearing upon section: see Brown v. Miller, 108-395; Harris v. Woodard, 96-232.

1040. Registration of, notice of sale under. Such chattel mortgage shall be good to all intents and purposes when the same shall

be duly registered according to law, but no sale thereunder shall be made without giving at least twenty days' public notice of the time and place of such sale.

Code, ss. 1273, 1274; 1870-1, c. 277, ss. 1, 2. **For fees for probate and registration, see sections 2773, 2776. For joinder of chattel mortgage and lien bond, see section 2055. See also section 982. Mortgages good inter partes without registration:** Williams v. Jones, 95-504; Robinson v. Willoughby, 70-363; Leggett v. Bullock, 44-283; Pike v. Armistead, 16-111. **Mortgage may be registered after death of mortgagor:** Williams v. Jones, 95-504. **Registration of mortgage after commission in bankruptcy is good against assignee.** Ibid. **Where husband mortgaged horse, but not registered until after his death, and prior to registration horse assigned to widow as part of year's support, widow took property subject to mortgage lien:** Williams v. Jones, 95-504.

Assignment of chattel mortgage need not be registered under section: Hodges v. Wilkinson, 111-56. **Mortgages are, as between parties thereto, when registered, effectual from their delivery:** Brem v. Lockhart, 93-191.

As to where mortgages to be registered, see under section 982.

As bearing upon section, see Thomas v. Cooksey, 130-151; Chemical Co. v. Johnson, 98-123.

1041. Mortgages of household and kitchen furniture. All conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other thing of value, shall be void, unless the wife join therein and her privy examination be taken in the manner prescribed by law in conveyances of real estate.

1891, c. 91. **Section not applicable to note signed by husband and wife binding her separate personal property:** Harvey v. Johnson, 133-352—**and not applicable to absolute sale of such property,** Kelly v. Fleming, 113-133—**but only to conveyance by chattel mortgage or other way by which lien can be fixed thereon, as by deed of trust or conditional sale,** Ibid. **As to sufficiency of instrument to convey property under section,** see Kelly v. Fleming, 113-133.

XIII. Mortgage Sales.

A 1904 f 66

1042. Advertised at courthouse door. All property, real and personal, sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract.

1889, c. 70.

For notice of sale under chattel mortgage, see section 1040. See also section 641. Presumption is that sale properly advertised: Cawfield v. Owens, 129-288. **Parties may affix such terms and conditions to mortgage**

as they see fit, provided creditors or others interested at time not affected thereby: McIver v. Smith, 118-73.

Expense of advertising charged as cost against the land: Turner v. Boger, 126-300.

1043. Description of property in advertisements. In sales of real estate under deeds of trust or mortgages, it shall be the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law, substantially as the same is described in the deed or authority under which said trustee or mortgagee makes such sale.

1895, c. 294.

1044. Power of sale barred when. The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations. Wherever an action to foreclose any such mortgage or deed of trust in now barred by the statute of limitations, the authority to execute the power of sale contained therein shall be barred on the first day of January, one thousand nine hundred and seven.

Revisal, 1905. Statute of limitations does not begin to run against principal of mortgage of land until due, and power of sale contained in mortgage may be exercised within ten years after maturity of principal: Scott v. Lumber Co., 144-44—and statute does not begin to run upon default in payment of annual interest upon principal, when power of sale in mortgage is optional with mortgagee upon default of either interest or principal of debt, Ibid. Section changes law as laid down in Menzel v. Hinton, 132-660; Cone v. Hyatt, 132-810. Where debt payable in two installments, payable at different times, creditor may wait until second installment due, and statute of limitations will not begin to run until that time: Cone v. Hyatt, 132-810; see also Capehart v. Dettrick, 91-344. Power of sale in mortgage not affected by mortgagor's death, and may be exercised without notice to heirs: Carter v. Slocomb, 122-475.

XIV. Revocation and Discharge.

1045. Deeds to persons not in esse revoked. The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse, may at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interests for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner.

1893, c. 498.

A 1404
4 1056

1046. Mortgages and deeds of trust released, how. Any deed of trust or mortgage which hath been or which hereafter may be registered in the manner required by law, may be discharged and released in the following manner, to-wit:

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon it shall be the duty of the register or his deputy forthwith to make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the said trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto; or,

2. Upon the exhibition of any mortgage, deed in trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee or assignee of the same, the said register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond and mortgage or other instrument: Provided, if the register or his deputy shall require it he shall file a receipt to him showing by whose authority the mortgage or other instrument was cancelled.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage, as if a deed of release or reconveyance thereof had been duly executed and recorded.

Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1870-1, c. 217.

Attorney can not cancel or discharge mortgage unless authorized by client: Christian v. Yarborough, 124-72—**but if client, after being informed, retains benefit from the unauthorized action of his attorney, it is a ratification,** Ibid.

Trustee has no power hereunder to release portion of premises from an unsatisfied trust: Woodcock v. Merrimon, 122-731; Brown v. Davis, 109-23—**but if he is authorized to do so, he should state his authority, the consideration for the release, and the name of the grantee.** Ibid.

Entry of satisfaction of a mortgage on margin or registry, witnessed by register of deeds, is competent evidence of payment of debt secured thereby: Robinson v. Sampson, 121-99. **Purchaser at sale made in pursuance of mortgage, without notice of unrecorded release of timber rights in land, obtains good title:** Barber v. Wadsworth, 115-29; Lumber Co. v.

Dail, 111-120. **Mortgage can only be released so as to affect purchasers at sale by cancellation hereunder, or by reconveyance duly recorded:** Barber v. Wadsworth, 115-32. **Where decree adjudges deed void, no marginal cancellation, as in case of mortgages and deeds of trust, is required, but same is commendable practice:** Smith v. King, 107-273. **When mortgage debt has been satisfied, mortgage is no longer operative, though not marked satisfied of record:** Blake v. Broughton, 107-220; Walker v. Mebane, 90-259. **Release of debt secured by mortgage need not be under seal:** Adams v. Battle, 125-158.

Section merely referred to in Bank v. Mfg. Co., 96-305.

CHAPTER 19.

CORONERS.

1047. How elected; clerk appoints for special cases. In each county a * * * coroner shall be elected by the qualified voters thereof, as is prescribed for members of the general asembly, and shall hold their offices (his office) for two years. * * * When there is no coroner in a county, the clerk of the superior court for the county may appoint one for special cases.

Const., Art. IV, s. 24. **In case of a vacancy the county commissioners appoint, see section 1321.**

1048. Oath of office to be taken. Every coroner, before entering upon the duties of his office, shall take and subscribe to the oaths prescribed for public officers, and an oath of office.

Code, s. 661.

1049. Vacancy, clerk may appoint special. Whenever there is a vacancy existing in the office of coroner in any county, and it shall be made to appear by the affidavit of some responsible person that a deceased person whose body has been found within the county probably came to his death by the criminal act or default of some person, it shall be the duty of the clerk of the superior court of such county to appoint some suitable person as special coroner to hold an inquest over the body of the deceased.

1903, c. 661.

1050. Powers, penalties and liabilities of special. The special coroner appointed under the provisions of the preceding section shall be invested with all the powers and duties conferred upon the

several coroners in respect to holding inquests over deceased bodies, and shall be subject to the penalties and liabilities imposed on the said coroners.

1903, c. 661, s. 2. **See section 299.**

Facts 1709
Forge 1103

1051. Holds inquests; when physician summoned. It shall be the duty of the several coroners, whenever it is made to appear, by the affidavit of some responsible person, that the deceased probably came to his death by the criminal act or default of some person or persons, to go to the place where the body of such deceased person is and forthwith to summon a jury of six good and lawful men: whereupon the coroner, upon oath of said jury at the said place, shall make inquiry when, how and by what means such deceased person came to his death, and his name if it was known, together with all the material circumstances attending his death; and if it shall appear that the deceased was slain, then who was guilty either as principal or accessory, if known, or in any manner the cause of his death. And as many persons as are found culpable, by inquisition in manner aforesaid, shall be taken and delivered to the sheriff and committed to jail; and such persons as are found to know anything of the matters aforesaid and are not culpable themselves, shall be bound in a recognizance with sufficient surety to appear at the next superior court to give evidence; of all which matters and things the coroner must make a record of his inquisition signed by the jurors, and return the same to the next superior court of his proper county. It shall be the duty of every coroner, when the jury investigating the case shall require it, to summon a physician or surgeon, except that in Buncombe county, when the coroner is a physician or surgeon, he shall, if requested by one or more of the jurors, make the investigation.

Code, s. 657; 1903, c. 586; 1899, c. 478; 1905, c. 628.

INQUEST. Time of death of party must be sufficiently stated, inferred from State v. Morgan, 86-731, 85-581. **The inquest is the court of the coroner:** State v. Knight, 84-789. **Justice of peace can not administer oaths at:** Ibid—**but witness must be sworn by coroner,** Ibid. **Proceedings at inquests discussed:** Ibid.

1052. Acts as sheriff, when; special coroner. If at any time there be no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process and in all other things to act as sheriff, until some person shall be appointed sheriff in said county; and such coroner shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law, for neglect or disobedience of the same duties. And if at any time the sheriff of any

county be interested in or a party to any proceeding in any court, and if there be no coroner in such county, or if the coroner be interested in any such proceeding, then the clerk of the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process, and such special coroner shall be under the same rules, regulations and penalties as hereinabove provided for.

Code, s. 658; 1891, c. 173. **The provision for deputizing special officer when sheriff and coroner interested applicable also to courts of justices of the peace:** Baker v. Brem, 127-322.

WHEN SHERIFF A PARTY OR INTERESTED. Process must be executed by coroner: Bowen v. Jones, 35-25; Battle v. Baird, 118-862—**by deputy of coroner,** Yeargin v. Siler, 83-348. **Where no coroner clerk appoints one to execute process:** Witkousky v. Wasson, 69-38. **Sheriff insane and county commissioners failing to declare office vacant, coroner performs duties of sheriff except as tax collector:** Somers v. Comrs., 123 582. **See also sections 2811 and 2819.**

1053. Compensation of jurors at inquest. All persons who may be summoned to act as jurors in any inquest held by a coroner over dead bodies, and who, in obedience thereto, shall appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the superior courts. The coroners of the respective counties are hereby authorized and empowered to take proof of the number of days of service of each juror so acting and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the superior courts.

Code, ss. 659, 660.

CHAPTER 20.

CORPORATION COMMISSION.

I. Court.

1054. Court of record. There shall be a court of record, known as the "corporation commission." Such court shall adopt a seal, and shall have all of the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this chapter. The members and clerk thereof may administer oaths.

1899, c. 164, ss. 1, 31.

[**NOTE.** Many annotations which might be properly placed in this chapter appear in chapter on Railroads, which see.]

The establishment of this court does not interfere with interstate commerce: Caldwell v. Wilson, 121-425. Discussion of power of legislature in formation of this court and constitutionality of certain provisions of railroad commission act of 1891 and of act of 1892 in Efland v. R. R., 146- ; Pate v. R. R., 122-877; Express Co. v. R. R., 111-463; Caldwell v. Wilson, 121-425; Industrial Siding Case, 140-239; Corporation Com. v. R. R., 139-126; Railroad Connection Case, 137-14; Corporation Com. v. R. R., 127-288; Leavell v. Tel. Co., 116-220; and cases there cited. Railroad commission under act 1891 an administrative, not a judicial body, Pate v. R. R., 122-877; Caldwell v. Wilson, 121-425. The reason for making this a court of record was simply to give authenticity to its records and proceedings and added nothing to its duties and powers, Caldwell v. Wilson, 121-425. Act of 1891, Chapter 320, not repealed by Acts of 1899, chapters 164 and 506, but in effect amended, reenacted and continued in force: State v. Railroad, Co., 125-666; Abbott v. Beddingfield, 125-256, and cases cited; see also Wilson v. Jordan, 124-683.

1055. Number of commissioners. The court shall consist of three commissioners, who shall be elected by the qualified voters of the state, in the same manner as other state officers are elected. The court shall organize by the election of one of the commissioners as chairman.

1899, c. 164, s. 1.

1056. Term of office. The term of office of the commissioners shall begin on the first day of January next after their election, and shall continue for six years and until their successors are elected and qualified. One member of the court shall be elected at each general election.

1899, c. 164.

1057. Vacancy. If for any cause there shall be a vacancy in the commission, the governor shall appoint to such vacancy. Such appointee shall hold until the election and qualification of his successor, who shall be elected at the next general election, after the vacancy occurred. The person so elected shall hold office for the unexpired term.

1899, c. 164; 1901, c. 194.

1058. Qualification of commissioners. It shall be unlawful for any member or official of said court to jointly, severally, or in any other way, either directly or indirectly, hold any stock or bond, or be the agent, attorney or employee, or have any interest in any way, in any steamboat, railroad, canal, navigation, express, telegraph, telephone, bank or building and loan company, or association. If

any member or official of said court shall, during the term of his office as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and upon failure to do so shall forfeit his office, and may be suspended by the governor.

1899, c. 164. **Power of governor to suspend railroad commissioner under prior enactment very similar to above section, fully discussed** in Caldwell v. Wilson, 121-425. **One accepting office of commissioner takes it subject to suspension hereunder:** Ibid. **Procedure in suspending commissioner discussed:** Ibid. **Constitutionality of provisions of statute discussed generally:** Ibid.

1059. Oath of office. The members of the court, in addition to the oath to support the constitution and laws of the United States and the constitution and laws of the state of North Carolina, shall take, to be administered by one of the judges of the supreme court, the following oath of office, which oath shall be signed by such commissioners and attested by said judge and recorded in the office of the secretary of state: "I do solemnly swear (or affirm) that I am not the owner of any steamboat or of any stock or bond of any railroad, navigation or canal company, express, telegraph or telephone company, or of any bank or building and loan association, or the agent or attorney or employee of any such company or association; that I have no interest in any way in any such company or association, and that I will well and faithfully execute the duties of my office as a member of the corporation commission and as state tax commissioner to the best of my knowledge and ability, without fear, favor, malice, reward or the hope of reward. So help me, God."

1899, c. 164, s. 1; 1903, c. 251, s. 3.

1060. Place of meeting. The court shall be held in the city of Raleigh. Special sessions may be held at any place, in the state, when in the judgment of the court the convenience of all parties is best subserved and expense is thereby saved.

1899, c. 164, ss. 30, 31; 1901, c. 679, s. 4.

1061. Open at all times. The court shall be open at all times for the transaction of business, and each member shall devote his whole time to the discharge of the duties of his office; and it shall be his duty to remain in the office of the commission at least fifteen days in each month, unless detained therefrom on official business.

1899, c. 164, s. 30; 1903, c. 251, s. 3.

1062. Quorum. Any two members of the court shall constitute a quorum for the transaction of business. The chairman is hereby

authorized and empowered to perform the duties and exercise the powers conferred by law upon the corporation commission as to or over banks and building and loan associations, but this shall not prevent, as to banking and building and loan associations, the other members of the court from acting with the chairman in all of such matters.

1899, c. 164, s. 29.

1063. Clerk. The court shall appoint a clerk, who shall be an expert accountant, experienced in railroad statistics and transportation rates. His term of office shall be for two years. He shall take and subscribe to oaths of office similar to those prescribed for the commissioners: Provided, this shall not prevent the clerk from holding stock in state or national banks.

1899, c. 164, ss. 9, 31; 1907, c. 999.

II. Investigations.

1064. Examinations. The commissioners shall from time to time visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, all public or private banks, loan and trust companies, and all building and loan associations, to ascertain if all the orders, rules and regulations of the corporation commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such companies, individuals, firms or corporations, and all other persons under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter, and the chapters entitled "Banks" and "Building and Loan Associations."

1899, c. 164, s. 1.

1065. Railroad accidents. The commission may investigate the causes of any accident on a railroad or steamboat which it may deem to require investigation, and any evidence taken upon such ivestigation shall be reduced to writing, filed in the office of the commission, and be subject to public inspection.

1899, c. 164, s. 24.

III. Powers.

1066. General powers. The corporation commission shall have such general control and supervision of all railroad, street railway,

steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter and the laws regulating such companies, and to require all transportation and transmission companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just.

1899, c. 164, s. 1; 1901, c. 679; 1907, c. 469, s. 2; 1907, c. 966. **See sections 1096, 1096a. Legislature has right to supervise, regulate and control rates and conduct of common carriers either directly or through commission:** Corporation Com. v. R. R., 139-26; Industrial Siding Case, 140-239; Corporation Com. v. R. R., 127-288; Express Co. v. Railroad, 111-463.

Cases as to power of commission to regulate telegraph companies: Leavell v. Tel. Co., 116-220; Railroad Comrs. v. Tel. Co., 113-213; Mayo v. Tel. Co., 112-343.

For meaning of word "company" in section, see Efland v. Railroad, 146- . **For power in specific cases, see under section dealing with such specific cases.**

1067. Witnesses; production of papers; contempt. The corporation commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts.

1899, c. 164, ss. 1, 9, 10.

1068. Rules of practice. The corporation commission shall prescribe rules of practice and procedure in all matters before it and in all examinations necessary to be made under this chapter.

1899, c. 164, s. 2, subsec. 24.

1069. Rules of evidence. In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil actions, except as provided by this chapter.

1899, c. 164, s. 26.

1070. Subpœnas, how issued; served. All subpœnas for witnesses to appear before the commission or before any one or more of the commissioners, and notice to persons or corporations, shall be issued by one of the commissioners or its clerk and be directed to any sheriff, constable or to the marshal of any city or town who shall execute the same and make due return thereof as directed therein

under the penalties prescribed by law for a failure to execute and return the process of any court.

1899, c. 164, s. 10.

1071. Service of orders. The clerk of the commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and other officers to serve any process, subpœnas and notices issued by the commissioners, and they shall be entitled therefor to the same fees as are prescribed by law for serving similar papers issuing from the superior court.

1899, c. 164, s. 9.

1072. Undertakings. All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state.

1899, c. 164, s. 7.

1073. Controversies may be submitted to commission. Whenever any company or corporation embraced in this chapter has a controversy with another corporation or person and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and their award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrators.

1899, c. 164, s. 25.

IV. Appeals.

1074. Right of; how taken. From all decisions or determinations made by the corporation commission any party affected thereby shall be entitled to an appeal. Before such party shall be allowed to appeal, he shall, within ten days after notice of such decision or determination, file with the commission exceptions to the decision or determination of the commission, which exceptions shall state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exception, and shall, within ten

days after the decision overruling the exception, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception, which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignment of errors filed by the appellant, to a judge of the superior court holding court or residing in some district in which such company operates or the party resides. If there be no exceptions to any facts as found by the commission, it shall be heard by the judge at chambers at some place in the district, of which all parties shall have ten days' notice.

151-447

1899, c. 164, ss. 7, 28; 1903, c. 126. **Appeal from railroad commission must be to superior court:** Pate v. Railroad Co., 122-877—**and can not be direct from commission to supreme court,** Ibid.

1075. Appeal docketed; priority of trial; burden. The cause shall be entitled "State of North Carolina on relation of the Corporation Commission against (here insert name of appellant)," and if there are exceptions to any fact found by the commission, it shall be placed on the civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the commission shall be prima facie just and reasonable.

1899, c. 164, s. 7. **See section 1112.**

1076. Heard at chambers by consent. By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business.

1899, c. 164, s. 7.

1077. To supreme court. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the state of North Carolina if it shall appeal shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing.

1899, c. 164, s. 7. **Appeal from railroad commission must be to superior court:** Pate v. Railroad Co., 122-877—**and can not be direct from commission to supreme court,** Ibid.

1078. Rates vacated pending appeal, how. The rates of freight and fare fixed by the commission shall be and remain the established rates and shall be so observed and regarded by corporations appealing until the same shall be changed, reversed or modified by the judgment of the superior court, unless the railroad company shall within fifteen days file with said commission a justified undertaking, in a sum to be fixed by the commission, conditioned to pay the state of North Carolina the difference between the aggregate freights charged or received and those fixed by said commission, and to make a report of freights charged or received every three months during the pendency of such appeal; and whenever such difference in freights equals or exceeds the penalty of such undertaking the commission may require another to be executed and filed with them. From the time the undertaking first mentioned is filed the judgment appealed from shall be vacated; but a failure for ten days to file any additional undertaking required by the commission shall eo instanti revive such judgment. Out of the funds paid into the state treasury under this section there shall be refunded to shippers the overpaid freight ascertained by the final determination of the appeal on the recommendation of the commission, if application therefor is made within one year from such final determination.

1899, c. 164, s. 7.

1079. Judgment superior court not vacated by appeal. Any freight or passenger rates fixed by the commission, when approved or confirmed by the judgment of the superior court, shall be and remain the established rates and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal thereto, and until changed by the corporation commission.

1899, c. 164, s. 7.

1080. Judgment on appeal enforced by mandamus. In all cases in which, upon appeal, a judgment of the corporation commission is affirmed, in whole or in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed.

1905, c. 107, s. 2.

1081. Peremptory mandamus to enforce order, when no appeal. If no appeal is taken from an order or judgment of the corporation

commission within the time prescribed by law, but the corporation affected thereby fails to put said order in operation, the corporation commission may apply to the judge riding the superior court district which embraces Wake county, or to the resident judge of said district at chambers, upon ten days' notice, for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the corporation commission, or the defendant corporation, from the refusal or the granting of such peremptory mandamus.

1905, c. 107.

V. Injunction.

1082. When granted; bond. No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the corporation commission fixing rates or fares, without requiring, as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freight charged and those fixed by the corporation commission; and in the event the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed.

1899, c. 164, s. 7.

1083. Restraining order vacated, when. Whenever the aggregate difference between the freights collected and those fixed by the corporation commission shall equal or exceed the sum specified in the undertaking, the corporation commission shall notify the appellant that another justified undertaking in like sum and with the same conditions as the original undertaking is required to be executed and filed with the corporation commission. A failure to file with the corporation commission the sworn statement provided for

in the preceding section, or any one of them when more than one is required or asked for, or a failure to give an additional undertaking when required within fifteen days from notice so to do, shall vacate and render null and void any restraining order, injunction or other process to stay the enforcement of any determination of the corporation commission as to schedules of rates.

1899, c. 164, s. 7.

1084. Suits on injunction bond. When any of the conditions of such undertaking are broken it may be sued on and enforced in the name of the state of North Carolina on the relation of the corporation commission by summons returnable to the superior court of any county in the state at a regular term thereof. The solicitor of the district shall prosecute the action in his court on behalf of the state, and shall be allowed such fees, to be taxed in the bill of costs, as the court may order; and the attorney general shall prosecute an appeal to the supreme court on behalf of the state and shall be allowed such fees, to be taxed in the bill of costs, as the court shall allow.

1899, c. 164, s. 7. **As to whether attorney general's fee should be turned into state treasury, see sections 2735a, 2735b.**

1085. What recovered; application of recovery. In cases where the sworn statements herein required to be made are not made the whole penalty of the undertaking shall be enforced and paid into the state treasury. The sums paid into the treasury under the provisions of this section shall be used to reimburse the shippers of freights for the excess of freights paid over what should have been paid, such reimbursements to be made on recommendation of the corporation commission: Provided, application therefor is made within one year after the determination of the appeal in which the undertaking was given. The recovery in each undertaking shall be applied to such excess of freights as has been paid during the period covered by such undertaking.

1899, c. 164, s. 7.

VI. Penalties.

1086. For violating rules. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or if not then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person

or corporation as may be directed by the commission shall not be made with thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars.

1899, c. 164, s. 15. **State has right to regulate public service corporations and other business enterprises in which owners have devoted property to public use:** Efland v. R. R., 146—**to establish regulations for public service corporations and to enforce the same by appropriate penalties and in so doing the right of classification is largely referred to its discretion; and, in absence of congressional inhibition, the state may establish laws and regulations on matters local in nature which tend to enforce proper performance of duties arising in the state, and which do not impede but aid and facilitate intercourse and traffic, though such action may incidentally affect interstate commerce:** Moffitt v. Express Co., 146-. **The word "company" intended to include all corporations, companies, firms and individuals engaged in business of common carriers:** Ibid.

1087. Refusing to obey orders of commission. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense.

1899, c. 164, s. 23. **As to meaning of word "company,"** see Efland v. Rwy., 146- .

1088. Discrimination between connecting lines. All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges against such connecting lines, and connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commission relating to trackage.

1899, c. 164, s. 21. **Railroad not compelled to furnish express facilities to another company to conduct express business over its road the same as it provides for itself or affords to other express companies:** Express Co. v. Railroad, 111-463. **Commission may require railroad to have train arrive at certain station on road at certain schedule time, so as to connect with**

train of another company: Corporation Com. v. Railroad, 137-1. **Discriminations in freight rates by railroad companies defined** in Freight Discrimination Cases, 95-434. **Construction of former statute against "discrimination:"** Ibid. **As to construction of penalty statutes,** see Alexander v. R. R., 144-93; Freight Discrimination Cases, 95-434.

1089. Failure to make reports. Every officer, agent or employee of any railroad company, express or telegraph company who shall wilfully neglect or refuse to make and furnish any report required by the commission for the purposes of this chapter, or who shall wilfully or unlawfully hinder, delay or obstruct the commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was wilful.

1899, c. 164, s. 18. **For case under section resembling above,** see Hodge v. Railroad, 108-24.

1090. General offenses. If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured.

1899, c. 164, s. 17. **As to construction of penalty statute,** see Alexander v. R. R., 144-93; Freight Discrimination Cases, 95-434. **Action for penalty hereunder is an action ex contractu:** Carter v. R. R., 126-443; Doughty v. R. R., 78-22, and cases under section 2632.

1091. Violation of rules, causing injury; damages; limitation. If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of wilful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury.

1899, c. 164, s. 16.

1092. Action for, when and how brought. An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the corporation commission against the company incurring such

penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the corporation commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney general or the solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the attorney general or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the costs. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions.

1899, c. 164, s. 15. **For cases holding that action for penalty, given by statute to person injured, is action ex contractu,** see Carter v. Railroad, 126-443; and cases cited; Doughty v. Railroad, 78-22. **As to construction of statutes imposing penalties,** see Alexander v. Railroad, 144-93; Freight Discrimination Cases, 95-434. **As bearing upon section,** see Express Co. v. Railroad, 111-463. **As to whether attorney general's compensation allowed hereunder must be turned into state treasury, see section 2735b.**

1093. Remedies cumulative. The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies.

1899, c. 164, s. 26.

VII. Jurisdiction.

1094. Delivering freight, express and baggage. The corporation commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations.

1899, c. 164, s. 2, subsecs. 2, 7.

1095. Prevent discriminations. The corporation commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers.

"Discrimination" defined in Freight Discrimination Cases, 95-434. **Railroad carrying logs to saw mill can not charge shipper agreeing to ship manufactured product by same line less for same services than charged shipper who makes no such agreement:** Railroad Discrimination Case, 136-479. **Consult** Express Co. v. R. R., 111-463.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers.

See State v. Rwy., 122-1052.

1899, c. 164, s. 2, subsecs. 3, 5.

1096. Telegraph and telephone companies; rates. All powers and duties in every respect conferred by law upon the corporation commission with respect to railroads and other transportation companies are hereby conferred upon said corporation commission to control and regulate telegraph, telephone and all other companies engaged in transmission of messages, in so far as they apply. The commission shall have power and are directed to make just and reasonable rates of charges for the transmission and delivery of messages by any telegraph company and to make just and reasonable rates of charges for the rental of telephones and furnishing telephonic communication by any telephone company or corporation.

1899, c. 164, s. 2, subsecs. 10, 11; 1907, c. 469, ss. 3, 4.

Railroad commission has incidental power to ascertain what corporation controls or operates any telegraph line in state: Railroad Com. v. Tel. Co., 113-213—**in order that commissioner may fix rates, as well as to know against whom to proceed for violation of regulations,** Ibid.

Messages transmitted from and to points in this state, although traversing another state en route, do not constitute interstate commerce, and are subject to tariff regulations of commission: Railroad Com. v. Tel. Co., 113-213.

As to illegal preferences by telegraph companies, see Leavell v. Tel. Co., 116-211.

For general power of commission to regulate telegraph and telephone companies, see Leavell v. Tel. Co., 116-220, and cases cited.

1096a. Individuals renting phones and wires controlled like corporations. Every person or individual owning and operating any telephone or telegraph line in North Carolina, and who rents phones or wires to persons generally, shall be subject to the same control and supervision by the corporation commission, and the same pains and penalties under the law, as are corporations owning and operating telephone and telegraph lines.

1907, c. 966.

1097. Stations; side tracks; union depots; increased number of trains; inspection of equipment; block system; raising and lowering track. The commission is empowered and directed—

1. To require, where the public necessity demands and it is demonstrated that the revenue received will be sufficient to justify it,

the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue: Provided, the commissioners shall not require any company or corporation to establish any station nearer to another station than five miles.

1899, c. 164, s. 2, subsec. 12. **Commission has power to require railroad to put in track scales at such points as quantity of business may justify:** Corporation Com. v. Railroad, 139-126—**but power may be unreasonably exercised, and such orders are subject to review by superior court and by supreme court on appeal,** Ibid—**and court or jury upon proper instructions, as case may be, should pass upon reasonbleness and necessity of order of commission requiring installment of track scales,** Ibid.

2. To require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public and to require the raising or lowering of the track at any crossing when deemed necessary.

1899, c. 164, s. 2, subsec. 13.

3. To require when practicable, and when the necessities of the case, in the judgment of the corporation commission, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of travelling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenues of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the corporation commission, are adequate and convenient and offer suitable accommodations for the traveling public.

1903, c. 126. **Section is valid exercise of legislative power:** Dewey v. Railroad, 142-392—**and as section in its principal purpose is remedial in its nature, it will receive liberal constructon as to that feature,** Ibid. **Section confers upon railroads incidental rights to make such changes in route as are necessary to accomplish purpose designed and to make depot available to travelling public as contemplated:** Dewey v. Railroad, 142-392. **Section intended to apply to all cities and towns in state, where in legal discretion of commissioners the move is practicable:** Ibid. **Section 2753 only applicable where railroad company for own convenience con-**

templates change of route: Ibid—**and not where commission acting under express legislative direction and authority require railroad to make change for convenience of travelling public,** Ibid..

4. To require the establishment of separate waiting-rooms at all stations for the white and colored races.

1899, c. 164, s. 2, subsec. 14.

5. To require the construction of side tracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commission authority to require railroad companies to construct side tracks more than five hundred feet in length.

153-859

1899, c. 164, s. 2, subsec. 15. **Order requiring construction of short spur-siding near station not unreasonable under circumstances, where it appears that cost of same to railroad about $200, and lumber shipped from same would yield revenue of $6,000 to railroad within two years:** Industrial Siding Case, 140-239. **As to evidence to show practicability of sidetrack under section,** see, Ibid.

6. To require when practicable and when the necessities of the travelling public, in the judgment of the corporation commission, demand, that any railroad in this state shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, no order under this subsection shall be made unless the business of the railroad justifies it.

1907, c. 469, s. 3. **Commission may require railroad to have train arrive at certain station on road at certain schedule time so as to connect with train of another company:** Corporation Com. v. Railroad, 137-1.

7. From time to time to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by them to be unsafe, they shall at once notify and require the railroad company to put the same in repair.

1907, c. 469, s. 3.

8. To make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public service corporation, and to require the observance of the same by the company and its employees.

1907, c. 469.

9. To require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road upon which is not operated as many as or more than eight trains each way per day.

10. To require the raising or lowering of any track or highway at any highway crossing and to designate who shall pay for the same, and, when they think proper, partition the cost of abolishing grade crossings and the raising or lowering of said tracks or highway among the railroads and municipalities interested.

1907, c. 469.

11. Wherever two or more railroads now, or hereafter, may maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of such town, it shall be the duty of the corporation commission, upon the petition of a majority of the qualified voters of such town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the corporation commission. Whenever a petition shall be filed with the corporation commission as aforesaid, the said corporation commission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the said notice, the said commission, if a majority of its members shall deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner, roadbeds, yards, and depots, and any other necessary buildings or equipment, at convenient places within the limits of said town, as to a majority of them shall seem proper for the needs and growth of the business and inhabitants of the said town. Such order of the corporation commission to such railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars to the board of commissioners or aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions. This subsection shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the corporation commission shall have the power to require such railroads to unite with the other railroads in

maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said corporation commission may seem proper. The railroads shall have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as shall be necessary for the purposes hereof, the condemnation proceedings to be had in the manner provided by law.

1907, c. 465.

1098. Depots not abandoned. A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains except by consent of the commission. Freight or passenger depots may be relocated upon the written approval of the commission.

1899, c. 164, ss. 19, 20.

1099. Freight and passenger rates. The commission shall make reasonable and just rates—

1. Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies, or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

As to limitation of power as to passenger rates, see section 2618. Where law establishing regulations and imposing penalties makes classification on reasonable basis, and having a real relation to the privileges or duties of the members of the class created, it is not imposing penalty for non-payments of debts, thereby creating an arbitrary classification within the prohibition of the constitution of United States forbidding the denial of the equal protection of law: Efland v. Railroad, 146-. **Commission may fix freight rates:** Corporation Com. v. Railroad, 127-283; Express Co. v. Railroad, 111-463—**and may provide that ten tons shall be minimum carload for shipping fertilizers, Corporation** Com. v. Railroad, 127-283.

Word "company" construed to include all corporations, companies, firms or individuals engaged as common carriers: Efland v. Railroad, 146-.

2. For the through transportation of freight, express or passengers.

As to passenger rates see section 2618. See State v. Southern Rwy., 145-495 (partially overruled by U. S. Supreme Court as this goes to press).

3. Of charges for the transportation of packages by any express company or corporation.

4. Of charges for the use of railroad cars carrying freight or passengers.

5. And rules and regulations as to contracts entered into by any

railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

6. And shall make, require or approve what is known as "milling-in-transit" rates on grain; or lumber to be dressed and shipped over the line of the railroad company on which such freight originated.

"Milling in transit" defined: Railroad Discrimination Case, 136-486.

7. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission.

1899, c. 164, ss. 2, 14; 1903, c. 683.

1100. Demurrage; storage; placing and loading of cars. The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment.

1903, c. 342.

1100a. Shipment of inflammable articles regulated. The corporation commission is hereby authorized and empowered to adopt and promulgate rules for the shipment of inflammable and explosive articles; cotton which has been partially consumed by fire, and such other like articles as in its opinion may be apt to render transportation dangerous. And after the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such article for shipment until all the rules prescribed by the corporation commission in regard to the shipments of the same shall be complied with.

1907, c. 471.

1101. May fix rate of speed trains may run through a town; petition to be filed; procedure. If any railroad company shall be of the opinion that an ordinance of a city or town through which a line of its railroad passes, except in the counties of Cumberland, Rockingham, Union and Wayne, regulating the speed at which trains may run while passing through said city or town, is unrea-

sonable or oppressive, such railroad company may file its petition before the corporation commission, setting forth all the facts, and asking relief against such ordinance, and that the corporation commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the corporation commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the corporation commission shall hear the petition: Provided, that any hearing granted by the corporation commission, as authorized by this section, shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said commission shall take evidence both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission.

1903, c. 552.

1102. To pass on ordinance, and fix rate of speed. Either party, petitioner or respondent, shall have the right to introduce testimony and to be heard by counsel, and the corporation commission, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commission shall find that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs to be taxed by the clerk to the corporation commission. If the corporation commission shall be of opinion that the ordinance is unreasonable, it shall so adjudge; and in addition thereto it shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the corporation commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

1903, c. 552, s. 2.

1103. When costs on hearing to fix rate of speed in discretion of commission. If the judgment of the corporation commission shall be in favor of the petitioner, it shall be lawful for the corporation commission to make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court.

1903, c. 552, s. 3.

VIII. Rates.

1104. How fixed. In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge of the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state: the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs.

1899, c. 164, s. 2, subsec. 1. **See section 2618. Commission may fix reasonable freight rates:** Corporation Com. v. Railroad, 127-288; Express Co. v. Railroad, 111-463.

1104a. Maximum rates for freight. The corporation commission shall not, in fixing the maximum rates and charges or tariff of rates or charges for any common carrier transporting freight in North Carolina, permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification fixed and prescribed, or approved by said corporation commission, where the initial point of shipment is on the road or line of one common carrier in this state and the terminal point of said shipment is on the line or road of another common carrier in this state, than is the sum of the present local rates now established, prescribed or approved by said corporation commission, less a reduction of twenty-five per centum of the said local rates on all railroads for which there is now made or prescribed a reduction for a joint haul; and on those railroads for which there is not now prescribed a reduction on joint hauls a reduction of fifteen per centum of the local rates now established, prescribed by said corporation commission for said railroads: Provided, that those railroads of this class whose rates are lower than the corporation commission's standard of freight rates may be permitted by said commission to adopt the standard rates prescribed by said commission: Provided, the corporation commission is hereby empowered to reduce the said local rates whenever in its opinion, and after investigation by it

shall determine that a lower rate is reasonable: Provided further, that present local rates now established, prescribed or approved by said corporation commission shall not be increased by classification or otherwise. Provided further, the corporation commission shall have power, when it is made to appear that it is just to do so, to exempt from the operation of this section that part of the charges of a joint haul which is over the line or lines of a railroad company, which company now owns, leases or operates not more than one hundred and twenty-five miles of railroad in or out of this State.

1907, c. 217; 1908, c. 126.

1105. What may be carried free. Nothing in this chapter shall prevent the carriage, storage or hauling of property free or at reduced rates for the United States, states or municipal governments or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while travelling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereat; or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons travelling in the interest of orphan asylums or homes for the aged and infirm, or any department thereof, or ex-Confederate soldiers attending annual reunions, or the issuance of mileage, excursion or commutation passenger tickets; or to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge under arrangements with the boards of managers of said homes; or to prevent railroads from giving free carriage to their own officers and employees and members of their families, or to prevent the principal officers of any railroad company from exchanging passes or tickets with other railroad companies for their officers or employees. Nothing in this section shall be construed to prevent or restrict transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the two parties for said consideration. The commissioners and their clerks shall be transported free of charge over all railroads and other transportation lines which are under the supervision of the commission; and when travelling on official business they may take with them experts or other

agents whose service they may deem temporarily of public importance.

1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652; 1905, c. 312. **A gratuitous passenger is not in pari delicto with the common carrier who issues the pass against the provision of law:** McNeill v. Railroad, 135-682. **As to action for injury to editor riding upon pass issued contrary to law,** see McNeill v. Railroad, 135-682, 132-510.

As bearing upon section, see State v. Railroad, 122-1052.

1106. Revision of rates. The commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedules of rates fixed by the commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company.

1899, c. 164, s. 7.

1107. Long and short hauls. It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commision may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this state for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad carrying the same are charged by such railroads.

1899, c. 164, s. 14.

1108. Contracts as to rates. All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commission for inspection and correction, that it may be seen whether or not they are a violation of law or of the rules and regulations of said commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the

commission for inspection and approval in so far as they affect the rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commission may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void.

1899, c. 164, s. 6.

1109. Published. All carriers shall, whenever required by the commission, file with it a schedule of their rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules if they deem it advisable.

1899, c. 164, s. 7.

1110. Interstate commerce. Upon the complaint of any person or community to the commission of any unjust discrimination or unjust or unreasonable rate in carrying freight which comes from or goes beyond the boundaries of the state by any railroad company, whether organized under the laws of this state or of another state and doing business in this state, the commission shall investigate such complaint, and if the same be sustained it shall be the duty of the commision to bring such complaint before the interstate commerce commission for redress in accordance with the provisions of the act of Congress establishing the interstate commerce commission. They shall receive upon application the services of the attorney general of the state and he shall represent them before the interstate commerce commission. The corporation commission shall have authority to employ counsel whenever and for such periods of time as in their judgment it is necessary to do so, and counsel so employed shall be paid such fee and compensation as may be agreed upon by them.

1899, c. 164, s. 14; 1907, c. 469, s. 5.

1111. Duplicate freight receipts; charges stated; freight delivered on payment of charges. All railroad companies shall on demand issue duplicate freight receipts to shippers in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and so far as practicable shall state the freight charges over the roads that carry such freight. When

the consignee presents the railroad receipt to the agent of the railroad that delivers such freight such agent shall deliver the articles shipped upon payment of the rate charged for the class of freight mentioned in the receipt.

1899, c. 164, s. 17.

1112. Schedule of rates, evidence. The schedule containing rates fixed by the commission shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence, the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named.

1899, c. 164, s. 7.

IX. Duties.

1113. Notice given of violations; suits instituted. The commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the attorney general, who shall take such proceedings thereon as he may deem expedient.

1899, c. 164, s. 8.

1114. Fees paid to treasurer. All license fees and seal tax and all other fees paid into the office of the corporation commission shall be turned into the state treasury; also all moneys received from fines and penalties.

1899, c. 164, ss. 33, 26.

1115. Record of receipts and disbursements. The commission shall keep a record showing in detail all receipts and disbursements.

1899, c. 164, s. 34.

1116. Fiscal year. The fiscal year for which all reports shall be made which may be required of any railroad or transportation company by the commission under this chapter shall end on the thirtieth of June.

1899, c. 164, s. 28.

1117. Report of commission. It shall be the duty of the commission to make to the governor annual reports of its transactions, and recommend from time to time such legislation as it may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution.

1899, c. 164, s. 27. **Reports of commission are matters of public record of which courts will take judicial notice:** Staton v. Railroad, 144-135.

1118. Expenses. All the expenses of the commission, except as otherwise provided by law, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation, or upon official business, or for any other purposes necessary for carrying out the provisions of this chapter, and necessary furniture, stationery, postage, lights and heat, shall be allowed, and the auditor shall issue his warrant upon presentation of itemized vouchers therefor approved by the chairman of the commission: Provided, that the expenses allowed under this section shall not exceed three thousand six hundred dollars annually.

1899, c. 164, s. 32; 1899, c. 688.

X. Tax Commissioners.

1119. Tax commissioners. The members of the corporation commission shall constitute a board of "State Tax Commissioners," with the powers and duties prescribed by law.

1901, c. 7, ss. 1, 3; 1903, c. 251, ss. 1, 3; 1907, c. 258.

1120. Oath of office. The members of said board shall take and subscribe the constitutional oath of office, to be filed with the secretary of state.

1907, c. 258, s. 3.

1121. Clerks to. Said board may employ such clerks as in their judgment they may deem necessary to put into proper execution the provisions of this subchapter. The persons so elected shall hold office during the pleasure of said board, and a record of all the proceedings of said board shall be kept, which record, with all other papers or proceedings of said board, shall be a part of the record of the board of corporation commissioners, and of which the clerk of said board of corporation commissioners shall be the lawful custodian, and who, when the board is not in session, shall also have oversight of the clerical force and have performed such duties as are directed by the board.

1907, c. 258, s. 2.

1122. When to meet; special meetings. Said board shall hold regular meetings at the office of said board in the city of Raleigh on the first Tuesday of March, June, July, August, September and October of each year, unless said dates are changed by order of the board, of which changes due notice shall be given, and may hold adjourned sessions as may be deemed necessary by it for the proper performance of the duties devolving upon said board. The chairman may call special sessions of the board whenever and wherever in the state he may deem it advisable so to do, and shall call such special sessions upon the written request of two members.

1907, c. 258, ss. 4, 5.

1123. Examination of records, etc. The said board, and the members thereof, shall have access to all books, papers, documents, statements and accounts on file or of record in any of the departments of state, subject to the rules and regulations of the respective departments relative to the care of the public records. It shall have like access to all books, papers, documents, statements and accounts on file or of record in counties, townships and municipalities. Said board shall have the right to subpœna witnesses, upon a subpœna signed by the chairman of said board, directed to such witnesses, which subpœna may be served by any person authorized to serve subpœnas from courts of record in this state, and the attendance of witnesses may be compelled by attachment to be issued by any superior court upon proper showing that such witness has been properly subpœnaed and has refused to obey such subpœna. The person serving such subpœna shall receive the same compensation now allowed to sheriffs and other officers for serving subpœnas. Said board shall have power to examine witnesses under oath, said oath to be administered by any member of said board or by the secretary thereof. Said board shall have the right to examine books, papers or accounts of any corporation, firm or individual owning property liable to assessment for taxes, general or specific, under the law of this state.

1907, c. 258, s. 4.

1124. Duties of. It shall be the duty of the board:—

1. To have and exercise general supervision over the tax-listers and assessing officers of this state, and to take such measures as will secure the enforcement of the provisions of this subchapter, to the end that all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed at their true value in money.

2. To confer with and advise assessing officers as to their duties under this subchapter, and to institute proper proceedings to enforce

the penalties and liabilities provided by law for public officers, officers of corporations and individuals failing to comply with this subchapter; to prefer charges to the governor against assessing and taxation officers who violate the law or fail in the performance of their duties in reference to assessments and taxation; and in the execution of these powers the said board may call upon the attorney general or any prosecuting attorney in the state to assist said board.

3. To receive complaints as to property liable to taxation that has not been assessed or has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if found to exist.

4. To see that each county in the state be visited by at least one member of the board as often as is necessary, to the end that all complaints concerning the law of assessment and taxation may be heard; that information concerning its workings may be collected; that all assessing and taxation officers comply with the law, and all violations thereof be punished, and that all proper suggestions as to amendments and change may be made.

5. To require from any register of deeds, clerk of court, mayor and clerk of towns, or any other officer in this state, on forms prescribed by said board of state tax commissioners, such annual or other reports as shall enable said board to ascertain the assessed valuation of all property listed for taxation throughout the state under this subchapter; the amount of taxes assessed, collected and returned delinquent, and such other matter as the board may require, to the end that it may have complete and statistical information as to the practical operation of this subchapter. That every such officer mentioned in this section who shall wilfully neglect or refuse to furnish any report required by the commission, for the purposes of this subchapter, or who shall wilfully and unlawfully hinder, delay or obstruct said commission in the discharge of its duties, shall forfeit and pay one hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was wilful.

6. To make diligent investigation and inquiry concerning the revenue laws and systems of other states and countries, so far as the same is made known by published reports and statistics, and can be ascertained by correspondence with officers thereof, and, with the aid of information thus obtained, together with experience and observation of our own laws, to recommend to the general assembly at each regular session thereof such amendments, changes or modifications of our revenue laws as seem proper and necessary to remedy injustice and irregularities in taxation, and to facilitate the assessment and collection of public revenues.

7. To further report to the general assembly at each regular session thereof, or at such other times as the general assembly may direct, the whole amount of taxes collected in the state for all purposes, classified as to state, county, township and municipal purposes, with the sources thereof, the amount lost, the cause of the loss, the proceedings of said board, and such other matters of information concerning the public revenues as it may deem of public interest.

8. To discharge such other duties which are or may be prescribed by law.

1907, c. 258, s. 6.

1125. List of taxables; how revised by. After the various tax lists required to be made under this chapter shall have been passed upon by the county board of equalization, the said several tax lists shall be subject to inspection by the said board of state tax commissioners or by any member thereof; and in case it shall appear or be made to appear to said board that property subject to taxation has been omitted from said list, the said board may issue an order directing the assessor or lister, whose assessments or failure to assess are complained against, to appear with his tax list at a time and place to be stated in said order, and the place to be at the office of the board of county commissioners at the county-seat or such other place in said county in which said roll was made, as said board shall deem most convenient for the hearing herein provided for. A notice of the time and place that said assessor or lister is ordered to appear with said list shall be published in a newspaper published at the county-seat in said county, if there be one; if not, in some paper printed in said county, if there be any, at least five days before the time at which said assessor or lister is required to appear, and personal notice shall be given by mail to said persons whose property or whose assessments are to be considered, at least five days prior to said hearing. A copy of said order shall be served upon the tax officer in whose possession said list shall be, at least three days before he is required to appear with said list. The said board, or any member thereof, shall appear at the time and place mentioned in said order, and the assessing or listing officer upon whom said notice shall have been served shall appear also with said tax list. The said board or any member thereof, as the case may be, shall then and there hear and determine as to the proper assessments of all property and persons mentioned in said notice, and persons affected or liable to be affected by the review of said assessments thus provided for may appear and be heard at said hearing. In case said board, or the member thereof who shall act in said review, shall determine that the assessments so reviewed are not assessed according to law, he or they shall, in a column provided for that purpose, place op-

posite said property the true and lawful assessment of the same. As to the property not on the tax list, the said board or members thereof acting in said review shall place the same upon said tax list by proper description, and shall place thereafter in the proper column the true cash value of the same. In case of review under this section, the said board or the member thereof acting in said review shall certify under his hand officially and spread upon said list a certificate of the day and date at which said tax list was reviewed by him, and the changes made by him therein. For appearing with said list as required herein, the tax officer shall receive the same pay per diem as is received by him in the preparation of the tax list, to be presented to and paid by the proper officers of the county or municipality of which he is the assessing officer, in the manner as his other compensation is paid. The action of said board or member taken as provided in this subchapter shall be final.

1907, c. 258, s. 8.

1125a. General review of tax list; how and when ordered. In case it shall appear or be made to appear to said board that any tax list in the state is so grossly irregular and unlawfully assessed that adequate compliance with the law can not be secured except by a general review of said tax list, said board may make and issue an order that said tax list shall be subject to general review, and the time and place shall be stated in said order at which said list shall be reviewed, and under said order the assessor whose assessment or failure to assess is complained against shall be required to appear with his tax list at the time and place thus determined, said time to be not less than fourteen days from the issuance of the order, and the place to be at the office of the board of county commissioners at the county-seat, or such other place in said county in which said list was made, as said board shall deem most convenient for the hearing herein provided for. A notice of the time and place that said assessor is required to appear with said list, together with a statement that said list will be subjected to general review, and that all persons interested therein may be heard at said time, shall be published in a newspaper published at the county-seat of said county, if there be one; if not, in some newspaper printed in said county, if there be any, at least seven days before the time at which said assessor is required to appear. A copy of the order made as aforesaid shall be served upon the tax officer in whose possession said list shall be, at least three days before he is required to appear with said list. The said board or any member thereof shall appear at the time and place mentioned in said order, and the tax officer upon whom said notice shall have been served shall appear also with said tax list. The said board or any member thereof, as the case may be, together

with the chairman of the board of county commissioners, shall then and there review said tax list and the assessment of property therein, and he or they shall have power to determine in accordance with law the amount at which said assessment shall be placed, and to change the same so that said assessments may comply with the law. Also to place upon said list property omitted therefrom in the same manner as provided in the last preceding section. The determination of said board or members thereof, acting in said review, shall be placed in a column provided for that purpose, and they or he shall proceed in all respects as provided in the last preceding section, and the tax officer shall receive the same compensation as provided in said section.

1907, c. 258, s. 9.

1126. Property unlisted, how listed by. If it shall appear to said board at any time that any property liable to taxation has not been assessed for any previous year as hereinbefore provided, the said board shall report the same to the proper assessing officer, and the same shall be listed for taxation upon the next tax list that shall be made, and shall be valued as all other property. The said board shall further certify to the board of county commissioners of the several counties at the October session thereof next after said property shall be then listed for taxation, and said board of county commissioners shall ascertain the rate of taxation for said several years, and shall order the taxes for said several years to be entered against said property upon the valuation for the then current year, and the same shall be so entered in a column provided for that purpose, and it shall constitute a charge against the person or property and be collected as other taxes: Provided, however, that this provision shall not be deemed to relate back prior to the eleventh day of March, one thousand nine hundred and seven: Provided further, that in case of change of ownership of the property omitted, said taxes shall not be entered against said property prior to the last change of ownership.

1907, c. 258, s. 10.

1127. Report to the governor, when; how distributed. The board of state tax commissioners shall, on or before the first day of November of each year, make an annual report to the governor of the state, setting forth the workings of said commission during the preceding year, and containing the findings and recommendations of said commission in relation to all matters of taxation. The state auditor shall cause two thousand copies of said report to be printed on or before the first day of December succeeding the making of said report. Five hundred copies of said report shall be placed at the dis-

posal of the state librarian for distribution and exchange, and a copy of said report shall be forwarded by said tax commission to each member of the general assembly as soon as printed.

1907, c. 258, s. 7.

CHAPTER 21.

CORPORATIONS.

I. General Powers.

1128. Corporate powers. Every corporation shall have power—

1. To have succession, by its corporate name, for the period limited in its charter, or certificate of incorporation, and, when no period is limited, for a period of sixty years.

Corporation can not endure longer than period named in charter: Asheville Div. v. Aston, 92-578.

2. To sue and be sued in any court.

Corporation must sue and be sued in corporate name: Young v. Barden, 90-424; Mauney v. Motz, 39-195; Brittain v. Newland, 19-363; see also Institute v. Norwood, 45-73—**though, where receiver appointed, he may sue as such or in corporate name,** Smathers v. Bank, 135-413; Davis v. Mfg. Co., 114-321; Gray v. Lewis, 94-392; see sec. 1203. **Corporation liable to civil and criminal actions as if individual:** Redditt v. Mfg. Co., 124-100. **Summons against "A. H. Bronson, President of Southern Improvement Co." is not against the company but against Bronson,** Plemmons v. Imp. Co., 108-614. **As to suing corporation in name not strictly correct,** see Institute v. Norwood, 45-73, and cases cited.

3. To make and use a common seal, and alter the same at pleasure.

4. To hold, purchase and convey real and personal estate in or out of the state, and to mortgage the same and its franchises; the power to hold real and personal estate shall include the power to take the same by devise or bequest.

Real or personal property of private corporation may be sold: Barcello v. Hapgood, 118-712; Benbow v. Cook, 115-324—**and may be mortgaged,** Paper Co. v. Chronicle, 115-143—**but such is not the case with quasi-public corporations,** Barcello v. Hapgood, 118-712; Logan v. Railroad, 116-945; Paper Co. v. Chronicle, 115-143—**for quasi-public corporations can not sell franchises without assent of legislature,** James v. Railroad, 121-528, and cases cited.

Foreign corporation having right under charter to acquire and sell land may exercise such right in this state: Barcello v. Hapgood, 118-712. **Corporation having power to hold land, may hold same in trust, unless trust**

repugnant to purpose for which incorporated: Keith v. Scales, 124-497. **Corporation may hold land in fee though existence limited to specific number of years:** Wilson v. Leary, 120-92; Asheville Div. v. Aston, 92-578; Rives v. Dudley, 56-126—**though if corporation by charter is forbidden to take or hold real estate, conveyance to it only voidable at option of state:** Mallett v. Simpson, 94-37.

Corporation formed hereunder has no power to acquire, maintain and operate a "railroad" dedicated to public use under the general law regulating highways, and its deed to a corporation having such power of a "tram or railroad" owned by it, and provided for in its charter can only convey a tram road and the right to maintain and operate it as such: Beasley v. R. R., 145-272.

5. To elect and appoint in such manner as it shall determine to be proper, all necessary officers and agents, and fix their compensation and define their duties and obligations.

6. To conduct business in this state, other states, the District of Columbia, the territories, dependencies and the colonies of the United States, and in foreign countries, and have one or more offices in or out of this state.

Corporation may transact business anywhere unless prohibited by charter or excluded by local laws: Garrett v. Bear, 144-25.

7. To make by-laws and regulations, consistent with the laws of the state, for its own government, and for the due and orderly conduct of its affairs and the management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved in the manner hereafter mentioned.

Section merely referred to: Clayton v. Ore Knob Co., 109-395.

Code, ss. 663, 666, 690, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1.

1129. Implied powers; how far this chapter affects all corporations. In addition to the power enumerated in the first section of this chapter, and the powers specified in its charter, or in the act or certificate under which it was incorporated, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges contained in this chapter so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation, and shall be governed by the provisions, and be subject to the restrictions and liabilities in this chapter contained, so far as the same are applicable to, and not inconsistent with, such charter, or the act under which such corporation was formed; and no corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given: Provided, nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways.

Code, s. 701; 1897, c. 204; 1901, c. 2, s. 4; 1901, c. 6. **See under section 1128. Corporations possess such powers as are essential to the exercise of powers expressly given, and such as are necessary to attain objects for which created:** Barcello v. Hapgood, 118-712. **Corporations having power to contract debt may issue bonds for same:** Comrs. v. Railroad, 77-289—**also corporations other than railroads have general power to mortgage property,** Paper Co. v. Chronicle, 115-143—**for right to mortgage is natural result of right to incur indebtedness,** Ibid—**though corporation has no implied power to engage in business different from that for which incorporated,** Wiswall v. Plank-Road Co., 56-186.

Semble, that corporation authorized to ship own products may, as incidental to business, carry goods of others and also passengers: Gruber v. R. R., 92-1.

1130. How land conveyed; certain conveyances void as to torts. Any corporation may convey lands, and all other property which is transferable by deed, by deed of bargain and sale, or other proper deed, sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation and attested by a witness or witnesses, or by deed of bargain and sale, or other proper deed, sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and attested by the secretary or assistant secretary of the company. But any conveyance of its property, whether absolutely or upon condition, in trust, or by way of mortgage, executed by any corporation, shall be void and of no effect as to torts committed by such corporation prior to, or at the time of the execution of said deed: Provided, persons injured, or their representatives, shall commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed, as required by law.

150-171

Code, s. 685; 1891, c. 118; 1893, c. 95, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1; 1905, c. 114. **As to probate of conveyance of corporations, see section 1005. Provisions of this section apply to corporations generally:** Bank v. Mfg. Co., 96-298. **Conveyance may be executed under statute or according to common law:** Barcello v. Hapgood, 118-712—**and for what constitutes good conveyance under common law,** see Caldwell v. Mfg. Co., 121-341; Heath v. Cotton Mills, 115-202; Bason v. Mining Co., 90-417. **Seal of corporation essential to validity of deed:** Caldwell v. Mfg. Co., 121-339—**though it seems it may adopt as seal the individual seal of officers,** Taylor v. Heggie, 83-244.

Conveyance has been held to be sufficient where signed by president, vice-president, secretary and treasurer, who constitute all the stockholders and officers, and corporate seal affixed: Heath v. Cotton Mills, 115-202—**where properly executed but in body of instrument it states it is made by "the President and Directors of the Raleigh National Bank,"** Shaffer v. Hahn, 111-1.

Conveyance has been held insufficient where signed by president and two members of corporation, but without corporate seal affixed: Caldwell v. Mfg. Co., 121-339—**where signed by president, secretary and two stockholders, and duly witnessed, but no corporate seal attached, and probate recites that it ''was acknowledged by secretary who also proved execution by president and two stockholders:''** Duke v. Markham, 105-131—**where executed in name of corporation by its president with the word ''seal'' at end of signature,** Caldwell v. Mfg. Co., 121-339—**where executed by C. M., president of D. R. Co., and W. M., trustee, and signed by C. M. with suffix ''President of D. R. Co.,'' with private seal:** Clayton v. Cagle, 97-300—**where in body of instrument it says ''I do convey'' and ''witness my hand and seal,'' and is signed by the ''president'' with his private seal, and ''treasurer'' and ''stockholder'' with corporate seal:** Clark v. Hodge, 116-761—**where acknowledged by individual instead of corporation officers:** Bernhardt v. Brown, 122-587.

Mortgage executed according to this section is act of corporation alone, and not of its officers: Bank v. Mfg. Co., 100-345.

Cases bearing on provision that conveyance shall be void as to creditors of corporation (this provision has been strickened from section by act of 1901, chapter 2): Fisher v. Bank, 132-777; Bank v. Bank, 127-432; Williams v. R. R., 126-918; Bernhardt v. Brown, 122-591; James v. Lumber Co., 122-160; Langston v. Imp. Co., 120-132; Bank v. Cotton Mills, 115-515; Cotton Mills v. Cotton Mills, 115-475; Hill v. Lumber Co., 113-180; Blalock v. Mfg. Co., 110-99; Duke v. Markham, 105-138.

Lease of property by railroad company does not exempt lessor from liability for torts committed by lessee: Carleton v. R. R., 143-43; Pierce v. R. R., 124-83; Norton v. R. R., 122-910; Tillett v. R. R., 118-1031; Logan v. R. R., 116-940.

Person injured must assert rights within 60 days after registration of conveyance, inferred from Williams v. R. R., 126-920; James v. Lumber Co., 122-159. **If conveyance not forbidden by statute of frauds it is good unless party injured objects within 60 days:** Bank v. Cotton Mills, 115-515; Blalock v. Mfg. Co., 110-104.

1131. Mortgaged corporate property subject to execution for labor and torts. Mortgages of corporations upon their property or earnings, whether in bonds or otherwise, shall not have power to exempt the property or earnings of such corporations from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor performed, nor torts committed by such corporation whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding.

Code, s. 1255; 1897, c. 334; 1901, c. 2, s. 3. **See section 1130. Private corporations have general power to mortgage property:** Paper Co. v. Chronicle, 115-143—**but mortgage conveys nothing as against subsequent judgment for tort,** Howe v. Harper, 127-356; Williams v. R. R., 126-920; Railroad Co. v. Burnett, 123-210.

152-456
152-164

Section has reference to labor performed or torts committed after execution of mortgage: Coal Co. v. Electric Light Co., 118-234—**though makes no difference whether mortgaged property was sold before or after judgment where purchaser takes with notice,** Railroad Co. v. Burnett, 123-210—**but section refers to torts committed by corporation and its agents while under mortgage,** Belvin v. Raleigh Paper Co., 123-138.

Judgment for labor performed can be enforced in perference to prior mortgages, though no lien be filed: Dunavant v. R. R., 122-1001; see Coal Co. v. Electric Co., 118-332—**but superintendent and bookkeeper do not come under provisions of this section as to labor performed,** Moore v. Industrial Co., 138-304—**and for definition of word "labor,"** see Ibid.

Under this section no lien is acquired, but person injured or performing labor has right to have satisfaction of judgment in preference to mortgage: Belvin v. Raleigh Paper Co., 123-148; Langston v. Imp. Co., 120-134 as explained in Railroad v. Burnett, 123-216; Coal Co. v. Electric Light Co., 118-234; Bank v. Mfg. Co., 96-308.

Cases bearing on provision that mortgage shall not exempt corporation from execution for judgment obtained for material furnished (note this provision has been stricken from this section): Belvin v. Raleigh Paper Co., 123-147; Electric Co. v. Power Co., 122-599; James v. Lumber Co., 122-157; Coal Co. v. Electric Light Co., 118-232; Heath v. Cotton Mills, 115-202; Paper Co., Chronicle, 115-143; Bank v. Mfg. Co., 96-298. **Mortgage not now postponed to judgment for materials furnished:** Cheesborough v. Sanatorium, 134-245.

1132. Gas companies may supply electricity. Any gas company, in addition to the powers contained in the charter, shall have full power to use, employ and supply electricity for lighting public and private buildings and all other places; and may charge and collect such reasonable rates and fees for the use of such lights, fixtures and appliances as may be established by said company, in accordance with law.

1889 (Pr.), c. 35.

1133. Special powers of gas and electric companies. Gas and electric light and power companies shall have power to lay, extend, construct, build, erect, maintain, repair and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, appurtenances, in, upon, through and over any and all roads, streets, avenues, lanes, alleys and bridges within and near any city, town or village where said company may be located; and all such roads, streets, lanes, alleys and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers,

poles, wires, conductors and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies.

1889 (Pr.), c. 35, s. 2. **Construction of street passenger railway imposes no additional servitude upon property fronting on street so occupied:** Hester v. Traction Co., 138-288; Merrick v. Street R. R., 118-1081—**and use of street for laying pipes, etc., in furnishing water, lights, etc., imposes no additional servitude beyond those reasonably included in dedication of street,** Smith v. Goldsboro, 121-350.

1134. Corporations created hereunder can not do banking business. No corporation created under the provisions of this chapter shall, by any implication or construction, be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, or of receiving deposits of money, or of buying gold or silver bullion, or foreign coins, or of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money: Provided, that in the transaction of its business it may make, and take and indorse, when necessary, all such bonds, notes and bills of exchange as the particular business may require.

Code, s. 684; 1901, c. 2, s. 5. **Banks can not organize under this chapter:** Worth v. Bank, 122-404; Hanstein v. Johnson, 112-257; Bain v. Loan Asso., 112-252—**and corporation organized hereunder can do no banking business,** Worth v. Bank, 122-404.

II. Legislative Control.

1135. Legislative power over corporate charters. The charter of every corporation, or any supplement thereto, or amendment thereof, shall be subject to alteration, modification, amendment or repeal, in the discretion of the legislature, and the legislature may, at pleasure, dissolve any corporation.

Const., Art. VIII., s. 1; 1901, c. 2, s. 6. **Legislature may alter or repeal laws under which corporations are organized:** Railroad v. Rollins, 82-523.

1136. This chapter may be amended; corporations bound thereby; appropriate portions a part of all charters. This chapter may be amended or repealed at the pleasure of the legislature, and every corporation shall be bound by such amendment; but such amendment or repeal shall not take away or impair any remedy against any such corporation, or its officers, for any liability which shall have been previously incurred. This chapter and all amendments thereof shall be a part of the charter of every corporation heretofore formed, or hereafter formed hereunder, except so far as the same are inapplicable and inappropriate to the objects of such corporation.

Const., Art. VIII., s. 1; 1901, c. 2, s. 7. **See** Railroad v. Rollins, 82-523.

III. Formation.

1137. How created. Any number of persons, not less than three, who may be desirous of engaging in any business, or of forming any company, society or association whatever, not unlawful, except railroads, other than street railways, or banking or insurance, or building and loan associations, shall be incorporated in the manner following, and in no other way (except in those cases where, in the judgment of the legislature, the object of the corporation can not be attained under the general law, and in all such cases the act creating the corporation shall contain a preamble, in which shall be set forth specifically and definitely the particular object of the corporation, or provision in the proposed charter, which can not be attained under the general law); that is to say, such persons shall, by a certificate of incorporation, under their hands, and seals, set forth—

153-52

No formal acceptance of charter necessary when corporation formed under general law: Benbow v. Cook, 115-324—**but when formed by special legislative act charter must be accepted,** Ibid; Railroad v. Olive, 142-257.

Banking and insurance companies can not be incorporated under this chapter: Worth v. Bank, 122-404; Hanstein v. Johnson, 1112-257; Bain v. Loan Asso. 112-252—**and corporations can not be created by special act except where in judgment of legislature object can not be attained under general law,** Hanstein v. Johnson, 112-253.

Section merely referred to in Hill v. Lumber Co., 113-175; Marshall v. Bank, 108-641.

1. The name of the corporation; no name shall be assumed already in use by another existing corporation of this state, or so nearly similar thereto as to lead to uncertainty or confusion; and shall end with either the word "company," or the word "incorporated."

See Tobacco Co. v. Tobacco Co., 145-367.

2. The location of its principal office in the state.

See Garrett v. Bear, 144-23.

3. The object or objects for which the corporation is formed.

Corporation organized for one purpose has no right to engage in different business: Wiswall v. Plank-Road Co., 56-183—**though fact that corporation avails itself of only one of several privileges granted by charter does not invalidate act of incorporation,** Cotton Mills v. Burns, 114-353.

4. The amount of the total authorized capital stock of the corporation, the number of shares into which the same is divided, and the par value of each share, the amount of capital stock with which it will commence business, and, if there be more than one class of stock, a description of the different classes, with the terms on which the respective classes of stock are created: Provided, however, that the provisions of this paragraph shall not apply to religious, charitable or literary corporations, unless it is desired to have a capital stock; in case any religious, charitable or literary corporation de-

sires to have no capital stock, it shall be so stated, and the conditions of membership shall be also stated.

5. The names and postoffice addresses of the subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of capital stock with which the company will commence business; and if there be no capital stock, the names and postoffice addresses of the incorporators.

Practice to set out number of shares subscribed by each incorporator: Cotton Mills v. Cotton Mills, 115-475.

6. The period, if any, limited for the duration of the company.

7. The certificate of incorporation may also contain any provision which the incorporators may choose to insert for the regulation of the business, and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders: Provided, such provision be not inconsistent with the laws of this state.

Code, s. 677; 1901, c. 2, s. 8; 1903, c. 453; 1901, cc. 6, 41, 47; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318, 1897, c. 204; 1899, c. 618.

1138. Street railways may be incorporated hereunder. Corporations may be organized under the provisions of this chapter for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, shall be held to include railways operated either by steam or electricity, or by whatever motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the territory lying contiguous to the municipality in which is the home office of said company, and such railways may carry and deliver freights: Provided, that no such railway shall operate a line extending in any direction more than fifty miles from the municipality in which is located its home office. No such railway shall be operated in any city or town without the consent of the municipal authorities thereof.

1901, cc. 6, 41; 1903, c. 350. **Street railway may be incorporated under this chapter:** Fayetteville Street Rwy. v. R. R., 142-423. **What included under denomination "street railways:"** Ibid.

1139. Certificate of incorporation, how signed, proved, filed and recorded. The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved, or acknowledged, before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. Such

certificate of incorporation, when so proved, shall be filed in the office of the secretary of state, and there remain of record, and he shall, if the same shall be in accordance with law, thereupon cause the same to be recorded in his office in a book to be kept for that purpose, and known as the "Corporation Book," and he shall, upon the payment of the organization tax and fees, certify, under his official seal, a copy of the said certificate of incorporation and probates, which said certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall, or is to be established, in a book to be known as the "Record of Incorporations;" and said certificate of incorporation, or a copy thereof, duly certified by the secretary of state, or by the clerk of the superior court of the county in which the same is recorded, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established.

Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343. **Original record of incorporation made by clerk of superior court is evidence to prove incorporation:** Carolina Iron Co. v. Abernathy, 94-545—**and copy of letters of incorporation prima facie evidence as to existence of corporation,** Marshall v. Bank, 108-639; Carolina Iron Co. v. Abernathy, 94-545.

Section merely referred to in Benbow v. Cook, 115-329.

1140. When incorporators become a corporation. The persons so associated, their successors and assigns, shall, from the date of such filing in said office of the secretary of state, be and constitute a body corporate by the name set forth in such certificate of incorporation, subject to amendment and dissolution in the manner provided by law.

1901, c. 2, s. 10. **Persons associated shall be corporation from time of filing certificate in office of secretary of state:** Fayetteville Street Rwy. v. R. R., 142-433. **Articles of agreement duly executed and recorded constitute corporation a body politic:** Benbow v. Cobb, 115-324.

1141. Incorporators to direct affairs until directors are elected. Until the directors are elected, the signers of the certificate of incorporation shall have the direction of the affairs and of the organization of the corporation, and may take such steps as are proper to obtain the necessary subscription to stock and to perfect the organization of the corporation.

1901, c. 2, s. 11. **Section referred to** in Fayetteville Street Rwy. v R. R., 142-433.

1142. First meeting, how called. The first meeting of every corporation shall be called by a notice, signed by a majority of the

incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in some newspaper of the county where the corporation is established; or said first meeting may be called without publication, if two days' notice be personally served on all the incorporators, or if all the incorporators shall in writing waive notice and fix a time and place of meeting, no notice or publication shall be required.

Code, s. 665; 1901, c. 2, s. 18. **As to corporation meetings generally, and notice required,** see Hill v. Railroad, 143-539, and cases under section 1179. **Where all stockholders have express notice of, and participate in, meeting, not necessary to prove compliance with section:** Benbow v. Cook, 115-324. **First meeting should be held in state:** Mining Co. v. Goodhue, 118-983—**but if held elsewhere, state only can complain,** Mining Co. v. Goodhue, 118-985.

1143. Death of incorporators; vacancy filled. When one or more of the incorporators of any corporation, created by or under any general or special act, shall have died before the corporation shall have been organized pursuant to law, the survivors or survivor may, in writing, designate other persons who may take the place and act instead of those deceased, in the organization; and the organization so affected by their aid shall be as effectual in law as if it had been effected by all the original incorporators.

1901, c. 2, s. 36.

1144. Errors in certificates of incorporation, how corrected. Whenever in the certificate of incorporation under any general law there shall be any error or omission in the recital of the act under which said corporation is created, or in the omission of any other matter which is required to be stated in the certificate, it shall be lawful for said corporation to correct such error in the manner following: The board of directors of such corporation shall pass a resolution declaring that such error exists, and that said corporation desires to correct the same, and shall call a meeting of the stockholders of said corporation to take action upon such resolution. The meeting of said stockholders shall be held upon such notice as the by-laws provide, and in the absence of such provision, then upon ten days' notice, given personally, or by mail. If two-thirds in interest of all the stockholders shall vote in favor of the correction of such error or ommission, a certificate of such action shall be made and signed by the president and secretary under the corporate seal; which said certificate shall be acknowledged or proved as in the case of deeds of real estate, and such certificate, together with the written assent, in person or by proxy, of two-thirds in interest of all the stockholders of said corporation, shall be filed in the office

of the secretary of state, and upon the filing thereof the certificate of incorporation shall be deemed to be corrected and amended accordingly, and the filing of said certificate in conformity with this chapter shall have the same force and effect as if said certificate of incorporation had been originally drafted in conformity with the amendment so made.

1901, c. 2, s. 109.

IV. By-Laws.

1145. Power to make and alter. The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors. By-laws made by the directors under power so conferred may be altered or repealed by the stockholders.

1901, c. 2, s. 13. **Books of corporation containing entries in accordance with charter, when identified, are competent to prove corporate existence:** Turnpike Co. v. McCarson, 18-306. **By-laws are not evidence for corporation against strangers who deal with it, unless brought to their knowledge and assented to by them:** Smith v. Railroad, 68-107.

1146. What they may determine and contain. All corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting all meetings; the number of members that shall constitute a quorum (provided, in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum; if the quorum shall not be so determined by the corporation, a majority in interest of the stockholders, represented either in person, or by proxy, shall constitute a quorum) the number of shares that shall entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessment; the tenure of office of the several officers, and the manner in which vacancies in any of the offices shall be filled, till a regular election, and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars, for any one offense: Provided, that no such by-law shall be made by any corporation repugnant to any provision of its certificate of incorporation; and the provisions of this chapter shall govern in all cases where the by-laws are silent.

Code, s. 664; 1901, c. 2, s. 12. **Corporation may provide in by-laws for sale of shares of delinquent subscribers:** Cotton Mills v. Dunstan, 121-12. **By-laws are made with reference to general law, and must conform to general requirements as regards vested rights of members:** Sherrod v. Ins. Co., 139-167. **By-law providing that subscriber shall be responsible for any balance due after application of proceeds of sale of shares held reasonable:**

Cotton Mills v. Dunstan, 121-12—**but by-law as to forfeiture of shares after notice may be rebutted by showing nonreceipt of notice though same was properly postpaid and addressed,** Sherrod v. Ins. Co., 139-167.

V. Officers.

1147. Directors, their selection, powers, duties, terms of office, classes, etc. The business of every corporation shall be managed by its directors; they shall not be less than three in number, and, except as hereinafter provided, they shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation any corporation organized under this chapter may classify its directors in respect to the time for which they severally hold office, the several classes to be elected for different terms: Provided that no class shall be elected for a shorter period than one year, or for a longer period than five years, and that the term of office of at least one class shall expire in each year. Any corporation which shall have more than one kind of stock, may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of any class, or classes, to the exclusion of the others. One director of every corporation of this state shall be an actual resident of this state, and it shall not be necessary for more than one director to be a resident of this state, notwithstanding the provisions of any special charter or other act.

1901, c. 2, s. 14. **Directors occupy fiduciary relation to corporation:** McIver v. Hardware Co., 144-483; Townsend v. Williams, 117-330; Hill v. Lumber Co., 113-173—**and are agents of corporation, though not of stockholders,** Coble v. Beall, 130-534—**for there is no privity between directors and stockholders,** Ibid—**and before stockholder can bring action for injury to corporation demand must be made on directors and they must have refused to sue, which complaint must show,** Ibid.

Where corporation insolvent, director can not take advantage of a superior knowledge to secure debt as against other creditors: McIver v. Hardware Co., 144-483; Bank v. Cotton Mills, 115-513; Hill v. Lumber Co., 113-173—**though may bona fide lend money to corporation when necessary, and take lien upon its property,** Hill v. Lumber Co., 113-173.

Directors and stockholders can not sell entire assets of corporation for own advantage to prejudice of creditors: McIver v. Hardware Co., 144-478. **Purchase by director of bonds and stock of insolvent corporation is valid if made bona fide and for value:** Graham v. Carr, 130-271; see also Latta v. Catawba Co., 146- —**though where director is surety for corporate debts, he can not apply proceeds of such sale to said debts,** Ibid. **Where director signed bond to indemnify corporate creditors to protect corporate property he may pay such creditors from funds derived from sale of corporate property to him,** Ibid. **Where directors buy land sold under mortgage by cor-**

poration they are presumed to have bought for corporation: Craft v. Asso., 127-163.

Directors are liable to corporation and creditors for losses caused by their bad faith, misconduct or want of care: McIver v. Hardware Co., 144-483; Townsend v. Williams, 117-330.

If president of corporation fraudulently disposes of its property, it is duty of officers to sue for and recover it for benefit of its creditors: Latta v. Catawba Co., 146-.

1148. Directors must be stockholders. No person shall be elected as director of any corporation issuing stock unless he shall be, at the time of his election, a bona fide holder of some of the stock thereof; and any director ceasing to be a bona fide holder of some of the stock thereof shall cease to be a director. Any corporation may, by its certificate of incorporation or by-laws, determine how many shares a person shall hold to qualify him to be a director.

1901, c. 2, s. 44.

1149. Officers, their selection, qualifications, duties, terms, etc. Every corporation organized under this chapter shall have a president, secretary and treasurer, who shall be chosen either by the directors or stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as shall be assigned to him. The treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety, or sureties, as shall be required by the by-laws. Any two of the offices may be held by the same person, if the body electing so determine.

1901, c. 2, s. 15.

1150. Other officers, agents and factors. The corporation may have such other officers, agents and factors, who shall be chosen in such manner and hold their office for such terms, and upon such conditions as may be prescribed by the by-laws or determined by the board of directors.

1901, c. 2, s. 16.

1151. Vacancies, how filled. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, by death, resignation, removal or otherwise, shall be filled in the manner provided for in the by-laws; in the absence of such provision such vacancies shall be filled by the board of directors.

1901, c. 2, s. 17.

1152. Annual statement; forfeiture for failure to make; duty of secretary of state and attorney general. Every corporation, authorized to transact business in this state, shall file in the office of the secretary of state, annually, on or before December first, a statement authenticated by the signatures of the president and secretary containing the total amount of capital stock authorized, the amount actually issued, whether for cash or for purchase of property, designating what property, the names of all the directors and officers, with the date of the election or appointment, term of office, residence and postoffice address of each, the character of its business and location, giving the street and number, if any, of its principal office in the state, and the name of the agent in charge of said office, upon whom process against corporation may be served; but this shall not prevent service of process on other agents authorized by law; and for this purpose the secretary of state shall furnish blanks in proper form and safely keep in his office all such statements, and issue to the corporations filing the same his certificate thereof, and also prepare an alphabetical index thereof, which statements and index shall be submitted to the inspection of persons interested, at all proper hours; and every corporation failing to comply with the provisions of this section shall forfeit to the state twenty-five dollars to be collected by the sheriff of the county where the principal office of said corporation is situated, in a civil action to be brought before a justice of the peace, and when collected shall be remitted by the sheriff to the secretary of state after deducting his cost as allowed by law, which he shall collect in addition to the penalty. This section shall not apply to any corporation which is required to file a similar statement in the office of the commissioner of insurance, or the corporation commission.

1901, c. 2, s. 48; 1907, c. 944.

1153. Secretary of state may call for special reports. The secretary of state shall have power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem public interest requires: Provided, no fees shall be charged for filing such special reports.

1154. Liability for making false certificates. If any certificate made, or any public notice given, by the officers of any corporation, in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforcible in the courts of this state only.

1901, c. 2, s. 56.

1155. Fraud; liability of officers, directors and stockholders for. In case of fraud by the president, directors, managers or stockholders in any corporation, the court shall adjudge personally liable to creditors and others injured thereby such of the directors and stockholders as may have been concerned in the fraud.

Code, s. 686; 1901, c. 2, s. 107. **False and fraudulent statements of condition of corporation put forth under authority of directors, they are liable to persons dealing with corporation upon faith of such statements:** Houston v. Thornton, 122-370, and cases cited. **Stockholders who participated in organization of fraudulent corporation are liable to creditors to at least amount of stock subscribed for by them:** Foundry Co. v. Killian, 99-501, and cases cited.

1156. Who may sue officers and directors personally. When the officers, directors or stockholders of any corporation shall be liable to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action against any one or more of them. And any such officer, director or stockholder shall have the right of equitable contribution in any action for that purpose against any other officer, director or stockholder who is liable with him for any amount which he may have been compelled to pay as provided in this section.

1901, c. 2, s. 90. **Directors who dispose of practically entire assets of corporation without provision for creditors are jointly and severally liable for corporate debts:** McIver v. Hardware Co., 144-478.

1157. Action by officer for money advanced. Any officer, director or stockholder who shall pay any debt of a corporation for which he is made liable by the provisions of this chapter, may recover the amount so paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation shall be liable to be taken, and not the property of any stockholder, except as provided in the preceding section.

1901, c. 2, s. 91.

1158. Assets of corporation first exhausted. No sale or other satisfaction shall be had of the property of any director or stockholder for any debt of the corporation of which he is such director or stockholder till judgment be obtained therefor against such corporation and execution thereon returned unsatisfied, or it shall be made to appear to the court that the corporation has no property available for the satisfaction of said indebtedness.

1901, c. 2, s. 92.

VI. Capital Stock.

1159. Classes of stock; issued for property or labor. Every corporation shall have power to create two or more kinds of stock

of such classes, with such designations, preferences and voting powers or restriction or qualification thereof as shall be prescribed by those holding two-thirds of its capital stock outstanding; and the power to increase or decrease the stock, as herein elsewhere provided, shall apply to all or any of the classes of stock; and such preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate thereof; and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-quarterly, or yearly, before any dividend shall be set apart or paid on the common stock, and such dividends may be made cumulative; and in case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock, except by authority given to the board of directors, by a vote of at least two-thirds of the stock voted at a meeting of the common stockholders, duly called for that purpose. The terms "general stock" and "common stock" are synonymous. When any corporation shall issue stock for labor done or personal property or real estate, or leases thereof, which stock may be so issued by any corporation, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive.

1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3. **Capital stock a trust fund to be managed by directors in trust for members:** State v. Petway, 55-407—**but upon insolvency, it and the company's property becomes trust fund, first for creditors, next for stockholders:** Hill v. Lumber Co., 113-173; Hobgood v. Ehlen, 141-352; Holhouser v. Copper Co., 138-251; Cooper v. Security Co., 122-464; Harmon v. Hunt, 116-682; Cotton Mills v. Cotton Mills, 115-475; Clayton v. Ore Knob Co., 109-389; Heggie v. Bldg. & Loan Asso., 107-591; Foundry Co. v. Killian, 99-501.

Corporation may accept property in payment of stock: Hobgood v. Ehlen, 141-354; Plank-Road v. Bryan, 51-85; also Clayton v. Ore Knob Co., 109-389—**but property must be taken at reasonable monetary value,** Hobgood v. Ehlen, 141-354.

The public has right to assurance that capital stock has been or will be paid in money or money's worth when necessary to meet corporate liabilities: Hobgood v. Ehlen, 141-352.

1160. Capital stock, how paid; loans to stockholders. Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made, the officers who make it, or assent thereto, shall be jointly and severally liable, to the

extent of such loan, and interest, for all the debts of the corporation until the repayment of the sum so loaned.

1901, c. 2, s. 53. **Subscription must be paid in money or money's worth;** Hobgood v. Ehlen, 141-352; Foundry Co. v. Killian, 99-506.

1161. Stock issued full-paid for property purchased; statements to contain the facts. Any corporation formed under this chapter may purchase mines, manufactories or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive; and in all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts.

1901, c. 2, s. 54. **See section 1159. Corporation may take property necessary for business in payment of stock:** Hobgood v. Ehlen, 141-344, and cases under section 1160—**but property must be taken at reasonable monetary value,** Ibid—**and where property which is grossly and excessively over-valued is taken in payment of stock same is fraud upon creditors,** Ibid; also Clayton v. Ore Knob Co., 109-390—**and they may proceed against subscribers as for unpaid subscription,** Hobgood v. Ehlen, 141-344; Clayton v. Ore Knob Co., 109-390—**moreover provision in charter that stock "shall be issued as full paid stock" does not permit stock to be issued without payment in money or property at honest valuation:** Clayton v. Ore Knob Co., 109-385. **Where charter does not give express power, a corporation can not take stock in another corporation:** Meares v. Imp. Co., 126-662; but see section 1173 enacted since this decision.

1162. Stockholders' liability for stock not fully paid; fiduciaries and pledgors. Where the capital stock of a corporation shall not have been paid in, and the assets shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the certificate of incorporation or charter, or such proportion of that sum as shall be required to satisfy such debts and obligations; but no person holding stock in any corporation in this state as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as a stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the

estate and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been, had he been living and competent to act and hold the stock in his own name.

1893, c. 471; 1901, c. 2, s. 22. **Unpaid balances on subscriptions may be subjected by creditors to payment of their debts, incorporator being liable for amount subscribed:** Smathers v. Bank, 135-414; Cooper v. Security Co., 122-463, 127-219; Harmon v. Hunt, 116-678; Cotton Mills v. Cotton Mills, 115-475; Hill v. Lumber Co., 113-176; Blalock v. Mfg. Co., 110-103; Clayton v. Ore Knob Co., 109-389; Foundry Co. v. Killian, 99-501—**and this, though corporation only de facto, where subscriber participates in organization,** Foundry Co. v. Killian, 99-501.

Creditor exhausting remedy against corporation may sue stockholder to amount of unpaid subscriptions, Cooper v. Security Co., 127-219; also consult cases above cited—**but not necessary to make other stockholders parties to action,** Ibid. **Statute of limitations does not run against subscriptions to stock payable as called for,** Ibid—**and where property grossly and excessively over-valued is taken in payment of stock, creditor may proceed against subscriber as for unpaid subscription,** Hobgood v. Ehlen, 141-354; Clayton v. Ore Knob Co., 109-390. **Where subscriber resides in state, unpaid subscription may be attached by creditors of foreign corporation:** Cooper v. Security Co., 122-463.

Party sued for unpaid subscription can not set up defense that corporation was not legally organized, where he has enjoyed benefit of membership: Cotton Mills v. Burns, 114-353.

Corporation is liable on stock it holds of another corporation, which becomes insolvent: Meares v. Imp. Co., 126-662. **If whole of unpaid subscriptions, together with other assets is not necessary to pay debts, subscriber only required to pay ratable part:** Harmon v. Hunt, 116-678.

Subscriber can only share in surplus of funds after discharging all liabilities of corporation to creditors: Heggie v. Bldg. & Loan Asso., 107-595.

Dissenting subscriber released of liability on subscription where charter of corporation materially altered by legislature after subscription to stock: Bank v. Charlotte, 85-433; R. R. v. Comrs., 87-131; Thompson v. Guion, 58-113; Railroad v. Leach, 49-340—**but in order to be released he must show that he did not assent to alteration,** Railroad v. Leach, 49-348.

Creditors have a right to examine into affairs of corporation to ascertain if subscriptions to stock have been paid, and how: Foundry Co. v. Killian, 99-501.

1163. Liability of officers failing to make certificate. If any of the officers shall neglect or refuse to make any reports required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they shall be jointly and severally liable to the person demanding such report, for the

amount of his debt, if he be a creditor, or for the amount of his loss, if he be a stockholder.

1901, c. 2, s. 27.

1164. Decrease of capital stock, how effected; liability of directors and stockholders. The decrease of capital stock may be effected by retiring or reducing any class of the stock, or by drawing the necessary number of shares by lot for retirement, or by the surrender by every shareholder of his shares, and the issue to him in lieu thereof of a decreased number of shares, or by the purchase at not above par of certain shares for retirement, or by retiring shares owned by the corporation, or by reducing the par value of shares; and when any corporation shall decrease the amount of its capital stock as hereinbefore provided, the certificate decreasing the same shall be published for three weeks successively, at least once in each week, in a newspaper published in the county in which the principal office of the corporation is located; the first publication to be made within fifteen days after the filing of such certificate, and in default thereof the directors of the corporation shall be jointly and severally liable for all the debts of the corporation contracted before the filing of the said certificate, and the stockholders shall also be liable for such sums as they may respectively receive of the amount so reduced: Provided, no such decrease of capital stock shall release the liability of any stockholder, whose shares have not been fully paid, for debts of the corporation theretofore contracted.

1901, c. 2, s. 32. **Corporation may purchase its own stock, but not to prejudice of creditors:** Heggie v. B. & L. Asso., 107-581; Blalock v. Mfg. Co., 110-99. **Subscriber to stock can not purchase other paid up shares and substitute them for his own, it being an unauthorized decrease of capital stock:** Foundry Co. v. Killian, 99-501.

1165. Certificates of stock. Every stockholder shall have a certificate signed by the president and treasurer, or secretary, certifying the number of shares owned by him in such corporation.

1901, c. 2, s. 20.

1166. Duplicate certificates issued by directors. Every corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may, in their discretion, require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against such corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper so to do.

1885, c. 265; 1901, c. 2, s. 94. **This section applies to all corporations and interferes with the charter rights of none:** Hendon v. Railroad, 125-124, 127-112; see Travers v. R. R., 133-324.

1167. Action to compel issuance of duplicate certificate. Whenever any corporation shall have refused to issue a new certificate of stock in place of one theretofore issued by it, or by any corporation of which it is a successor, alleged to have been lost or destroyed, the owner of the lost or destroyed certificate or his legal representatives may maintain a civil action in the superior court of the county in which the principal office of the corporation is located to compel such corporation to issue a duplicate certificate of stock in the place of the certificate alleged to have been lost or destroyed; and if the issues of fact arising upon the pleadings shall be found in favor of the plaintiff, the court shall make an order requiring the corporation or other party, within such time as it shall designate, to issue and deliver to the plaintiff a new certificate for the number of shares of the capital stock of the corporation which shall have been found to be owned by the plaintiff. In making the order the court shall direct that the plaintiff deposit such security as to the court shall appear sufficient to indemnify any person other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed; and the court may also direct publication of such notice, either preceding or succeeding the making of such final order, as it shall deem proper. Any person who shall thereafter claim any rights under the certificate so lost or destroyed shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order.

1901, c. 2, s. 95. **When loss of certificate denied, issue should be submitted to jury:** Hendon v. Railroad, 125-124. **Act of 1885, chapter 265, authorizing corporation to hold in escrow new certificate in lieu of lost certificate repealed by this section:** Travers v. R. R., 133-322.

1168. Shares, personal property; how transferred; held as collateral. The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer.

Code, s. 689; 1901, c. 2, s. 21. **Shares of stock in corporation are personal property:** Worth v. Comrs., 82-420, 90-409; Belo v. Comrs., 82-418.

Delivery of certificate of stock with assignment and power indorsed passes title as between parties: Havens v. Bank, 132-223—**notwithstanding charter or by-laws declare stock transferrable only on book,** Ibid; but see

Morehead v. R. R., 96-362—**but by omitting to register transfer purchaser fails to obtain right to vote,** Havens v. Bank, 132-223—**and may lose stock by fraudulent transfer on books by registered owner to bona fide purchaser,** Ibid.

Transfer of stock on books of corporation by executor, corporation is fixed with knowledge of will and its contents: Wooten v. R. R., 128-119—**though in case of wrongful transfer of stock specifically bequeathed, corporation not liable in absence of grounds to believe transfer not proper,** Ibid—**but it is the duty of corporation to protect rights of persons interested in stock against unauthorized transfer,** Wooten v. R. R., 128-121; Cox v. Bank, 119-302.

Agreement by which stockholders undertake to divest themselves of right to vote or to transfer stock are usually void: Harvey v. Imp. Co., 118-693.

1169. Assessments upon shares. The directors of every corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof remaining unpaid; and the sums so assessed shall be paid to the treasurer at such times and by such instalments as the directors shall direct, said directors having given thirty days' notice of the assessment and of the time and place of payment, either personally or by mail, or by publication in a newspaper published in the county where the corporation is established.

1901, c. 2, s. 23. **Statute of limitations does not run upon subscriptions to stock payable as called for:** Cooper v. Security Co., 127-219.

1170. Shares sold to pay assessments. If the owner of any shares shall neglect to pay any sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such numbers of the shares of the delinquent owner as will pay all assessments then due from him, with interest, and all necessary incidental charges, and shall transfer the shares sold to the purchaser, who shall be entitled to a certificate therefor.

1901, c. 2, s. 24. **This section valid:** Cotton Mills v. Dunstan, 121-12. **Where proceeds of sale of stock do not pay the assessments in full, party held personally for remainder:** Ibid. **Stock advertised to be sold for unpaid assessments and tender made of amount due before sale, subsequent sale void:** Wilson v. Telephone Co., 139-395—**and delinquent subscriber entitled to mandamus to compel issuance of stock upon payment of amount due, interest, and costs,** Ibid. **Law passed subsequent to incorporation without assent of subscribers, changing place of sale of forfeited shares, is no invasion of rights granted by charter:** Navigation Co. v. Benton, 9-10.

1171. Notice of sale. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share,

by advertising the same three weeks successively, once in each week, before the sale, in some newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and by mailing a notice thereof to the last known postoffice address of the delinquent stockholder.

1901, c. 2, s. 25.

1172. Certain construction companies may take stock and bonds for labor, materials, etc.; statements to contain the facts. Corporations having for their object the building, constructing or repairing of railroads, water, gas, or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, or utility, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for, such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such instalments or proportions as such directors may agree upon, full-paid stock, in full or partial performance of the whole, or any part of such subscription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact.

1901, c. 2, s. 55.

1173. One corporation may hold stock and securities of another. Any corporation may purchase, hold, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of or any bonds, securities or evidences of indebtedness created by, any other corporation or corporations of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

1903, c. 660, s. 3. **This renders obsolete on this point Meares v. Imp. Co., 126-562. Where corporation in course of business becomes holder of stock of another corporation, it may be held liable on same, in case of insolvency of latter corporation:** Meares v. Imp. Co., 126-665.

VII. Amendments, Surrender and Extension.

1174. Amendments before payment of stock. It shall be lawful for the incorporators of any incorporation, before the payment of any part of its capital, to file with the secretary of state an amended certificate of incorporation, duly signed by the incorporators named in the original certificate of incorporation, and duly acknowledged or proved, modifying, changing or altering the original certificate of incorporation in whole, or in part, which amended certificate of incorporation shall take the place of the original certificate of incorporation, and when recorded in the proper county shall be deemed to have been filed and recorded on the date of filing and recording the original certificate of incorporation: Provided, the officer shall be entitled to the same fees for filing and recording the amended certificate of incorporation as if they were original; but there shall be charged no additional organization tax, except when the certificate of incorporation is amended by increasing the capital stock, in which event, an additional organization tax shall be paid upon such increase.

1901, c. 2, s. 28. **Any fundamental change in charter of corporation relieves nonassenting subscriber from liability on stock:** Bank v. Charlotte, 85-433, and cases under section 1162.

1175. Amendments, generally. Every corporation, whether organized under a special act of incorporation, or under general laws, and which might now be created under the provisions of this chapter, may change the nature of its business, relinquish one or more branches thereof, or extend its business to such other branches as might have been inserted in its original certificate of incorporation, change its name, increase its capital stock, decrease its capital stock, change the par value of the shares of its capital stock, extend its corporate existence, create one or more classes of preferred stock, and make such other amendment, change or alteration as may be desired, in manner following: The board of directors shall pass a resolution declaring that such change or alteration is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provisions, upon ten days' notice, given personally or by mail; if two-thirds in interest of each class of the stockholders having voting power shall vote in favor of such amendment, change or alteration, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged or proved, as in the case of deeds to real estate, and such certificate, together with the written assent, in person or by proxy, of two-thirds in interest of each class of such stockholders, shall be filed

and recorded in the office of the secretary of state, and upon such filing he shall issue a certified copy thereof, which shall be recorded in the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation shall be deemed to be amended accordingly: Provided, that such certificate of amendment, change or alteration shall contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment, and the certificate of the secretary of state, under his official seal, that such certificate and assent have been filed in his office shall be taken and accepted as evidence of such change, or alteration, in all courts and places. And any corporation which could not now be created under the provisions of this chapter may in like manner increase or decrease its capital stock, or change its name.

1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30; 1903, c. 510.

1176. Change of location of principal office. The board of directors of any corporation, organized under the laws of this state, may change the location of the principal office of such corporation within this state to any other place within this state, by resolution adopted at a regular or special meeting of such board, by the votes of at least two-thirds of the members of such board: Provided, that no certificate shall be required to be filed of the removal of any office from one point to another in the same town, township or city of the state. Upon the adoption of a resolution as aforesaid, a copy thereof shall be filed in the office of the secretary of state, signed by the president and secretary of such corporation, and sealed with its corpōrate seal.

1901, c. 2, s. 31.

1177. Surrender of corporate rights before payment of stock. The incorporators named in any certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises, and thereupon the said corporation shall be dissolved.

1901, c. 2, s. 35.

1178. Extension of corporate existence. Any corporation, created by special charter, or under the general law, for any objects which are allowed by this chapter may extend its corporate existence in

the manner prescribed herein: Provided, that if such corporation possesses franchises, powers, privileges, immunities or advantages which could not be obtained under this chapter, such extension shall not continue, renew or extend such franchises, powers, privileges, immunities or advantages, but the filing of the certificate of extension shall operate as a waiver and abandonment of such franchises, powers, privileges and advantages.

1901, c. 2, s. 37.

VIII. Corporate Meetings.

1179. Place of meetings; books at principal office; jurisdiction superior court over books. The meetings of the stockholders of every corporation of this state shall be held at the principal office in this state. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside of the state. Every corporation shall maintain a principal office in this state, and have an agent in charge thereof, wherein shall be kept the stock and transfer books for the inspection of all who are authorized to see the same, and for the transfer of stock. The superior court may, upon proper cause shown, order any or all of the books of said corporation to be forthwith brought within this state, and kept therein at such place and for such time as may be designated in such order, and the charter of any corporation failing to comply with such order, may be declared forfeited by the court making such order. And it shall thereupon cease to be a corporation, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of such order.

1901, c. 2, s. 49. **Notice to every stockholder of time and place of meeting absolutely essential to validity of same:** Hill v. R. R., 143-539—**unless all stockholders present in person or by proxy,** Ibid; Benbow v. Cook, 115-324—**or unless time and place definitely fixed by statute, by charter or usage,** Hill v. R. R., 143-539—**though where shown that meeting was not called according to law, same validated where all stockholders subsequently ratify it,** Benbow v. Cook, 115-324.

It is presumed that annual or stated meeting is regular in all respects, Hill v. R. R., 143-539. **When minutes of meeting are made it is presumed that notice given, and meeting lawfully held:** Benbow v. Cook, 115-324—**and where all stockholders met without notice and transacted business, but failed to make record of proceedings, though subsequently made and signed minutes, action of stockholders valid,** Ibid. **Necessary to valditity of acts of stockholders that they should be assembled in corporate meeting:** Hill v. R. R., 143-539; Duke v. Markham, 105-131—**for, though each one individually assents to corporate action, same not binding on corporation,** Ibid.

Corporation created by laws of North Carolina can not be lawfully

organized in another state: Mining Co. v. Goodhue, 118-981—**though such fact can not be taken advantage of by corporation debtors nor by persons dealing with it as lawful corporation,** Ibid. **Duty of corporation to keep "principal place of business," its books, records and principal officers within state in which incorporated:** Simmons v. Steamboat Co., 113-147.

Directors' meetings to be regular must be held at stated time provided in charter or by-laws, or all directors must have had prior notice of same: Bank v. Lumber Co., 116-827—**and acts of majority of directors at meeting held at unusual place and without notice are void,** Ibid.

1180. Transfer and stock books at principal office; only evidence as to stockholders, when; directors' duties. Every corporation shall keep at its principal and registered office in this state the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder; and the books aforesaid shall be the only evidence as to who are the stockholders entitled to examine such books or list, and to vote at elections; and the board of directors shall produce at the time and place of such election such books or list, there to remain during the election, and the neglect or refusal of said directors to produce the same shall render them ineligible to any office at such election.

1901, c. 2, s. 38.

1181. Transfer book determines right to vote. In case the right to vote upon any share of stock shall be questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote.

1901, c. 2, s. 45. 150-216

1182. Directors, how elected; quorum for. All elections for directors shall be by ballot, unless otherwise expressly provided in the charter or certificate of incorporation of by-laws; the poll shall remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing; the persons receiving the greatest number of votes shall be the directors: Provided, however, that a majority of all the stock issued and outstanding shall be present in person or by proxy. 150-216

1901, c. 2, s. 39.

1183. Votes stockholders entitled to; cumulative voting. The certificate of incorporation, original or amended, of any corporation

now or hereafter organized under the laws of this state, and thereunder issuing or authorized to issue shares of its capital stock, may provide that, at all elections of directors, managers or trustees, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors, managers or trustees to be elected, and that he may cast all of such votes for a single director, manager or trustee, or may distribute them, among the number to be voted for, or any two or more of them, as he may see fit, which right, when exercised, shall be termed cumulative voting. This section shall not be construed as affecting in anywise the determination of whether or not the right of cumulative voting has been heretofore granted by implication, or the right of cumulative voting, if any, granted specifically by special charter, or certificate of incorporation: Provided, that, notwithstanding the absence from the certificate of incorporation or charter of any corporation now or hereafter organized under the laws of this state, and thereunder issuing or authorized to issue shares of its capital stock, of any provision therein conferring upon the stockholders of such corporation the right of cumulative voting in the election of the directors, managers, or trustees of such corporation, as hereinbefore provided, the stockholders of such corporation shall, nevertheless, possess such right, as fully as if conferred by such certificate of incorporation or charter, whenever at the time of the election of the directors, managers, or trustees of such corporation, or any one or more of them, the stock transfer book of such corporation shall disclose, or it shall otherwise appear, that more than one-fourth of all the capital stock of such corporation is owned or controlled by any one person: Provided, further, however, that cumulative voting as herein provided for shall not be permitted unless the minority stockholder or stockholders shall openly and publicly announce in the meeting of the stockholders held for the election of directors, managers or trustees, before the balloting begins, that they, the minority stockholders, will in such election exercise such right of cumulative voting; and no amendment of the certificate of incorporation, charter or by-laws of such corporation which may be hereafter adopted or allowed shall have the effect of abrogating or abridging any right herein conferred.

1901, c. 2, s. 40; 1907, c. 457.

1184. Votes stockholders entitled to in absence of special provision; proxies; transfers within twenty days of election. Unless otherwise provided in the charter, certificate of incorporation or by-laws of the corporation, at every election each stockholder, whether resident or non-resident, shall be entitled to one vote in person or by proxy, duly authorized in writing, for each share of the capital stock held

by him, but no proxy shall be voted on after three years from its date; nor shall any share of stock be voted on at any election which has been transferred on the books of the corporation within twenty days next preceding such election.

1901, c. 2, s. 41. **At common law stockholder had no right to vote by proxy:** Harvey v. Imp. Co., 118-698. **Agreement between stockholders holding majority of shares to "pool stock" by transferring same to trustees to be voted at corporate meetings is illegal and voidable:** Harvey v. Imp. Co., 118-693—**and combination by which any number of stockholders attempt to place voting of stock in irrevocable power of another is against public policy,** Ibid. **Anyone may act as proxy, including officers of corporation:** Hill v. Life Asso., 128-463.

1185. Stock held by fiduciaries, pledgees and married women. Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent the same at all meetings of the corporation, and may vote thereon as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust shall provide to the contrary. A married woman holding stock may vote the same, in person or by proxy, in the same manner and with the same effect as if she were a feme sole; and every person who shall pledge his stock as collateral security may, nevertheless, represent the same at all such meetings, and may vote thereon as a stockholder, unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee or his proxy may represent said stock and vote thereon.

1901, c. 2, s. 42; 1901, c. 474.

1186. Stock held by life tenant. Where stock is owned by, or shall be transferred on its record books to, one for life with remainder over, such life tenant at all meetings of such corporation may represent and vote said stock in person or by proxy, in the same manner and with the same effect as if such life tenant was the absolute owner thereof.

1901, c. 474, s. 2.

1187. Shares belonging to corporation. Shares of stock of a corporation belonging to said corporation shall not be voted upon directly or indirectly.

1901, c. 2, s. 43.

1188. Failure to hold election, effect; judge may order. If the election for directors of a corporation shall not be held on the day designated by the act or certificate of incorporation or by-laws, the

directors shall cause the election to be held as soon thereafter as conveniently may be. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors shall fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding shares of stock, to call a meeting for such election, then the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder, and on notice to the directors, order an election or make such other order as justice may require. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing.

150-216

1901, c. 2, s. 46.

1189. Jurisdiction of superior court over elections. The superior court judge, upon application of any person who may be aggrieved by, or complain of, any election, or any proceeding, act or matter in or touching the same, ten days' notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, at chambers, in any county in the district in which the principal office of the corporation is situated, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of, or order a new election, or make such order, and give such relief in the premises as right and justice may require. The proceedings shall be the same as in injunctions, as nearly as may be.

150-216

1901, c. 2, s. 47.

1190. Meetings called by three stockholders, when. Whenever, for any reason, a legal meeting of the stockholders of any corporation can not be otherwise called, three or more stockholders, having voting powers, may call such meeting by publishing ten days' notice of the time, place and purposes of the meeting, in a newspaper published in the county in which the principal office in this state is located, and mailing such notice to all stockholders whose postoffice address is known, or can be ascertained. A meeting called as aforesaid shall be a legal meeting of the corporation, and if there be no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the book of minutes of the corporation.

150-216

1901, c. 2, s. 51.

IX. Dividends.

1191. When declared; working capital. The directors of every corporation created under this chapter shall, in January in each year, unless some specific day or days for that purpose be fixed in its charter, certificate of incorporation or by-laws, and in that case then on the days so fixed, after reserving, over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand: Provided, that the corporation may, in its certificate of incorporation, or in its by-laws, give the directors power to fix the amount to be reserved as a working capital.

1901, c. 2, s. 52. **A dividend due from and declared by a private corporation is a debt due to the shareholder and recoverable as such:** University v. Railroad, 76-106.

1192. From profits and surplus only; liability of directors; limitations of actions. No corporation shall declare and pay dividends, except from the surplus or net profits arising from its business, nor when its debts, whether due or not, shall exceed two-thirds of its assets, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this chapter, and in case of any violation of the provisions of this section, the directors under whose administration the same may happen shall be jointly and severally liable, at any time within six years after paying such dividend, to the corporation and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend so paid, or capital stock so divided, withdrawn, paid out or reduced, with interest on the same from the time such liability accrued: Provided, that any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the same was done, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors, at the time the same was done, or forthwith after he shall have notice of the same.

Code, s. 681; 1901, c. 2, ss. 33, 52. **Agreement to distribute assets of corporation void as to creditors:** Heggie v. Bldg. & Loan Asso., 107-581 —**and where assets have been distributed among stockholders, or transferred to other than bona fide creditor or purchaser for value they may be followed and applied to payment of debts:** McIver v. Hardware Co., 144-488—**and in case of insolvency directors who distribute assets are personally liable to creditors,** Ibid.

Where capital stock of bank has been impaired, a division of its funds

among the stockholders, although called a division of profits, is in fact a dividend of capital: Atty-Gen. v. Bank, 21-545.

See, as to directors wrongly declaring dividends for fraudulent purposes, Houston v. Thornton, 122-370; Solomon v. Bates, 118-311; Caldwell v. Bates, 118-323.

X. Foreign Corporations.

1193. May do business here. Any corporation created by any other state, or by any foreign state, kingdom or government may acquire by devise or otherwise and hold, mortgage, lease and convey real estate in this state for the purpose of prosecuting its business, or objects, or such real estate as it may acquire by way of mortgage or otherwise in the payment of debts due such corporation: Provided, such foreign state, kingdom or government, under whose laws such corporations were created, shall not be at the time of such purchase at war with the United States.

1901, c. 2, s. 93. **Foreign corporations having right under charters to acquire and sell land, can exercise such right in this state:** Barcello v. Hapgood, 118-712—**and are permitted to do business in other states by comity,** Tobacco Co. v. Tobacco Co., 145-367; Shields v. Ins. Co., 119-380; Barcello v. Hapgood, 118-728—**but with proviso that corporation is subject to laws of state in which it does business, and has no greater privileges than domestic corporations,** Shields v. Ins. Co., 119-380; Tobacco Co. v. Tobacco., 145-367. **Liability of incorporators and stockholders for debts of corporation in bankruptcy determined by laws of state of domicile:** Hobgood v. Ehlen, 141-344. **Foreign corporation may, by comity, exercise in this state the general powers under its charter granted by another state, subject to the power of this state, within the limitations of the federal constitution, to prescribe the terms and conditions or to prohibit it altogether:** Tobacco Co. v. Tobacco Co., 145-367.

1194. To file charters and statement with secretary of state; fees therefor; forfeiture. Every foreign corporation before being permitted to do business in this state, railroad, banking, insurance, express and telegraph companies excepted, shall file in the office of the secretary of state a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized, the amount actually issued, the principal office in this state, the name of the agent in charge of such office, the character of the business which it transacts and the names and postoffice addresses of its officers and directors. And such corporation shall pay to the secretary of state, for the use of the state, ten cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than

ten dollars nor more than one hundred dollars. And every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney general, who shall prosecute such actions whenever it shall appear that this section has been violated.

1901, c. 2, s. 57; 1903, c. 766. **Legislature has undoubted power to prescribe terms upon which foreign corporation may come into the state and to pass statutes for protection of its own citizens doing business with it:** Williams v. Life Asso., 145-132.

Where corporation fails to comply with section, state may sue for penalty: Tobacco Co. v. Tobacco Co., 144-363.

The following cases holding that where corporations become domesticated by filing charter with secretary of state they can not remove case to federal court are overruled by Southern Railroad Co. v. Allison, 190 U. S., 326: Beach v. R. R. Co., 131-399; Allison v. R. R., 129-336; Debnam v. Telephone Co., 126-831.

Statutes requiring "domestication" enable plaintiff to get personal service upon foreign corporation, but do not remove its property to the state, nor the situs of its debts created elsewhere: Strause v. Ins. Co., 126-223.

See the following cases of interest: Staton v. R. R., 144-135; Coal & Ice Co. v. R. R., 144-732.

XI. Dissolution.

1195. Voluntary. Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board, at any meeting called for that purpose, of which meeting every director shall have received at least three days' notice, shall cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known postoffice address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation shall have its principal office, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolutions so adopted by the board of directors, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of all the stockholders shall consent that a dissolution shall take place, and signify their consent in writ-

ing, such consent, together with the list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed and the board of directors shall cause such certificate to be recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and published four weeks successively, at least once a week, in a newspaper published in said county; and upon the filing in the office of the secretary of state of an affidavit of the manager or publisher of such newspaper that said certificate has been so published, the corporation shall be dissolved, and the board shall proceed to settle up and adjust its business and affairs. Whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located.

1901, c. 2, s. 34.

149-415

In dissolution of corporations the statute must be complied with; the mere voluntary cessation of business and winding up of affairs of corporation will not do: Heggie v. B. & L. Asso., 107-581. **Upon dissolution of corporation real estate does not revert to grantor, and personal property does not escheat to state:** Wilson v. Leary, 120-90. **Neither officers nor members of corporation can avoid responsibility to creditors by dissolution of corporation:** Perry v. Ins. Co., 139-374.

Officers of corporation not liable to judgment creditor because they procured dissolution of old, and formation of new, corporation: Ibid—**but where such dissolution of old and formation of new corporation occurs, creditors of defunct corporation under certain circumstances may cause its property to be applied in payment of their debts,** Marshall v. R. R., 92-322; see also McIver v. Hardware Co., 144-478—**and where legislature provides that under certain contingencies stockholders shall reorganize as new corporation with different capital, etc., such reorganization at once dissolves old and creates new corporation:** Marshall v. R. R., 92-322.

Voluntary winding up of corporation and failure for three years to do any business is not a dissolution: Heggie v. B. & L. Asso., 107-581. **A railroad company is not dissolved by the sale of its road:** State v. Rives, 27-297. See also Navigation Co. v. Costen, 63-264; James v. R. R., 121-523.

146-505

1196. Involuntary, at instance of private persons. Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the attorney general

in the name of the state, in the cases hereinafter mentioned, to-wit:

Merely referred to in Asheville Div. v. Aston, 92-585.

1. For any abuse of its powers to the injury of the public or of the stockholders, or of its creditors or debtors.

Persistent failure of domestic corporation to maintain principal place of business in state and withdrawing of all agencies from state authorizes court to dissolve under this section: Simmons v. Steamboat Co., 113-147.

2. For nonuser of its powers for two years or more consecutively.

Merely referred to in Railroad v. Alsbrook, 110-156.

3. When it shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, or be in imminent danger of insolvency, or has forfeited its corporate rights.

4. Upon any conviction of the company of a criminal offense if such offense be persistent.

Code, s. 694; 1901, c. 2, s. 73. **For obtaining leave of attorney general, see sections 828, 829.**

1197. Attorney general may sue to restrain ultra vires acts; to compel accounts; to remove officers; to preserve property. An action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases: To restrain by injunction any corporation from assuming or exercising any franchise, or transacting any business not allowed by its charter; to restrain any person from exercising corporate franchises not granted; to bring directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care; to remove such officers or trustees upon proof of gross misconduct; to secure, for the benefit of all interested, the property or funds aforesaid; to set aside and restrain improper alienation thereof, and generally to compel the faithful performance of duty, and prevent all malversations, peculations and waste.

Code, ss. 607, 686; 1901, c. 2, s. 107. **For obtaining leave of attorney general, see sections 828, 829. Proceedings to restrain corporation from transcending powers applicable where purpose is not to dissolve corporation but, while preserving its existence, at same time to keep it within statutory bounds:** Atty. General v. R. R. Co., 28-464.

Section merely referred to in McCall v. Webb, 135-366; Hargett v. Bell, 134-396; Barnhill v. Thompson, 122-495; Saunders v. Gatling, 81-301.

1198. Involuntary, at instance of attorney general. An action may be brought by the attorney general in the name of the state against a corporation for the purpose of vacating or annulling the

act or certificate, or renewal of the same, creating the corporation, on the ground that such act or certificate or renewal was procured upon some fradulent suggestion, or concealment of a material fact, by the persons incorporated, or by some of them or with their knowledge and consent, or annulling the existence of a corporation, other than municipal, whenever such corporation shall—

Attorney general can not of his own motion bring action to vacate charter: Atty. General v. R. R., 134-481.

Corporation can not endure for longer time than prescribed in charter, and no judicial proceedings necessary to declare forfeiture: Asheville Div. v. Aston, 92-578—**but for any other cause of forfeiture direct proceedings by state necessary to enforce same,** Ibid.

If legislature, with knowledge of grounds of forfeiture, by act remits penalty and continues its existence or deals with corporation as lawfully existing, such conduct is waiver of forfeiture: Atty. General v. R. R., 28-469.

As to pleadings and procedure, see Ibid. **For action to annul charter upon ground of fraud under this section before amendment,** see Atty. General v. R. R., 134-483.

1. Offend against the act creating, altering, or renewing such corporation; or,

See Mining Co. v. Goodhue, 118-985.

2. Violate any law by which such corporation shall have forfeited its charter by abuse of its powers; or,

See Atty. Gen. v. R. R., 28-456.

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its power; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law; or,

That corporation transcends chartered powers is a matter to be taken advantage of by state in direct proceedings to vacate charter: Banking Co. v. Tate, 122-313. **For action under this subsection before amendment of section,** see Atty. General v. R. R., 134-483.

6. For nonuser of its powers for two or more years consecutively; or,

7. For insolvency, manifested by the return of an execution unsatisfied, upon a judgment against the company docketed in the superior court of the county where it has its principal place of business.

Merely referred to in Simmons v. Steamboat Co., 113-152.

And it shall be the duty of the attorney general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to bring the action, in every case of public interest, and also in every other case in which satisfactory

security shall be given to indemnify the state against the costs and expenses to be incurred thereby.

Code, ss. 604, 605; 1889, c. 533.

1199. Service of summons in actions for. In any action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent thereof upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and others interested in the affairs of the company, by publishing a copy thereof at least weekly for not less than three successive weeks in some newspaper printed in the county in which such corporation has its principal place of business, or if there be no such newspaper published, then by posting a copy of such summons at the door of the courthouse of such county, and publishing a copy thereof for the time and in the manner aforesaid in the newspaper published nearest the county seat of the county in which such corporation has its principal place of business, or in some newspaper published in the city of Raleigh: and such publication shall be deemed and held sufficient service on all the stockholders, creditors of, or dealers with, such corporation, and upon the corporation, if no officer can after due diligence be found in the state and it shall have no process agent in the state: and all such stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest under such rules as the court for the purpose of justice shall prescribe.

Code, s. 695.

1200. Corporate existence continued three years for winding up. All corporations whose charters shall expire by their own limitation, or shall be annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital: but not for the purpose of continuing the business for which such corporation may have been established: Provided, that in any pending action the court, in its discretion, may extend the time for winding up the affairs of such corporation.

Code, s. 667; 1901, c. 2, s. 58. **Section relates to corporations whose charters expire by limitation or are annulled by forfeiture or otherwise:** Heggie v. B. & L. Asso., 107-581—**and statutory remedy must be pursued within three years or corporation and individual stockholders released from liability.** VonGlahn v. DeRossett, 81-467.

Judgment against corporation rendered upon process issued after it has ceased to exist is of no validity, Dobson v. Simonton, 86-492—**and where old corporation merged into new this section does not apply so as to make old corporation necessary party to action against succeeding corporation,** Friedenwald v. Tobacco Works, 117-544.

Section merely referred to in Smathers v. Bank, 135-413; Kruger v. Bank, 123-19; Wilson v. Leary, 120-92; Asheville Div. v. Aston, 92-586; Marshall v. Railroad, 92-332.

1201. Upon dissolution, directors to be trustees; powers and duties; debts not extinguished. Upon the dissolution in any manner of any corporation, unless otherwise directed by an order of the court, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them. They shall have power to meet, and act under the by-laws of the corporation, and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all, or any part for cash, or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of said property. In case of the dissolution of a corporation, the debts due to and from it shall not be thereby extinguished.

Code, s. 687; 1901, c. 2, s. 59. **See sections 846-849; 1219-1232. Duty of directors to preserve assets of corporation and administer them for benefit of creditors:** McIver v. Hardware Co., 144-478; Bank v. Cotton Mills, 115-507; Electric Light Co. v. Electric Light Co., 116-119; Hill v. Lumber Co., 113-173—**and they can not sell practically entire assets for own advantage and to prejudice of creditors, and in case they do they are jointly and severally liable, together with purchaser, for corporate debts,** Ibid.

Confession of judgment by insolvent corporation in favor of director who is a creditor, upon debt theretofore existing, is void as against other creditors: Hill v. Lumber Co., 113-173.

Failure to proceed under statute within three years releases corporation and stockholders from liability for debts: VonGlahn v. DeRossett, 81-467.

1202. Directors as trustees may sue and be sued. The directors, constituted trustees as aforesaid, shall have power to sue for and recover the aforesaid debts and property, in the name of the corporation, and shall be suable by the same name for the debts owing by such corporation, and shall be jointly and severally responsible for such debts, only to the amount of moneys and property of the corporation which shall come to their hands or possession as such trustees.

1901, c. 2, s. 60.

1203. Jurisdiction of superior court; may appoint directors or others as receivers; powers and duties. Whenever any corporation shall be dissolved in any manner whatsoever, the superior court, on application of any creditor, or stockholder, at any time, may either continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business; and the powers of such trustees or receivers may be continued as long as the court shall think necessary for such purposes.

Code, ss. 619, 668; 1901, c. 2, s. 61. **See sections 846-849; 1219-1232.** 149-415

Remedy of creditors is by creditor's bill to have assets administered for their benefit: Latta v. Catawba Co., 146-; Holshouser v. Copper Co., 138-251; Hill v. Lumber Co., 113-173.

As to appointment of receiver, see Latta v. Catawba Co., 146-; Smathers v. Bank, 135-413; Huet v. Lumber Co., 138-443; Bank v. Bank, 127-432; Black v. Gentery, 119-504; Bank v. Cotton Mills, 115-115; Guilford v. Georgia Co., 112-34; Marshall v. R. R., 92-322; Young v. Rollins, 85-485; 90-125; Railroad v. Rollins, 82-523; Dobson v. Simonton, 78-66. **If, during existence of corporation, its officers fraudulently or unlawfully dispose of any of its property, creditors are entitled to receiver:** Latta v. Catawba Co., 146-. **Where receiver appointed at suit of one creditor, it is for benefit of all creditors:** Lenoir v. Imp. Co., 117-471.

As to title of receiver to the assets of corporation, and the lien gained thereon by creditor's bill, see Bank v. Bank, 127-432; Fisher v. Bank, 132-769. **Receiver represents the corporation:** Howe v. Harper, 127-358.

For general powers and duties of receivers hereunder, see Davis v. Industrial Mfg. Co., 114-326; Atty. General v. Roanoke Nav. Co., 84-710. **Receiver may sue either in own name or in that of corporation:** Smathers v. Bank, 135-413; Davis v. Mfg. Co., 114-321; Gray v. Lewis, 94-392—**and can collect assets, and prosecute and defend suits after corporation ceases to exist by expiration of charter:** Asheville Div. v. Aston, 92-578—**moreover power of receiver may be continued as long as court may think necessary for settlement,** Ibid; also Young v. Rollins, 90-125. **For action by receiver to collect assets alleged to have been wasted,** see Dunn v. Johnson, 115-258. **For sufficiency of pleadings in suit by receiver to collect unpaid subscriptions,** see Worth v. Wharton, 122-376. **For liability of officers of defunct corporation to account with receiver for assets,** see McIver v. Hardware Co., 144-478; Young v. Rollins, 90-125.

Statutory remedy under this section is exclusive and ousts former equity jurisdiction: VonGlahn v. DeRossett, 81-467.

Judgments rendered upon process issued after corporation ceased to exist are of no validity: Dobson v. Simonton, 86-492.

Section merely referred to in Wilson v. Leary, 120-92; Bank v. Cotton Mills, 115-487; Foundry Co. v. Killian, 99-503.

1204. Jurisdiction of judge. The judge of the superior court shall have jurisdiction of such application and of all questions arising in the proceedings thereon, and make such orders, injunctions, and decrees therein as justice and equity shall require at any place in the district.

Code, s. 669; 1901, c. 2, s. 62. **Claims of insolvent bank and its debtor who is also depositor, may be adjusted under this section:** Davis v. Mfg. Co., 114-321.

1205. Injunction; when notice and undertaking required. An injunction to suspend the general and ordinary business of a corporation or to appoint a receiver shall not be granted without due notice of the application therefor to the corporation, except where the state is a party to the proceeding, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, or the appointment of the receiver, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

Code, s. 343; C. C. P., s. 194. **See, for annotations on injunctions generally, section 806. See also sections 818; 846-849; 1219-1232. Facts sufficient to sustain cause of action must be alleged before injunction will issue:** Moore v. Mining Co., 104-534; Jones v. Comrs., 107-265, and cases cited. **Where, directors who are authorized to issue and sell stock, make sale and sell stock it is too late for injunction:** Huet v. Lumber Co., 138-443.

Individual stockholders in their own name are not proper parties to assert rights of corporation: Moore v. Mining Co., 104-534—**unless they resort to remedy specified by charter and fail to secure same,** Ibid.

As to remedy of creditors by creditor's bill, see Holshouser v. Copper Co., 138-251; Hill v. Lumber Co., 113-173.

1206. Wages for two months lien on assets. In case of the insolvency of any corporation the laborers and workmen and all persons doing labor or service of whatever character in the regular employment of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work, and services done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation, which lien shall be prior to all other

liens that can or may be acquired upon or against such assets.
1901, c. 2, s. 87.

1207. Distribution of funds. After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same, and the surplus funds, if any, after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, according to their respective shares, and if there still be a surplus it shall be divided and paid to the general stockholders proportionately, according to their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered.

Code, s. 670; 1901, c. 2, ss. 63, 89. **See sections 846-849; 1219-1232. Order for distribution of funds should not be made until fund is in court; such order can be made at any time as to funds then in court:** Strauss v. Loan Asso., 118-556. **Receiver required to pay all debts if assets sufficient:** McIver v. Hardware Co., 144-483; Bank v. Cotton Mills, 115-515—**and if assets insufficient must distribute equally and ratably subject to priorities already accrued:** Worth v. Bank, 122-404; Bank v. Cotton Mills, 115-515.

Judgment against receiver merely establishes debt, and gives judgment creditor no preference in distribution of assets: Lacy v. Clinton Loan Asso., 132-131.

Corporate debts must be paid before stockholders get anything: McIver v. Hardware Co., 144-483.

Receiver is not justified in appealing from a judgment in an action between creditors as to distribution of fund: Bank v. Bank, 127-432.

Section merely referred to in Asheville Div. v. Aston, 92-586.

1208. Dissolution does not abate actions; receivers to be notified. Any action now pending, or to be hereafter begun, against any corporation which may become dissolved before final judgment, shall not abate by reason thereof, but no judgment shall be entered therein, except upon notice to the trustees or receivers of the corporation.
1901, c. 2, s. 64.

1209. Judgment of forfeiture against a corporation. If it shall be adjudged that a corporation against which an action shall have been brought, has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered

that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Code, s. 617.

1210. Persons claiming to be corporation liable for costs of action. If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Code, s. 618.

1211. Clerk superior court to file copy of judgment dissolving corporation with secretary of state; costs thereof. A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court, in the office of the secretary of state, and a note thereof shall be made by the secretary of state, on the charter or certificate of incorporation, and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court, in the action wherein the corporation is dissolved.

1901, c. 2, s. 65.

XII. Execution.

1212. How issued and on what levied. If any judgment shall be rendered against a corporation, the plaintiff may sue out such executions against the property of a corporation as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation.

1901, c. 2, s. 66. **See section 627. Proceedings supplemental to execution lie against corporations:** LaFountain v. Underwriters Asso., 79-514. **Corporate property and franchise must go together in certain cases and can not be sold separately:** James v. Railroad, 121-527; Pipe and Foundry Co. v. Howland, 111-625; Gooch v. McGee, 83-59. **Court may enjoin sale under execution of franchise and property of corporation when it is in hands of the court:** Atty. General v. Roanoke Nav. Co., 84-705.

1213. Agent must furnish information as to property to officer with. Every agent or person having charge or control of any property of a corporation, on request of any public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due to it, so far as he may have knowledge of the same.

1901, c. 2, s. 67.

1214. Shares of stock sold under. Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this state, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution, in the same manner as goods and chattels.

1901, c. 2, s. 69. **Shares of stock could not be sold under execution prior to statute:** Pool v. Glover, 24-129.

1215. Officer entitled to information as to stock. The clerk, cashier, or other officer of such company, who has at the time the custody of the books of the company, shall, upon exhibiting to him the writ of execution, give to the officer having such writ a certificate of the number of shares or amount of the interest held by the defendant in such company; and if he shall neglect or refuse so to do, or if he shall wilfully give a false certificate thereof, he shall be liable to the plaintiff for the amount due on said execution, with costs.

1901, c. 2, s. 70. **As to action to compel corporation to transfer on books stock purchased under execution sale,** see Morehead v. Railroad, 96-362.

1216. Against debts due corporation; liability of agents refusing compliance. If any officer holding an execution shall be unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part, out of any debts due to the corporation; and it shall be the duty of any agent or person having custody of any evidence of such debt, to deliver the same to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor shall be a valid assignment thereof; and such creditor may sue for and collect the same in the name of the corporation, subject to such equitable setoffs on the part of the debtor as in other assignments; and every agent or person who shall neglect or refuse to comply with the provisions of this and the last preceding section shall be himself liable to pay to the execution creditor the amount due on said execution, with costs.

1901, c. 2, s. 68.

1217. Proceedings when custodian of corporate books is a nonresident. When the clerk, cashier, or other officer of any corporation incorporated under the laws of this state, who has the custody of the books of registry of the stock thereof, shall be nonresident in this state, it shall be the duty of the sheriff receiving a writ of execution issued out of any court of this state against the goods and

chattels of a defendant in execution holding stock in such company, to send by mail a notice in writing, directed to such nonresident clerk, cashier, or other officer, at the postoffice nearest his reputed place of residence, stating in such notice that he, the said sheriff, holds such writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels such writ has been issued, and that by virtue of such writ he, the sheriff, seizes and levies upon all the shares of stock of such company held by the defendant in execution on the day of the date of such written notice; and it shall also be the duty of such sheriff on the day of mailing such notice, to affix and set up upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of said company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode; and the sending, setting up and serving of such notices in the manner aforesaid, shall constitute such levy so made a valid levy of such writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of such notice by said clerk, cashier, or other officer, who has custody of the books of registry of the stocks thereof, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution shall be void as against the plaintiff in said execution, or any purchaser of such stock at any sale thereunder.

1901, c. 2, s. 71.

1218. Duty and liability of nonresident custodian of corporate books. The nonresident clerk, cashier, or other officer in such company, to whom notice in writing is sent, as prescribed in the preceding section, shall thereupon send forthwith, by mail or otherwise, to the officer having such writ, a statement of the time when he received such notice and a certificate of the number of shares held by the defendant in such company at the time of the receipt by him of such notice, not actually transferred on the books of said company; and the said sheriff, or other officer, shall, on receipt by him of such certificate, insert the number of such shares in the inventory attached to said writ; and if such clerk, cashier, or other officer in such company, neglect to send such certificate as aforesaid, or if he shall wilfully send a false certificate, he shall be liable to the plaintiff for double the amount of all damages occasioned by such neglect, or false certificate, to be recovered in an action against him; but the neglect to send, or miscarriage of such certificate, shall not impair the validity of the levy upon the stock.

1901, c. 2, s. 72.

XIII. Receivers.

1219. When appointed. Whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, or be in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence shall have expired by limitation, a receiver may be appointed by the court under the same regulations as are provided by law for the appointment of receivers in other cases.

Code, s. 668; 1901, c. 2, s. 73. **See also section 1203. For appointment of receivers generally, see sections 846, 847. See also 1203; 679-682. Receiver may be appointed, when corporation fails to meet obligations or suspends business:** Holshouser v. Copper Co., 138-251—**or when corporation insolvent or in imminent danger of insolvency:** Bank v. Cotton Mills, 115-515—**or when trustee of sinking fund to pay debts of corporation loaned the money to a bankrupt firm without authority:** Railroad v. Wilson, 81-223—**or where corporation dissolved and there is a contest as to rights of different creditors to the assets, there being no officer of the corporation,** Dobson v. Simonton, 78-63.

Receiver should not be appointed to enable stockholder, who has deposited stock as collateral for debt, to have an account of corporate assets: Huet v. Lumber Co., 138-443.

Organization of new corporation at once dissolves the old; and creditors of defunct corporation are entitled to have receiver appointed to apply its property to their debts: Marshall v. R. R., 92-322.

Where prior action for appointment of receiver is pending, court will not entertain jurisdiction of another action in which same relief demanded, Young v. Rollins, 85-485—**also where corporation dissolved by legislature and powers transferred to new corporation, courts can not on ex parte application appoint receiver of defunct corporation,** Ibid.

Party to proceedings should not be appointed receiver, Ibid.

Powers of directors and stockholders cease upon appointment of receiver, and they can make no contract which will bind corporation after such appointment: Lenoir v. Imp. Co., 117-475.

Party who has had receiver appointed has no right to have him discharged against protest of non-satisfied creditor who might be damaged by such discharge: Ibid.

Existence of corporation not affected by fact that corporation has gone into hands of receiver and property sold: Pinchback v. Mining Co., 137-171. **As to duration of receivership, see** Asheville Div. v. Aston, 92-586; Young v. Rollins, 90-125.

Section merely referred to in Smathers v. Bank, 135-413; Fisher v. Bank, 132-774; Wilson v. Leary, 120-92; Cotton Mills v. Cotton Mills, 115-485; Dunn v. Johnson, 115-258; Foundry Co. v. Killian, 99-504.

1220. Debts provided for, receiver discharged. Whenever a receiver shall have been appointed, and it shall afterwards appear that the debts of the corporation have been paid, or provided for,

and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that its property, rights, franchises and effects shall revert to the corporation, and thereafter the corporation may resume control of, and enjoy the same, as fully as if the receiver had never been appointed.

1901, c. 2, s. 76.

1221. Reorganization after receiver discharged. Whenever a majority in interest of the stockholders of such corporation shall have agreed upon a plan for the reorganization of the corporation and a resumption by it of the management and control of its property and business, such corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for such amount as may be necessary for the purposes of such reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization.

1901, c. 2, s. 77.

1222. Powers and bond. Such receiver shall have full power and authority to demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation, foreclose mortgages, deeds of trust and other liens executed to the corporation, and to institute suits for the recovery of any estate, property, damages or demands existing in favor of the corporation, and to appoint agents under him, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of such receiver may be continued as long as the court shall think necessary for the purposes aforesaid, and the receiver shall have power to sell, convey and assign all the said estate, rights and interest, and shall hold and dispose of the proceeds thereof under the direction of the court. The word receiver as used in this chapter shall be construed to include receivers and trustees appointed, as provided in this chapter. Every receiver shall, before acting, enter into such bond and comply with such terms as the court may prescribe.

Code, s. 668; 1901, c. 2, s. 74. **See sections 679-682; 846-849; 1203, for additional annotations.**

Title of receiver relates to date of appointment: Fisher v. Bank, 132-775; Bank v. Bank, 127-432—**but his possession does not interfere with prior liens,** Pelletier v. Lumber Co., 123-596. **Where corporation in hands of receiver, before stockholder can sue for injury to corporation, he must show demand on, and refusal of, receiver to sue:** Coble v. Beall, 130-533. **Receiver may sue either in own name or in that of corporation:** Smathers v. Bank, 135-413, and cases under section 1203.

As to duration of receivership, see Asheville Div. v. Aston, 92-586; Young v. Rollins, 90-125.

POWERS AND DUTIES OF RECEIVER. Receiver has sole right to collect assets of insolvent corporation: Dunn v. Johnson, 115-258—**and may maintain action against officer of insolvent corporation to recover corporate property in his hands,** Ibid—**also has right to enjoin resident creditor of corporation from prosecuting suit in another state which hinders his collection of assets,** Davis v. Lumber Co., 132-233.

Receiver may collect assets and prosecute and defend suits after corporation ceases to exist by expiration of charter: Asheville Div. v. Aston, 92-578—**though judgments against corporation rendered upon process issued after it has ceased to exist are of no validity,** Dobson v. Simonton, 86-493. **It is duty of receiver to appeal where he thinks the corporation he represents has not had justice:** Strauss v. Loan Asso., 118-556—**though not his duty to appeal in interest of one creditor or stockholder against another,** Ibid.

Sufficiency of complaint in action by receiver to recover unpaid subscriptions discussed in Worth v. Wharton, 122-376. **For duty of officers of defunct corporation to turn over corporate property to receiver,** see Young v. Rollins, 90-125.

Corporation purchasing practically entire assets of another corporation without provision for debts is liable to receiver of defunct corporation for such debts: McIver v. Hardware Co., 144-478; see Marshall v. R. R., 92-322.

RECEIVER'S BOND. Liability of sureties on receiver's bond only enforcible by action; they can not be proceeded against by motion in the cause: Black v. Gentery, 119-502. **Where judgment is obtained against receiver he is not necessary party to action against sureties on bond:** Ibid. **Leave of court necessary before suing sureties:** Black v. Genetry, 119-504; Boothe v. Upchurch, 110-64—**except where receiver is ex officio receiver of certain funds:** Boothe v. Upchurch, 110-62; Black v. Gentery, 119-504—**and complaint should allege that leave has been granted in case where same necessary,** Ibid—**but omission to so allege is cured by failure to demur upon that ground,** Ibid; Wilson v. Rankin, 129-447.

1223. Majority may act; removal of; vacancies. Every matter and thing required to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority of them; and the court may remove any receiver or trustee and appoint another in his place, or fill any vacancy which may occur.

1901, c. 2, s. 79.

1224. Property to vest in. All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

1901, c. 2, s. 75. **Title of receiver relates only to time of appointment, and he takes property subject to existing liens:** Fisher v. Bank, 132-769; Bank v. Bank, 127-432; Pelletier v. Lumber Co., 123-596. **For duty of officers of defunct corporation to turn over corporate property to receiver,** see Young v. Rollins, 90-125.

1225. Inventory. Such receiver, within thirty days after his appointment, shall lay before the court a full and complete inventory of all estate, property and effects of the corporation, its nature and probable value, and an account of all debts due from and to it as nearly as the same can be ascertained, and make a report to the superior court of his proceedings, at every civil term thereof during the continuance of the trust.

1901, c. 2, s. 80.

1226. Compensation. Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent. upon receipts and disbursements, and the costs and expenses of administration of his trust, and the costs of the proceedings in said court to be first paid out of said assets.

150-281

1901, c. 2, s. 88. **Commissions are part of costs and expense of suit and should be paid as such:** Cotton Mills v. Cotton Mills, 115-475; Simmons v. Allison, 119-556—**and are usually taxed against losing party,** Simmons v. Allison, 119-556—**though court below may in its discretion divide same between parties,** Ibid.

Allowance of commissions and counsel fees by court prima facie correct, and supreme court will alter same only where clearly inadequate or excessive, Graham v. Carr, 133-449. **Allowance of commissions is reviewable when made on wrong principle or when clearly inadequate or excessive:** Bank v. Bank, 126-531. **Allowance of commissions premature before work finished, as it can not be determined before then whether commissions excessive or inadequate:** Delafield v. Construction Co., 118-105. **Order allowing commissions is a final judgment and appeal lies:** Bank v. Bank, 126-531.

Rate not exceeding five per cent. on receipts and disbursements seems to be limit allowed: Bank v. Bank, 126-531, and cases cited.

1227. May send for persons and papers; penalty for refusing to answer. Such receiver shall have power to send for persons and papers, and to examine any persons, including the creditors and

claimants, and the president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, and choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuse to declare the whole truth touching the subject matter of the said examination, the court may, on report of the receiver, commit such person as for contempt.

1901, c. 2, s. 78.

1228. Time limit for creditors to present claims. The court may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation and may bar all creditors and claimants failing so to do within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time.

1901, c. 2, s. 81. **Creditor, bona fide ignorant of proceedings for distribution of corporate assets, will be allowed to prove claim after time limited by court and before distribution of assets:** Bank v. Creditors, 80-9 (note that this decision was rendered prior to enactment above).

1229. Claims, how presented and proved; power and duty of receiver. Every claim against an insolvent corporation shall be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver shall direct, and shall produce such books and papers relating to the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination.

1901, c. 2, s. 82. **Claims of all creditors should be heard and disposed of before receiver discharged:** Lenoir v. Imp. Co., 117-475—**and officer filing claim for salary should be allowed opportunity to show contract with company for entire year made prior to appointment of receiver,** Ibid.

1230. Claims reported to court; exceptions in ten days; right to jury trial. It shall be the duty of such receiver to report to the term of the superior court subsequent to any finding by him as to any claim against the corporation, and exceptions thereto may be

filed by any person interested, within ten days after notice of such finding by the receiver, and not later than within the first three days of the said term; and if, on any exception so filed, a jury trial shall be demanded, it shall be the duty of the court to prepare a proper issue and submit the same to a jury; and if such demand is not made in the exceptions to the report the right to a jury trial shall be deemed to have been waived. The judge may, in his discretion, extend the time for filing such exceptions.

1901, c. 2, s. 83.

1231. May become plaintiff in pending actions. Such receiver shall, upon application by him, be substituted as party plaintiff or complainant in the place and stead of the corporation, in any suit or proceeding which was pending at the time of his appointment.

1901, c. 2, s. 84.

1232. Property sold pending litigation; fund reserved. When the property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrances, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court shall direct.

1901, c. 2, s. 86.

XIV. Taxes and Fees.

1233. State taxes; organization, amendments, dissolution, etc. On filing any certificate or other paper relative to corporations in the office of the secretary of state, the following taxes shall be paid to the state treasurer, for the use of the state: For certificates of incorporation, twenty cents for each thousand dollars of the total amount of capital stock authorized, but in no case less than twenty-five dollars; increase of capital stock, twenty cents for each thousand dollars of the total increase authorized, but in no case less than twenty dollars; extension or renewal of corporate existence of any corporation, the same as required for the original certificate of organization by this chapter; change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock), decrease of capital stock, increase or decrease of par value of, or number of, shares, twenty

dollars; for filing list of officers and directors, one dollar; dissolution of corporation, change of principal place of business five dollars: Provided, that no taxes shall be required to be paid by any benevolent, religious, educational, or charitable society or association having no capital stock; and these taxes shall not be cumulative, but when two or more taxes would have been incurred at the same time, the tax for all shall be the largest single tax.

1901, c. 2, s. 96.

1234. Fees to secretary of state and clerk of superior court. The secretary of state shall collect and retain the following fees, viz.: For recording the certificate of incorporation, one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal fifty cents; for copying the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars.

Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96.

1235. Tax on bills creating private corporations; copy to be filed with secretary of state before organization. Every bill introduced in either house of the general assembly to incorporate any private corporation or railroad company, or to amend the charter of such corporation, shall be accompanied by a receipt from the state treasurer, showing that there has been paid an organization tax in double the amount prescribed for corporations organized under this chapter, and in addition thereto each private corporation (railroad, insurance and banking companies excepted) shall, before its organization, file and have recorded a copy of the bill creating it in the office of the secretary of state, and shall become subject to the provisions of this chapter.

1901, c. 2, s. 97; 1903, c. 93; 1905, c. 168, s. 3.

1236. Corporate property liable for taxes, though in receiver's hands. Whenever taxes are duly assessed, charged and extended against any corporation having chartered rights, or doing business in this state, or having property in this state, or against any person resident in this state or doing business, or having property in this state, and the tax list is in the hands of any officer or tax collector, it shall be competent for such officer or tax collector, whenever said taxes, whether listed or unlisted, or due and unpaid, to levy upon, seize and take into his possession such part of the property belonging to such person or corporation as may be necessary to pay such taxes listed or unlisted, whether the property of such corporation or person be in the hands of a receiver duly appointed or not.

Code, s. 699.

1237. Tax collector need not obtain order of court though property is in receiver's hands. In all cases provided for in the preceding section, it shall not be necessary for such officer or tax collector to apply and obtain from the court appointing such receiver, or having jurisdiction of the property or of the receiver, an order for the payment of such taxes, but the same may be collected as aforesaid, by distraint and seizure, as if the property or corporation was not in the hands of a receiver. This section and the preceding section shall apply to all taxes, whether state, county, town, or municipal; and shall be liberally construed in favor of, and in furtherance of, the collection of said taxes.

Code, s. 700.

XV. Reorganization.

1238. Corporations whose property and franchises sold under order of court or execution. Whenever the property and franchises of the corporation shall be sold under a judgment or decree of a court of this state, or of the circuit court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon such sale shall vest in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchises so sold, subject to all the conditions, limitations and restrictions of said corporation; and such purchaser and his associates, not less than three in number, shall thereupon become a new corporation, by such name as said persons shall select, who shall be the stockholders in the ratio of the purchase money by them respectively contributed; and shall be entitled to all the rights and franchises and be subject to all the conditions, limitations and penalties of the said corporation whose property and franchises shall have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of such sale shall succeed to all the franchises, rights and privileges of said original corporation only when such sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when said railroad is sold as an entirety.

Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99. **Corporate property and franchise must be sold together:** James v. R. R., 121-527; Bradley v. Rwy., 119-927 (Appx.); Pipe and Foundry Co. v. Howland, 111-625; Gooch v. McGee, 83-59. **Sale of railroad under second mortgage, and conveyance thereunder subject to first mortgage, does not extinguish corporate existence of company:** James v. R. R., 121-523—**nor release corporation from liability to public for manner in which railroad operated,** Ibid—**and in**

order that sale should work dissolution, another corporation must take the place, and assume obligations of old corporation, Ibid—**though, when this is done, corporation will be domestic corporation,** Ibid. **Upon foreclosure of mortgage of railroad, purchaser takes rights acquired by company in relation to right of way under charter:** Barker v. R. R., 137-214; Hendrick v. R. R., 101-617.

1239. New corporators to meet and organize. The persons for, or on whose account, any such property and franchises may have been purchased, shall meet within thirty days after the conveyance made by virtue of said process, or decree, shall have been delivered, written notice of the time and place of said meeting having been given to each of said several persons at least ten days before said meeting, and organize said new corporation.

1901, c. 2, s. 100.

1240. Duties and powers at meeting. At such meeting the said persons shall adopt a corporate name and corporate seal, determine the amount of the capital stock of said corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they shall see fit. The said corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

1901, c. 2, ss. 101, 102.

1241. Certificate to be filed with secretary of state. It shall be the duty of such new corporation, within one month after its organization, to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of such organization, the name so adopted, the amount of capital stock, and the name of its president and directors, and transmit the said certificate to the secretary of state, to be filed and recorded in his office, and there remain of record; and a certified copy of such certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the said corporation, and shall be the charter and evidence of the corporate existence of said new corporation: Provided, that nothing contained in this chapter shall divest, or in any manner impair, the lien of any prior mortgage, or other encumbrance upon the property or franchises, conveyed under the sale of said property or franchise, when by the terms of the process or decree under which the sale was made, or by operation of law, the said sale is made subject to the lien of any such prior mortgage or other encumbrance: And, provided, that no such sale and conveyance or organization of such new corporation shall in anywise affect or impair any rights of any person, body politic or corporate, not a party to

the action in which the aforesaid decree was made, nor of the said party, except so far as determined by said decree: And provided, also, that when any trustee shall be made a party to such action and his cestui que trust, for any reason satisfactory to the court in which the action may be, shall not be made a party thereto, the rights and interest of such cestui que trust shall be concluded by such decree.

1901, c. 2, s. 103.

XVI. Miscellaneous Provisions.

1242. Name of corporation to be displayed. The name of every corporation shall be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof for sixty days the corporation shall be liable to a penalty of one hundred dollars, to be recovered with costs, by the state, in an action to be prosecuted by or under the direction of the attorney general.

1901, c. 2, s. 50.

1243. Resident process agent required; in absence, service upon secretary of state sufficient; fees. Every corporation having property or doing business in this state, whether incorporated under its laws or not, shall have an officer or agent in this state, upon whom process in all actions or proceedings against it can be served; and any corporation failing to comply with the provisions of this section shall be liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In any such case, process in any action or proceeding against such corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the said copy to the president, secretary or other officer of the corporation, upon whom, if residing in this state, service could be made; and for the service to be performed by the said secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service is made.

182 - 656

1901, c. 5. **For general statute as to service of process on corporations, see section 440; on foreign insurance companies, 4750. Provisions of this section as to service of process on foreign corporations held constitutional:** Fisher v. Ins. Co., 136-217. **Section applicable to foreign corporations doing business in state, or who have done business herein and have incurred liabilities which remain unsatisfied:** Fisher v. Ins. Co., 136-225.

Section merely referred to in Kelly v. Lefaiver, 144-7; Green v. Ins. Co., 139-310.

1244. Secretary of state to annually publish list of corporations created. The secretary of state shall annually compile from the records of his office, and publish a complete list, in alphabetical

order, of existing domestic corporations and of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the amount issued, the date of filing the certificate, and the period for which the corporation is to continue.

1901, c. 2, s. 104.

1245. Mutual corporations may create stock. The members of any mutual corporation may provide for and create a capital stock of such corporation, upon the consent in writing of all the members of the corporation, and may provide for the payment of such stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law.

1901, c. 2, s. 105.

1246. Forfeiture by failure for two years to organize; or after organization, to act; duty of secretary of state and attorney general. When any act shall have been passed, or certificate of incorporation, as provided in this chapter, shall have been recorded, creating a body corporate, and the corporators for two years shall neglect or fail to organize the company and carry into effect the intent of the act, or when organized, if they at any time for two years together shall cease to act, then such disuse of their corporate privileges and powers shall be deemed and taken as a forfeiture of the charter. And if, after thirty days' notice by the secretary of state, such corporation shall fail to surrender its corporate rights, or to dissolve, in the manner provided in this chapter, the secretary of state shall report such corporation to the attorney general, who shall institute an appropriate action for the dissolution of such corporation.

Code, s. 688; 1901, c. 2, s. 106. **Failure to organize within statutory period can not be taken advantage of collaterally:** Boyd v. Redd, 120-338 —**and sovereign is proper party, by direct proceedings to take advantage of such fact,** Ibid; Asheville Div. v. Aston, 92-578; Academy v. Lindsey, 28-476; Navigation Co. v. Neal, 10-520.

Section merely referred to in Railroad v. Alsbrook, 110-156.

1247. Meaning of "judge," "court," etc. Whenever the words "court," "superior court," or "judge of the superior court" appear in this chapter, they shall be construed to mean the judge of the superior court resident of the district or holding the courts by rotation, exchange, or appointment, of the district wherein such corporation may have its principal place of business.

1901, c. 2, s. 111.

1248. Amendments to certain charters validated. All amendments to the plan of incorporation of any corporation which was organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An act to revise the corporation law of North Carolina," being chapter two, public laws of one thousand nine hundred and one, are hereby declared to be valid in all respects, whether such amendments have been made in accordance with the provisions of chapter three hundred and eighty of the public laws of one thousand eight hundred and ninety-three or in accordance with the provisions of chapter two of public laws of one thousand nine hundred and one; but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of chapter two of public laws of one thousand nine hundred and one.

1905, c. 316. **See sections 1027, 1028.**

CHAPTER 22.

COSTS.

I. Generally.

1249. What allowed. To either party for whom judgment shall be given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same.

Code, s. 528.

As to who pays costs in criminal cases, see sections 1290, 1291 and 1295.

Only the costs of witnesses duly subpœnaed and examined or tendered can be taxed against party cast and then not more than two to prove one material fact: Cureton v. Garrison, 111-271; Sitton v. Lumber Co., 135-540; Moore v. Guano Co., 136-248; Loftis v. Baxter, 66-340; see also Stern v. Herren, 101-516—**but this does not apply to cases of nonsuit:** Henderson v. Williams, 120-339. **While not more than two witnesses to a single point may be taxed against losing party in a civil action, party who subpœnaed them still liable for their compensation:** State v. Massey, 104-877.

Where mortgagor sues mortgagee for usury and to restrain him from selling under mortgage, and issue as to usury found against defendant mortgagee, held that mortgagee entitled to costs, he recovering judgment for his mortgage debt: Cook v. Patterson, 103-127. **Defendant establishing disputed right to betterments entitled to costs:** Vann v. Newsome, 110-130.

Recovery of costs depends upon statutory regulations: Costin v. Baxter, 29-111; Clerk's Office v. Comrs., 121-29, and cases cited—**and by our statute the party who obtains judgment is entitled to costs,** Costin v. Baxer, 29-111; Vestal v. Sloan, 83-555. **Where plaintiff prevails in part of his action he is entitled to cost:** Vanderbilt v. Johnson, 141-370; Field v. Wheeler, 120-264; Ferrabow v. Green, 110-416; Horton v. Horne, 99-219. **No part of costs can be taxed against party recovering judgment:** Williams v. Hughes, 139-20; Wall v. Covington, 76-150; Field v. Wheeler, 120-270; Wooten v. Walters, 110-251; Horton v. Horne, 99-219; but see as to referee and fees, section 1268 (6).

Referee's fees are part of costs and of no greater dignity, and pro-rate with other items of cost: Cobb v. Rhea, 137-298. **Fee of referee taxed against administrator is not a preferred debt:** Cobb v. Rhea, 137-295.

The rule that costs follow final judgment applies in criminal as well as civil cases; hence where prisoner was convicted but afterwards acquitted on new trial, his costs in both trials taxable against county: State v. Horne, 119-853.

As to whether item properly chargeable as costs, or whether, taking case below as properly decided, the costs are properly adjudged, are questions reviewable on appeal: State v. Horne, 119-853, and cases cited therein.

As to retaxing costs in action where plaintiff was required to pay accrued costs to get a continuance, but judgment finally rendered for him, see Owen v. Paxton, 122-770.

Where arbitrator's report objected to, costs awarded against party objecting: Knight v. Holden, 104-107.

Prevailing party may be adjudged to pay costs incurred in an unsuccessful attempt to enforce same: Norris v. Luther, 101-196.

Costs adjudged against plaintiff when he fails to recover over the amount tendered by defendant: Smith v. B. & L. Asso., 119-256; Coward v. Comrs., 137-299; Pollock v. Warwick, 104-638; Murray v. Windley, 29-201.

Plaintiff recovering nominal damages entitled to costs: Britton v. Ruffin, 123-70.

Defendant can not bar plaintiff's right to cost by admitting, at close of evidence, his right to relief demanded: Rawls v. White, 127-17.

No appeal from a judgment for costs only: Comrs. v. Gill, 126-86; Taylor v. Vann, 127-243; Herring v. Pugh, 125-437; State v. Horne, 119-853; Futrell v. Deanes, 116-38; Elliott v. Tyson, 116-184; Russell v. Campbell, 112-404; Pritchard v. Baxter, 108-129; State v. Byrd, 93-624; Hasty v. Funderburk, 89-93; State v. R. R., 74-287; Martin v. Sloan, 69-128; Osborne v. Henry, 66-354; but see Blount v. Simmons, 120-19; Mills Co. v. Lytle, 118-837; Hobson v. Buchanan, 96-444; May v. Darden, 83-237.

The costs in processioning proceedings must not be adjudged until final determination: Roberts v. Dickey, 110-67.

Where suit abates upon death of party, each party is liable for his own costs: Officers v. Taylor, 12-99.

1250. Summary judgment for, uncollected. If any officer, to whom fees are payable by any person, shall fail to receive them

at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days' notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed. If the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term.

Code, s. 3760; 1868-9, c. 279, s. 561. **Clerk can have judgment, on motion, for his costs, when not paid:** Andrews v. Whisnant, 83-447. **Judgment in favor of officers for fees, if docketed, is a lien on land:** Sheppard v. Bland, 87-167. **Execution can issue, even though defendant in execution is the successful party:** Clerk v. Wagoner, 26-131.

This section permits a motion to retax costs to be made in favor of officer within one year after termination of action: In re Smith, 105-169; see Owen v. Paxton, 122-770.

1251. Judgment and execution for, against sureties on prosecution or appeal bond. Whenever an action shall be brought in any court in which security shall be given for the prosecution thereof, or when any case shall be brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit shall have been given, and judgment shall be rendered against the plaintiff for the costs of the defendant, the appellate court, upon motion of the defendant, shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety.

Code, s. 543; R. C., c. 31, s. 126; 1831, c. 46. **Recovery on bonds to secure costs may be had in the actions in which they are given:** McCall v. Zachary, 131-466.

1252. Executions for, when issued; irregular if not itemized. The clerks of the supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the state, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words, so as plainly to show each item of costs, and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued.

Code, s. 3762; R. C., c. 102, s. 24. **An order taxing costs is in effect a judgment, and, when docketed, is a lien on land and can be enforced by execution:** Sheppard v. Bland, 87-163; see also King v. Featherston, 20-259.

1253. Juror's tax fees. On every indictment or criminal proceeding, tried or otherwise disposed of in the superior, or criminal courts, the party convicted, or who shall be adjudged to pay the costs, shall pay a tax of two dollars. In every civil action in any court of record, the party who shall be adjudged to pay the costs shall pay a tax of three dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerks in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending the courts thereof. In Pitt county the jury tax shall be five dollars in civil and in criminal cases.

Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249; 1905, c. 348.

1254. Criminal, not demandable in advance. In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process shall not be entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable.

Code, s. 1173; 1868-9, c. 178, subch. 3, s. 40.

1255. Clerk to insert, in entry of judgment. The clerk shall insert in the entry of judgment the allowances for costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. Whenever it shall be necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge.

Code, s. 532.

1256. Bills of criminal costs itemized; approved by solicitor. It shall be the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk, and approved by the solicitor.

Code, s. 733; 1873-4, c. 116; 1879, c. 264.

1257. Justices required to itemize bills of. In all trials before justices of the peace it shall be lawful for plaintiff or defendant before payment of costs, to demand of the justice before whom a trial is held an itemized statement of costs; and it shall be his duty to insert in the entry of judgment in every criminal action tried or otherwise disposed of by him a detailed statement of the different items of cost, and to whom due.

Code, s. 734; 1887, c. 297. **Full discussion of costs in criminal cases in courts of justices of the peace** in Merrimon v. Comrs., 106-369.

1258. Bills of, open to the public. Every bill of costs shall at all times be open to the inspection of any person interested therein.

Code, s. 735; 1873-4, c. 116.

II. State Liable, When.

1259. Civil actions by the state. In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution issued therefor against such private party and returned unsatisfied.

Code, s. 536. **Incidental bills of cost (except certain ones mentioned) for failure of actions authorized by state are not "expenses of the state government" within the meaning of the act providing that certain taxes shall be applied to their payment:** Garner v. Worth, 122-250.

Injunction asked for by state dissolved, carries costs against state: State v. R. R., 74-287. **If plaintiff, solicitor and relator, to vacate oyster entry in name of state be nonsuited, county not liable for costs:** Blount v. Simmons, 118-9.

When solicitor ordered to bring action as relator in name of state, state liable for costs: Blount v. Simmons, 120-19; 119-50.

Supreme court has no original jurisdiction of clerk's claim against state for costs: Miller v. State, 134-270.

As to distinction between suits where state brings for benefit of individual and for public benefit, as to costs, see State v. McGalliard, 62-346; State v. King, 23-22.

1260. Civil actions by and against state officers. In all civil actions depending, or which may be instituted, by any of the officers of the state, or which have been, or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the attorney general, and the same shall be decided against

such officers, the costs thereof shall be paid by the state treasurer upon the warrant of the auditor for the amount thereof as taxed.

Code, s. 3373; 1874-5, c. 154.

1261. Civil actions by state for individuals. In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the state.

Code, s. 537.

1262. In bribery prosecutions. The expenses which shall be incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state.

Code, s. 742; 1868-9, c. 176, s. 6; 1874-5, c. 5.

1263. On appeal by state to supreme court of United States. In all cases, whether civil or criminal, to which the state of North Carolina is a party, and which may be carried from the courts of this state, or from the circuit court of the United States, by appeal or writ or error, to the United States circuit court of appeals, or to the supreme court of the United States, and the state shall be adjudged to pay the costs, it shall be the duty of the attorney general to certify the amount of such costs to the auditor, who shall thereupon issue a warrant for the same, directed to the treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated.

Code, s. 538; 1871-2, c. 26.

III. Civil Actions and Proceedings.

1264. When allowed plaintiff; when limited by amount of recovery. Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

It means an ultimate "recovery:" Williams v. Hughes, 139-17. **This section and section 1267 are subject to section 97:** Whitaker v. Whitaker, 138-207. **One not a party is not liable for costs:** Loven v. Parson, 127-301.

He who sues in another's name without consent must pay costs incurred by such other: Metcalf v. Alley, 24-38.

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

Consult Vanderbilt v. Johnson, 141-370; Kennedy v. Maness, 138-35; Moore v. Angel, 116-843; Wooten v. Walters, 110-251; Ferrabow v. Green, 110-414; Currie v. Clark, 101-321; Spruill v. Arrington, 109-192. **Costs of survey and witness fees of surveyor taxable against losing party:** Porter v. Durham, 79-596; see Wilcox v. ....., 2-484. **Where, in a proceeding to sell land for assets, defendants set up title to land but issue found against them, all costs should be taxed against them except that of filing petition;** Noble v. Koonce, 76-405. **In an action for foreclosure and accounting brought by mortgagor against mortgagee in possession, judgment was given that mortgagor was indebted to mortgagee in a certain sum and foreclosure decreed; held that plaintiff entitled to costs:** Bruner v. Threadgill, 93-225. **In action for trespass, where title disputed, plaintiff must be successful in both issues to be entitled to costs:** Murray v. Spencer, 92-264. **One successful in maintaining equitable defense against recovery of land on bare legal title entitled to costs:** Vestal v. Sloan, 83-555; see Patterson v. Ramsey, 136-561.

2. In an action to recover the possession of personal property.

Successful party in claim and delivery recovers cost: Rawlings v. Neal, 126-271. **Where, in claim and delivery, plaintiff establishes title to portion of property, he is entitled to cost:** Field v. Wheeler, 120-264; Horton v. Horne, 99-219.

3. In actions of which a court of a justice of the peace has no jurisdiction unless otherwise provided by law.

See Williams v. Hughes, 139-18.

4. In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages.

In action of slander where plaintiff recovers less than four dollars (now fifty dollars), defendant does not recover costs: Coates v. Stephenson, 52-124. **In action for assault and battery, where plaintiff recovers less than $50 he gets no more costs than damages:** Palmer v. Rwy. and Electric Co., 131-251.

5. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions shall have been within the state and not secreted at the commencement of the previous action or actions.

Code, s. 525; 1874-5, c. 119; R. C., c. 31, s. 78.

1265. When allowed pauper plaintiff. Whenever any person shall sue as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him.

Code, s. 212; 1895, c. 149; 1868-9, c. 96, s. 3. **See, as to who allowed to sue and defend in forma pauperis, sections 451, 454.**

[The amendment "except in case of recovery by him" has rendered obsolete the line of decisions holding that one who sues as pauper can recover no costs even if successful in suit.]

No officer shall require any fee of one suing as pauper: Booshee v. Surles, 85-90—**but he must pay the clerk for transcript on appeal to supreme court in civil cases,** Speller v. Speller, 119-356; Brown v. House, 119-622; State v. Deyton, 119-883; Bailey v. Brown, 105-127; Andrews v. Whisnant, 83-446—**though he need not in criminal cases,** State v. Deyton, 119-880; State v. Nash, 109-822.

The order in forma pauperis extends only to court making it: Clark v. Dupree, 13-411.

1266. When allowed defendant. Costs shall be allowed as of course to the defendant, in the actions mentioned in section one thousand two hundred and sixty-four, unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them.

Code, ss. 526, 527; C. C. P., s. 277. **Defendant recovers cost where he successfully maintains an equitable defense against recovery of land on bare legal title:** Patterson v. Ramsey, 136-561; Currie v. Clark, 101-329; citing Vestal v. Sloan, 83-555—**where he prevails in action of ejectment,** Kennedy v. Maness, 138-35—**where plaintiff fails in attempt to enforce his judgment,** Norris v. Luther, 101-196—**where plaintiff fails to set aside deed to grantee,** Brisco v. Norris, 112-671—**where plaintiff fails in action on covenant of warrant,** Britton v. Ruffin, 123-67—**where plaintiff fails to show both title and trespass in action for trespass where title in issue,** Murray v. Spencer, 92-264—**where plaintiff fails to establish his demand,** Griffith v. Winborne, 105-403.

One defending in forma pauperis is entitled to cost where he successfully defends action to recover real estate: Dempsey v. Rhodes, 93-120, and cases cited on page 128.

Surety on prosecution bond not liable for plaintiff's cost but costs which defendant recovers of plaintiff: Smith v. Arthur, 116-871; Swain v. McCullock, 75-495.

Where several plaintiffs have been forced to withdraw from action because they did not file cost bond, not erroneous to enter judgment against them for cost: Lafoon v. Shearin, 95-391.

1267. Discretionary in other actions. In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.

152-715

Code, s. 527. **Cases in which costs have been adjudged in discretion of court:** Whitaker v. Whitaker, 138-208; Satterthwaite v. Goodyear, 137-305; Sprinkle v. Wellborn, 132-468; Herndon v. Rwy., 121-500; Simmons v. Allison, 119-556; Wooten v. Walters, 110-259; McNamee v. Alexander, 109-242; Parton v. Boyd, 104-422; Smith v. Smith, 101-468; Kron v. Smith, 96-386; Gulley v. Macy, 89-345.

This section is modified by the statute with reference to costs in actions against executors and administrators: Whitaker v. Whitaker, 138-205.

Cases referring to this section: Williams v. Hughes, 139-18; Patterson v. Ramsey, 136-563; Harrington v. Rawls, 136-68; Harrington v. Hatton, 129-148; Taylor v. Vann, 127-245; Gore v. Davis, 124-234; Reade v. Street, 122-301; Hawkins v. Cedar Works, 122-92; Ladd v. Ladd, 121-121; Crenshaw v. Johnson, 120-270; State v. Horne, 119-855; Smith v. B. & L. Asso., 119-262, 256; Brisco v. Norris, 112-677; McNeill v. McBryde, 112-412; Ferrabow v. Green, 110-416; Jones v. Mial, 85-597.

1268. When in discretion of the court. Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

1. Application for year's support, for widow or children.

2. Caveats to wills.

It is discretionary with court to direct payment of cost out of estate: Mayo v. Jones, 78-406.

3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate as may be just.

See Broom v. Broom, 130-565;

5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of road supervisors or board of county commissioners may order the costs incurred before them paid in their discretion.

See McDowell v. Asylum, 101-658; Davis v. Hill, 33-9.

6. The compensation of referees and commissioners to take depositions.

The sum allowed referee is in court's discretion and not reviewable: Worthy v. Brower, 93-492. **[The decision of Young v. Connelly, 112-646; Wall v. Covington, 76-150, and others of like tenor are modified by the amendment making it discretionary with judge as to who pays referee's fees.] Appointment of referee's fees is now in discretion of court:** Cobb v. Rhea, 137-297; Field v. Wheeler, 120-269.

7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.

See Hinnant v. Wilder, 122-149; Wilson v. Lumber Co., 131-167.

8. In all proceedings under the chapter entitled "Draining Lowlands," except as therein otherwise provided.

9. In proceedings under section six hundred and ninety-one.

Code, ss. 2134, 2161, 1660, 1294, 2039, 2056, 533, 1422, 1323; 1889, c. 37; 1893, c. 149, s. 6.

See sections 54, 58, 339, 407.

1269. Petitioner pays, when. The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or daming lowlands.

2. In petitions for condemnation of water mill sites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

3. In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

4. When the petition is refused.

Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562.

1270. Defendant pays, unreasonably defending action after notice of no personal claim. In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff.

Code, s. 216.

1271. None allowed to party suing on usurious contract. No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract.

1895, c. 69.

See sections 1950, 1951.

1272. In special proceedings. The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided.

Code, s. 541. **In proceeding to make real estate assets, where defendants set up title to land, which issue decided against them, defendants must**

pay costs: Noble v. Koonce, 76-405. **As to costs in partition proceedings,** see Hinnant v. Wilder, 122-149; Wilson v. Lumber Co., 131-167.

1273. Allowed in supplemental proceedings. The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements.

Code, s. 499; C. C. P., s. 273.

1274. Laying off homestead and exemptions. The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead.

Code, s. 510. **Lien exists in favor of officers for their fees, sheriff having right to retain costs out of amount collected, and no compromise between debtor and creditor can affect officer's remedy:** Long v. Walker, 105-90.

1275. On re-assessment of homestead. If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant shall be reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining.

Code, s. 521. **See** Beavans v. Goodrich, 98-225.

1276. Against infant plaintiff, guardian responsible. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor.

Code, s. 534.

1277. Actions by or against executors, trustees or persons authorized by statute. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And whenever any claim against a deceased person shall be referred, the pre-

vailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law.

Code, s. 535. **See sections 92, 97, 1799. No judgment recoverable against executors, etc., for cost unless it appears that payment unreasonably delayed or neglected or that defendant refused to refer matter in controversy:** Whitaker v. Whitaker, 138-205; Morris v. Morris, 94-613; May v. Darden, 83-238; see section 97—**or acted in bad faith or was guilty of mismanagement,** Sugg v. Bernard, 122-156; Lewis v. Johnston, 69-395; Davis v. Duval, 112-833; Varner v. Johnston, 112-577. **An administrator should be taxed with the cost of a suit subjecting him to liability for misapplication of funds:** Valentine v. Britton, 127-57. **Old case of interest:** Arrington v. Coleman, 5-102.

Costs in actions by and against trustee should be taxed against estate in hands of trustee except where trustee guilty of mismanagment or bad faith, when they can be taxed against him personally, Smith v. King, 107-278. **A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the fund to payment of costs and expenses:** Chemical Co. v. Johnson, 101-223.

Where court finds that ''next friend'' officiously procurred his appointment or was guilty of mismanagment or bad faith, it may tax him with cost; Smith v. Smith, 108-365.

Referee's fees in action against deceased persons are taxed against losing party: Wall v. Covington, 76-150.

As to taxing costs against receiver, see Battle v. Mayo, 102-433.

1278. Assignee after action brought, liable for. In actions in which the cause of action shall become by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party.

Code, s. 539. **See** Davis v. Higgins, 92-204.

IV. On Appeals.

1279. Generally. On an appeal from a justice of the peace to a superior court, or from a superior court or a judge thereof, to the supreme court, if the appellant shall recover judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below, had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he shall have paid under the erroneous judgment of of such court. If in any court of appeal there shall be judgment for a new trial, or for a new jury, or if the judgment appealed from be not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court.

Code, s. 540. **See section 1280. Section discussed generally** in Williams v. Hughes, 139-17.

Error in judgment of lower court, to which exception taken, entitles plaintiff to cost in supreme court although only nominal damages recovered: Lumber Co. v. Lumber Co., 137-431.

Where certain infant appellees were not represented by guardian or next friend it was deemed proper to tax cost of appeal against appellants: Cooper, ex parte, 136-130.

Successful party on appeal to supreme court is entitled to recover back cost of transcript and certificate, though judgment against him finally rendered in lower court: Dobson v. Rwy., 133-624. **Where judgment modified, costs on appeal taxed against appellee:** McLean v. Breece, 113-393. **Where judgment reversed, it includes cost:** Stafford v. Newsom, 34-17.

Appellant from justice's court to superior court, if he recovers judgment, should recover all costs, including what he should have recovered in justice's court: Kincaid v. Graham, 92-155—**but if appellant is a defendant appealing from justice's judgment refusing his counterclaim, and in superior court jury allows counterclaim yet plaintiff gets judgment for balance due, costs of superior court shauld be awarded plaintiff,** Ibid.

Where subject matter of action is destroyed before appeal heard, judgment below is presumed to be correct until reversed and no part of costs should be adjudged against appellee: Taylor v. Vann, 127-243; Comrs. v Gill, 126-86; Wikel v. Comrs., 120-452. **There is no appeal from a judgment awarding costs only and the supreme court will not entertain appeal upon the merits of a case just to settle the matter of costs:** Comrs. v. Gill, 126-86; Taylor v. Vann, 127-243; Herring v. Pugh, 125-437; State v. Horne, 119-853; Futrell v. Deanes, 116-38; Elliott v. Tyson, 116-184; Russell v. Campbell, 112-404; Pritchard v. Baxter, 108-129; State v. Byrd, 93-624; Hasty v. Funderburk, 89-93; State v. R. R., 74-287; Martin v. Sloan, 69-128; Osborne v. Henry, 66-354; but see Blount v. Simmons, 120-19; Mills Co. v. Lytle, 118-837; Hobson v. Buchanan, 96-444; May v. Darden, 83-237.

Where appellant was awarded a partial new trial, as to one issue only out of several, costs of appeal are in court's discretion: Rayburn v. Casualty Co., 142-376. **Where new trial granted in supreme court, the awarding of costs is discretionary:** Metal Co. v. R. R., 145-293; Satterthwaite v. Goodyear, 137-302. **Where new trial awarded but imperfect record sent up, costs divided:** Sprinkle v. Wellborn, 132-469.

Appellant failing to show that order he appealed from is prejudicial; taxed with cost: Harrington v. Rawls, 136-65.

Where, pending appeal, statute under which action brought is repealed, judgment below as to cost will stand: Wikel v. Comrs., 120-452.

In a fragmentary appeal judgment below as to division of costs will not be disturbed: Rodman v. Calloway, 117-13.

Judgment for costs in supreme court is rendered in that court: Johnson v. R. R., 109-504.

Where both parties appeal from judgment dismissing action, which judgment is affirmed, defendant's appeal will be dismissed with cost: Horne v. Horne, 72-534.

Undertaking for costs required is to secure costs of appellee, therefore surety not liable for appellant's cost: Morris v. Morris, 92-142.

1280. Of transcript on appeal taxed in supreme court. Whenever an appeal is taken from the superior court to the supreme court the clerk of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the costs thereof shall be taxed as a part of the costs of the supreme court.

1905, c. 456. **This section overthrows decision of Roberts v. Lewald, 108-405, holding that the cost of transcript is superior court cost.**

Appellant will be taxed with cost of unnnecessary and irrelevant matter in the record in case on appeal: Yow v. Hamilton, 136-357; Harris v. Davenport, 132-697; Land Co. v. Jennett, 128-3; Gray v. Little, 127-304; Tobacco Co. v. McElwee, 96-71; Kivett v. McKeithan, 90-106—**and this is so even though he succeeds in getting final judgment,** Yow v. Hamilton, 136-363; Gray v. Little, 127-304; Kivett v. McKeithan, 90-106.

The successful party on appeal from superior court is entitled to recover back cost of transcript and certificate, though subsequently final judgment rendered in lower court against him: Dobson v. Rwy., 133-624.

Successful party on appeal will not be allowed to recover cost for printing record in excess of amount prescribed by supreme court rule, except in extraordinary cases where the necessity for such printing is made to appear: Roberts v. Lewald, 108-405.

1281. From justices of the peace. After an appeal from the judgment of a justice of the peace shall be filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

Code, s. 542. **See** Kincaid v. Graham, 92-154. **The judge may or may not require prosecution bond of plaintiff on appeal from justice of the peace:** Smith v. R. R., 72-62.

1282. Not allowed plaintiff unless his recovery is greater than before justice. If on appeal from a justice of the peace judgment be entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same.

Code, s. 566; R. C., c. 31, s. 106; 1794, c. 414, s. 17.

V. Liability of Counties in Criminal Actions.

1283. County pays, when. If there be no prosecutor in a criminal action, and the defendant shall be acquitted, or convicted and unable to pay the costs, or serves out a sentence on the public roads of New Hanover county, or a nolle prosequi be entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees only; except in capital felonies and in prosecutions for fogery, perjury and con-

spiracy, when they shall receive full fees. And in the following counties the county shall pay one-half their lawful fees, when "not a true bill" is found: Alexander, Alleghany, Ashe, Bertie, Brunswick, Burke, Caldwell, Caswell, Catawba, Chatham, Clay, Craven, Davie, Duplin, Gaston, Granville, Greene, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Madison, McDowell, Mecklenburg, Montgomery, Northampton, Onslow, Orange, Pamlico, Pender, Pitt, Richmond, Robeson, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. All persons subpœnaed as witnesses before the grand jury in Moore county in any criminal prosecution, or who shall be subpœnaed to appear before the judge in any criminal prosecution in said county, shall receive one dollar per day for each day attending, and five cents per mile for each mile traveled to and from court one time, whether a true bill be found or not. And no county shall pay any such costs, unless the same shall have been approved, audited and adjudged against the county as provided in this chapter. All witnesses subpœnaed by order of court to appear before the grand jury in Martin county, and who do attend, and all other witnesses who may testify in open court on the part of the state, shall be allowed to prove attendance and collect one-half fees. In the counties of Brunswick and Catawba the county shall not be liable for any part of the costs of justices of the peace. Half fees shall be allowed in Burke county in case of acquittal of defendant upon appeal to superior court, in all criminal actions commenced in good faith before a justice of the peace having final jurisdiction where no prosecutor is marked therein.

Code, ss. 733, 739; 1901, cc. 715, 765; 1903, cc. 57, 73, 288, 298, 581; 1905, c. 134, s. 3; 1905, cc. 203, 324, 362, 370, 375, 511, 598; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1874-5, c. 247; 1907, cc. 40, 93, 94, 162, 208, 606, 627, 695.

See special act, 1907, c. 269, amending this as to New Hanover county. For special act as to fees in Wake county, see 1907, c. 204, and in Cherokee county, see 1907, c. 226.

Constitution exempts acquitted defendant from payment of necessary witness fees of defense, but does not require that they be paid by public: State v. Hicks, 124-829.

Where nol pros is entered upon indictment for homicide, as to murder in first degree, state's witnesses subsequently attending trial entitled to only half fees: Coward v. Comrs., 137-299.

COUNTY'S LIABILITY. This section and sections 1290, 1303, 1306, collated and construed together, places it in discretion of judge to refuse to direct fees of state's witnesses or for an acquitted defendant to be paid by county, and from his decision there is no appeal: State v. Hicks, 124-829; State v. Ray, 122-1095.

State and county only liable for costs where statute provides: Guilford v. Comrs., 120-23. **County can not be taxed with any part of clerk's fees, or fees of other officers, in criminal actions if grand jury returns "not a true bill:"** Ibid.

The rule that costs follow final judgment applies in criminal as well as in civil cases; hence where prisoner was convicted but afterwards acquitted on new trial, payment of his witnesses in both trials was properly taxed against county: State v. Horne, 119-853.

Where a person who is unable to pay costs is convicted of a criminal offense not within the exceptions of this section and is sentenced to the roads county is liable for only one-half fees: State v. Saunders, 146-; State v. Wheeler, 144-777.

COSTS IN APPELLATE COURT. Officers of supreme court are not entitled to collect from county the costs accruing in supreme court on appeal in criminal cases where defendant was allowed to appeal without bond and without order allowing him to appeal as a pauper and is insolvent: Clerk's Office v. Comrs., 121-29; Clerk's Office v. Comrs. of Richmond, 79-598; but see section 1284.

Where, on appeal to superior court from a judgment of justice of the peace in a matter in which he had final jurisdiction, a nol pros was entered by solicitor, error to tax county with cost accrued in superior Court: State v. Shuffler, 119-867; see also Merrimon v. Comrs., 106-369.

1284. County liable in supreme court, when. If on appeal to the supreme court in criminal actions the defendant is successful, the county from which the appeal was taken shall pay one-half the costs of the appeal, and all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court.

Revisal, 1905. **Consult** Clerk's Office v. Comrs., 121-29.

1285. County where offense committed to pay costs; if not paid, prisoner returned. In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are empaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is

sent shall pay his prison expenses, unless the same shall be collected from him on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justices of the peace of its own county, the amount due, with ten per cent. additional, together with eight per cent. interest on the sum due; and said courts of said county shall have full jurisdiction to hear, try and determine all actions and proceedings that may be brought for the purpose of enforcing the collection of the same: Provided, that when the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof.

1889, c. 354; 1901, c. 718. **Where judge below orders insolvent prosecutor to pay costs and he fails or is unable to pay, county in which offense committed is liable for same:** Pegram v. Comrs., 75-120; Guilford v. Comrs., 120-28.

1286. Statement of, chargeable to county, filed with commissioners. In all criminal actions where the county is liable in whole or in part for costs, it shall be the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county.

Code, s. 736; 1873-4, c. 116, s. 3.

1287. Expense incurred in going after prisoner, how paid. When a sheriff or other officer shall arrest a person under a capias or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer shall be obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried shall incur any expense in going for and conveying said prisoner to his county, then in either case, the sheriff or other officer shall file with the court or judge issuing the capias or other legal process and with the register of deeds an itemized and sworn

account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting to be audited by them. Such sworn statement shall be received by the said board as prima facie correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county.

1885, c. 262; 1901, c. 64.

1288. Lynchings, costs of investigation.. In all cases of investigation and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. And whenever any solicitor goes to a county to investigate a crime of breaking or entering a jail for the purpose of lynching, the county where such crime is committed shall pay the solicitor the sum of one hundred dollars for making the investigation.

1893, c. 461, s. 6.

1289. When county pays state's witnesses. Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts where the defendant is insolvent, or by law shall not be bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence in behalf of the state, and the defendant shall be discharged, and in cases where the defendant shall break jail and shall not afterwards be retaken, the court shall order the witnesses to be paid.

Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253.

For additional annotations on this subject, see under section 1283. Where judge below orders insolvent prosecutor to pay costs and he fails or is unable to pay, county in which offense committed is liable for same: Pegram v. Comrs., 75-120; State v. Wheeler, 141-777; Guilford v. Comrs., 120-28;

Tickets given out by clerks in state cases are only evidence of witnesses attendance, and, until judge passes upon costs, and by whom it is to be paid, county not responsible: Moore v. Comrs., 70-340.

Where nol pros entered as to murder in first degree, state's witnesses subsequently attending trial entitled to only half fees: Coward v. Comrs., 137-299.

Witnesses are entitled to compensation where bill is sent to grand jury with names of those summoned indorsed thereon as sworn and sent: Lewis v. Comrs., 74-194.

To tax county with cost in criminal action where defendant is convicted the trial judge must find that defendant is unable to pay it: Coward v. Comrs., 137-299.

1290. When county pays defendant's witnesses. When the defendant shall be acquitted, a nolle prosequi entered, or judgment against him arrested, and it shall be made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpœnaed, bound or recognized, in attendance, and that they were necessary for his defense, it shall be the duty of the court, unless the prosecutor be adjudged to pay the costs, to make and file an order in the cause directing that said witness be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases.

Code, s. 747; 1879, c. 264; 1881, c. 312. **This section, collated and construed with sections 1283, 1303 and 1306, places it in discretion of judge to refuse to direct fees of witnesses for state or acquitted defendant, in whole or in part, to be paid by county, and his decision not reviewable:** State v. Hicks, 124-829.

The constitution exempts an acquitted defendant from payment of necessary witness fees of defense, but does not require them to be paid by public: Ibid.

The provision of this section does not extend to a case where indictment quashed: State v. Massey, 104-877.

The provision of the constitution forbidding any defendant being taxed with cost of necessary witnesses summoned by him unless found guilty does not, ex vi termini, authorize such costs to be taxed against the county: Ibid.

Liability of county for defendant's witnesses is restricted to same cases in which county responsible for half fees to officers, except that county is not liable to defendant's witnesses where he is convicted and is unable to pay: Guilford v. Comrs., 120-23.

Where a prisoner was convicted but afterwards was acquitted upon a new trial, payment of witnesses at both trials was properly taxed against county: State v. Horne, 119-853.

It seems that an acquitted defendant's costs for witnesses can be taxed against a county only in those cases where a private prosecutor may be taxed with them: State v. Massey, 104-877.

Old cases in which there are several defendants and some acquitted, those acquitted entitled to their costs: Stockstill v. Shuford, 5-39; Harriss v. Lee, 46-226.

1290a. Assignor of witness ticket to indorse amount received therefor. Whenever any person shall prove a ticket as a witness in any criminal action, wherein either Union, Anson, Rutherford, Gaston, Forsyth, Robeson or Surry county shall be adjudged to pay the cost or any part thereof, and such person shall sell or assign the same to any other person, firm or corporation, he shall state on

the back of the ticket the amount which he shall receive from the assignee named for such sale or assignment, and the assignee shall make an affidavit of the truthfulness of such amount as stated in the endorsement of sale.

1907, c. 120.

1290b. Assignee receives what he paid with ten per cent. It shall be unlawful for any assignee of any ticket proved in a criminal action, wherein either Union, Anson, Rutherford, Gaston, Forsyth, Robeson or Surry county is or shall be adjudged to pay the cost thereof, to receive from the county any greater sum than the amount paid by such person, firm or corporation, with ten per cent. added to the amount received by the person proving the ticket.

1907, c. 120, s. 2.

1290c. Tickets not properly indorsed not charged against county. It shall be the duty of the clerks of the superior courts of the counties of Union, Anson, Rutherford, Gaston, Forsyth, Robeson, and Surry, in making out the bills of cost which shall be adjudged against their respective counties for payment, to examine carefully all witness tickets, and whenever any ticket shall fail to show the amount paid for any transfer, sale or assignment properly endorsed on said ticket, and sworn to, as provided in section one thousand two hundred and ninety (a), they shall not tax the same against the county for payment.

1907, c. 120, s. 3.

1290d. Collecting from county greater amount than allowed by preceding sections, misdemeanor. If any person shall collect from either Union, Anson, Rutherford, Gaston, Forsyth, Robeson or Surry county a sum greater than the amount received by the person proving any witness ticket issued in a criminal action wherein either of such counties shall be adjudged to pay the costs or any part thereof, with ten per cent. added thereto, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined double the amount so collected by him, not exceeding the sum of fifty dollars, or imprisoned not more than thirty days.

1907, c. 120, s. 4.

VI. Liability of Defendant in Criminal Actions.

1291. When defendant pays. Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution.

Code, s. 1211; R. C., c. 35, s. 46.

Pardon does not exempt one from payment of officer's cost: State v. Mooney, 74-98; but see State v. Underwood, 64-599.

The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include costs of defendant in his defense: State v. Wallin, 89-578.

A witness for defendant has no right to have his ticket for attendance allowed in the bill of costs of the prosecution with which defendant is taxed: Ibid—for it is a personal debt of defendant which witness may enforce by execution in the cause, Ibid.

Defendant liable for witness fees for entire time where nol pros entered and another indictment for same offense later returned, witnesses never having been discharged: State v. Hashaw, 4-230.

Expenses of transporting criminal insane person no part of costs of prosecution: Neal v. Comrs., 85-420.

Fees due officers are vested rights and are not discharged when defendant receives unconditional pardon after conviction and sentence: State v. Mooney, 74-98; but see State v. Underwood, 64-599.

The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to them: State v. Crook, 115-765.

Costs constitute no part of the punishment in criminal actions, though the payment of them may be considered in mitigation of sentence: Ibid.

Where judgment is directed by supreme court to be entered in lower court for punishment and costs, and at succeeding term judgment only for punishment entered, judgment may be entered at subsequent term nunc pro tunc for costs also against defendant and his sureties on his appeal to supreme court: State v. Patterson, 27-89.

Cases illustrating how insolvents are discharged: State v. McNeely, 92-829; State v. Miller, 97-451; State v. Williams, 97-414; State v. Davis, 82-610.

1292. Defendant imprisoned, detained until cost paid. If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison after the expiration of the fixed time for his imprisonment until the costs shall be paid, or until he shall otherwise be discharged according to law.

Code, s. 905; 1868-9, c. 178.

1293. Confession of judgments to secure fine and cost. In cases where a court, mayor or a justice of the peace permits a defendant convicted of any criminal offense, to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid.

Code, s. 749; 1885, c. 364; 1879, c. 264.

151-687

1294. Defendant failing to pay, may be arrested. In default of payment of such fine and costs, it shall be the duty of the court at any subsequent term thereof on motion of the solicitor of the state to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law. 151-687

Code, s. 750; 1885, c. 364; 1879, c. 264.

VII. The Prosecutor.

1295. Who is prosecutor; when pays costs. In all criminal actions, if the defendant be acquitted, nolle prosequi entered, judgment against him arrested, or if the defendant shall be discharged from arrest for want of probable cause, the costs, including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment shall have been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record.

Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49.

When prosecution frivolous and malicious, prosecutor must pay cost: State v. Butts, 134-607; State v. Jones, 117-768; State v. Baker, 114-812; State v. Lance, 109-789; State v. Carlton, 107-958; State v. Roberts, 106-662; State v. Hamilton, 106-660; State v. Dunn, 95-697; State v. Powell, 86-640; State v. Adams, 85-560; State v. Norwood, 84-794, State v. Cannady, 78-541; State v. Darr, 63-516. **Legislature has power to prescribe that prosecutor pay cost when prosecution frivolous or malicious:** State v. Cannady, 78-541. **Prosecution in peace warrant failing to pay cost where prosecution frivolous or malicious can be imprisoned:** Ibid.

Prosecutor insolvent and failing to pay costs, county liable: Pegram v. Comrs., 75-120. **Justice's judgment taxing prosecutor with cost is appealable:** State v. Byrd, 93-627; State v. Powell, 86-640. **Prosecutor can not be taxed with cost where "not a true bill" is found:** State v. Horton, 89-581—**or where grand jury ignores the bill,** State v. Gates, 107-832.

Error to tax costs of denfendant's witness against prosecutor on a finding that prosecution was malicious and not for public good in the absence of a finding that the witnesses were proper for the defense: State v. Jones, 117-768. **Prosecutor of an action "not for the public interest" properly adjudged to pay cost:** State v. Baker, 114-812.

State can not appeal from refusal of judge to mark one as prosecutor: State v. Moore, 84-724.

As to when prosecutor can be adjudged to pay cost in a magistrate's court, see State v. Carlton, 107-958. **Solicitor's fee can not be charged against prosecutor:** State v. Dunn, 95-697.

For notice to party of motion to mark him as prosecutor, see State v. Jones, 117-768; State v. Hamilton, 106-660; State v. Norwood, 84-794; State v. Hughes, 83-665; State v. Crosset, 81-579. **The court may order ex mero motu that prosecutor be taxed with cost:** State v. Adams, 85-560. **One marked as prosecutor has notice of all subsequent proceedings, and he can not make motion to set aside irregular judgment against him for costs after a year:** State v. Horton, 89-581; see also State v. Spencer, 81-519; State v. Owens, 87-565.

Prosecutor can be marked, upon notice given, after prosecution ended: State v. Jones, 117-772; State v. Hughes, 83-665—**or, upon motion and notice to show cause, at a subsequent term,** State v. Sanders, 111-700—**and where he was present attending trial, judgment for costs may be entered in his absence where he left the court room before judgment,** State v. Owens, 87-565; State v. Spencer, 81-519. **Formerly the name of prosecutor had to be marked on bill before being sent to grand jury, but now it can be marked after acquittal, upon motion and notice:** State v Hughes, 83-665.

FINDINGS OF FACT. Prosecutor should not be taxed with cost without a previous finding of fact by court: State v. Roberts, 106-662.

Where taxation of costs could not be sustained because of failure to find prerequisite facts, new motion could be made several terms later: State v. Sanders, 111-702.

The findings by the judge below that prosecution was frivolous and malicious is conclusive and will support a judgment that prosecutor pay costs or in default thereof be imprisoned: State v. Lance, 109-789; State v. Carlton, 107-958; State v. Hamilton, 106-660; State v. Dunn, 95-697; State v. Adams, 85-560; State v. Norwood, 84-794; but see State v. Powell, 86-640. **Before defendant's witnesses can be taxed against prosecutor, a finding that they were proper for the defense must be made:** State v. Jones, 117-768.

1296. Pay of witnesses in criminal cases. All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant, only upon conviction, confession or submission; and if the defendant be acquitted on any charge of an inferior nature, or a nolle prosequi be entered thereto, the court shall order the prosecutor to pay the costs, if such prosecution shall

appear to have been frivolous or malicious; but if the court shall be of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request.

Code, s. 1204; R. C., c. 35, s. 37; 1800, c. 558, s. 1; 1879, c. 49; 1879, c. 92, s. 3; 1881, c. 176. **For fees of witnesses, see sections 2803 and 2804. As to when defendant pays witnesses, see section 1291. As to when prosecutor pays cost, see section 1295. As to when county pays state's witnesses, see sections 1283 and 1289—pays defendant's witnesses, see section 1290.**

1297. When imprisoned for. Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the nonpayment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious.

Code, s. 738; R. C., c. 35, s. 37; 1800, c. 558; 1879, c. 49; 1881, c. 176. **For annotations as to when prosecutor pays cost, see under 1295. Costs of prosecution is not a debt within the constitutional inhibition against imprisonment for debt:** State v. Wallin, 89-578; State v. Cannady, 78-539—**and a prosecutor failing to pay costs adjudged against him may be imprisoned where court finds that prosecution was frivolous or malicious:** State v. Lance, 109-789; State v. Carlton, 107-956; State v. Roberts, 106-662; State v. Wallin, 89-578; State v. Cannady, 78-539.

VIII. Witnesses.

1298. Not entitled to, in advance. Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the state or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned, shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may due, for travelling to the place of examination, and for the number of days of attendance.

Code, s. 1368; 1868-9, c. 279, subsec. 11, s. 3. **For fees of witnesses, see sections 2803, 2804. Pauper must pay his witnesses:** Booshee v. Surles, 85-91; Bailey v. Brown, 105-129. **Witnesses in civil case, except for state or municipal corporation, refused compensation, need not attend but one day:** State v. Massey, 104-881; see also Carter v. Wood, 33-22. **Witness can not be summoned before grand jury when mere matter of inquiry; he is entitled to fees when indorsed on bill as sworn and sent:** Lewis v. Comrs., 74-194. **Witness tickets are merely evidence of attendance:** Moore v. Comrs., 70-340.

1299. Must prove attendance; may recover therefor. Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for travelling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the state and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered.

Code, s. 1369; R. C., c. 31, s. 73; 1777, c. 115, s. 46; 1796, c. 458; 1868-9, c. 279, subchap. 11, ss. 2, 4. **A witness not subpœnaed can not charge the losing party:** Stern v. Herren, 101-516; Thompson v. Hodges, 10-318—**nor can witness who is a non-resident, though subpœnaed, charge mileage even if he attends,** Ibid—**and witnesses subpœnaed can not be charged against losing party unless examined or sworn and tendered,** Moore v. Guano Co., 136-248; Sitton v. Lumber Co., 135-540; Cureton v. Garrison, 111-271; but see Herring v. R. R., 144-208; Loftis v. Baxter, 66-340—**except when nonsuit taken,** Henderson v. Williams, 120-339. **Only two witnesses to a material point can be charged losing party:** State v. Wheeler, 141-777; Ex parte Beckwith, 124-115; State v. Massey, 104-881—**except in action of slander, where more can prove in court's discretion,** Holmes v. Johnson, 33-55—**also except where "value" is to be proven,** Ex parte Beckwith, 124-111.

All witnesses may recover from the party who subpœnaed them: Sutton v. Lumber Co., 135-540; Cureton v. Garrison, 111-271; Office v. Lockman, 12-146—**but they must prove their attendance before the clerk and get a ticket each term,** Thompson v. Hodges, 10-318; see Moore v. Islar, 1-81—**which ticket is sufficient evidence in court upon which to recover judgment against party cast or against party who subpœnaed witness, if party cast is insolvent, the statute making it presumptive evidence of the attendance, for whom, how long, for how much, and miles travelled,** Deaver v. Comrs., 80-116; Belden v. Snead, 84-243.

Witness is not at liberty after final judgment to withdraw his witness ticket and sue upon it. His fees for attendance should be taxed and collected with other costs against party adjudged to pay, if solvent, and if not, then the party who summoned and required his testimony is responsible: Belden v. Snead, 84-243; Carter v. Wood, 33-22.

One can not recover for attendance of an incompetent witness: Keith v. Goodwin, 51-398.

Witnesses for the losing party receive no pay unless he is solvent, and witnesses for state in criminal actions where convicted party in insolvent, receive only half pay: State v. Wheeler, 141-777.

Where material witness theretofore present is absent at trial for suffi-

cient cause, he may be taxed against losing party: Loftis v. Baxter, 66-340 cited in Herring v. R. R., 144-208; see also Carpenter v. Taylor, 4-689.

1300. Tickets filed with clerk; only two to prove same fact. At the court where the cause shall be finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact.

Code, s. 1370; R. C., c. 31, s. 74; 1783, c. 189, s. 3; 1796, c. 458, s. 2.

For further annotations, see under section 1299. Where a party is apprehensive that clerk will err in taxation of costs he should move court for special directions to the officer as to taxing costs: Wooley v. Robinson, 52-30.

Witness ticket omitted, may, after notice and motion, be charged, and execution issued therefor: Tate v. Kincade, 9-334.

Only two witnesses to a material fact subpœnaed by the prevailing party can be charged against losing party: State v. Wheeler, 141-777; Ex parte Beckwith, 124-115; State v. Massey, 104-877—except in action of slander where more than two can prove in the discretion of the court, Holmes v. Johnson, 33-55—and where value is to be proven: Ex parte Beckwith, 124-111.

For witness tickets as evidence, see Deaver v. Comrs., 116-80; Belden v. Snead, 84-243; Moore v. Comrs., 70-340.

Where case in Rowan removed to Iredell county for trial, but returned to original court for some cause and then removed to Cabarrus, costs of officers and witnesses in Iredell court properly taxable by clerk: Boyden v. Williams, 84-608.

1301. Pay of, before jury of view or commissioner. Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning.

Code, s. 1365; R. C., c. 31, s. 67; 1805, c. 685; 1848, c. 66; 1850, c. 188, s. 3.

1302. When witness before grand jury. No witness shall receive pay for attendance in a criminal case before a grand jury unless such witness shall have been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or shall have been bound or recognized by some justice of the peace to appear before the grand jury.

Code, s. 743; 1879, c. 264. **Grand jury has no right to summon witnesses to appear before them except by permission of foreman or of solicitor:** State v. Wilcox, 104-847.

1303. State's paid, when; only two paid; one attendance, one day. No person shall receive pay as a witness for the state on the trial of any criminal action unless such person shall have been summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, shall otherwise direct. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day.

Code, s. 744; 1871-2, c. 186; 1879, c. 264. **For the history of taxation of witness fees,** see State v. Massey, 104-877. **As to when county pays state's witnesses, see sections 1283 and 1289 and annotations thereunder.**

This section, construed along with sections 1283, 1290 and 1303, places it in discretion of judge to refuse to direct fees of state's witnesses to be paid by county, and from his decision there is no appeal: State v. Hicks, 124-829; State v. Ray, 122-1095—**unless he bases the decision upon want of power,** In re Smith, 105-167. **Where several actions consolidated and judgment rendered against both parties for their costs in each case, witnesses subpœnaed were entitled to prove but one attendance and in one action and but one bill of costs could be taxed:** Mills Co. v. Lytle, 118-837.

1304. Only two bound over on appeal in criminal action. When the defendant shall appeal from the judgment of the justice of the peace, in any criminal action, it shall be the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal,

unless additional witnesses shall be summoned by order of the appellate court as provided in the preceding section.

Code, s. 745; 1879, c. 264. **Where, on appeal from justice's court, in a matter where justice had final jurisdiction, nol pros entered, county does not pay cost:** State v. Shuffler, 119-867.

1305. How discharged; certificate of attendance filed. It shall be the duty of all solicitors prosecuting in the several courts, as each criminal prosecution shall be disposed of by trial, removal, continuance or otherwise, to call and discharge the witnesses for the state, either finally or otherwise, as the disposition of the case may require; and he shall thereupon file with the clerk of the court a certificate giving the names of the witnesses entitled to prove their attendance, with the date of their discharge. The said certificate shall be in the following or similar form, and blanks thereof shall be furnished to the solicitor by the clerk at the county expense, viz.:

North Carolina,.....County.

.....Court, ...Term, 19....

State v. .....

Witness .....

discharged.....day of.....19.... ....., Solicitor.

Code, s. 746; 1879, c. 264; 1881, c. 312.

1306. Not paid unless certified; discretion of judge. No county, prosecutor or defendant shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name be certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law: Provided, that the court, at any time within one year after judgment, may order that any witness may be paid, who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs.

Code, ss. 733, 748; 1879, c. 264; 1881, c. 312. **For additional annotations, see other sections in this subchapter on same subject.**

Judge may refuse fees to state's witnesses in his discretion: State v. Hicks, 124-837—**and such discretion not reviewable,** State v. Ray, 122-1095; State v. Massey, 104-878—**but whether costs rightly adjudged on particular item properly chargeable is reviewable,** State v. Horne, 119-853. **When defendant bound over to court case becomes proceeding of superior court and all the costs from beginning are governed accordingly:** Merrimon v. Comrs., 106-372.

IX. Criminal Costs Before Justices.

1307. Who pays in justice's court. The party convicted in a criminal action, or proceeding before a justice, shall always be adjudged to pay the costs; and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding of which he has final jurisdiction, commenced or tried in a court of a justice of the peace, shall the county be liable to pay any costs.

Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176. **The law as to costs in criminal cases before magistrates stated** in Merrimon v. Comrs., 106-369.

Costs in cases where magistrates have jurisdiction can not be taxed against county: State v. Butts, 134-608; State v. Morgan, 120-565; Guilford v. Comrs., 120-27; State v. Carlton, 107-956; Merrimon v. Comrs., 106-369.

Complainant prosecutor shall be adjudged to pay the cost and imprisoned for nonpayment thereof if the court finds the prosecution frivolous or malicious: State v. Butts, 134-607; State v. Jones, 117-768; State v. Carlton, 107-956; State v. Lance, 109-789; State v. Roberts, 106-662; Merrimon v. Comrs., 106-369; State v. Dunn, 95-697; State v. Powell, 86-640; State v. Adams, 85-560; State v. Norwood, 84-794; State v. Murdock, 85-598—**from which judgment prosecutor may appeal,** State v. Morgan, 120-563.

1308. Defendant imprisoned for. If the justice shall sentence the party found by him to be guilty to pay a fine and costs, and the same shall not be immediately paid, the justice shall commit the guilty person to the county jail until the same shall be paid, or until he shall be otherwise discharged according to law.

Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15. **Defendant convicted may be imprisoned for failure to pay costs:** Merrimon v. Comrs., 106-369.

NOTE. For costs in taking depositions to be used in another state, see section 1655.

For costs of advertising for creditors of deceased person, see section 39.

For fees to clerk superior court for issuing orders, etc., in guardianship matters, see section 1797.

For security for costs, see sections 450, 453.

For execution for costs in supreme court, see chapter Courts—Supreme.

For costs in bastardy cases, see sections 254, 255—in actions against guardians, see section 1797—in habeas corpus proceedings, see section 1859—in foreclosing liens, see chapter Liens—in draining lowlands, see chapter Drainage—when plaintiff refuses to accept tender of judgment, and fails to recover more, see section 850—in pauper suits, see section 451; in actions between landlord and tenant, see chapter Landlord and Tenant—in actions to establish public mills, see chapter Mills—in partition proceedings, see chapter Partition—in actions for forfeiture of corporate charter, see section 1210.

CHAPTER 23.

COUNTY COMMISSIONERS.

I. General Provisions.

1309. Body politic; powers exercised by commissioners. Every county is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no others; which powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them.

Code, ss. 702, 703; 1868, c. 20, ss. 1, 2; 1876-7; c. 141, s. 1.

COUNTIES GENERALLY. The political and legal relation of counties; their creation, organization, division, enlargement; legislative provision for taxes and payment of public debt: Jones v. Comrs., 143-59; Prichard v. Comrs., 126-908; Tate v. Comrs., 122-812; Harris v. Wright, 121-172; Manuel v. Comrs., 98-9; Dare Co. v. Currituck Co., 95-189; McCormac v. Robeson Co., 90-445; White v. Chowan Co., 90-438; Watson v. Comrs., 82-17; Comrs. of Currituck v. Comrs. of Dare, 79-565; Hill v. Comrs., 67-367; Manly v. Raleigh, 57-370; Taylor v. Comrs., 55-141; Love v. Schenck, 34-304; Mills v. Williams, 33-558; State v. Jones, 23-414. **Distinction between counties and municipal corporations such as cities and towns discussed** in Manuel v. Comrs., 98-11, and cases cited; but see Winslow v. Comrs., 64-220.

POWERS OF COUNTIES GENERALLY. Shall have those "prescribed by statute:" Manuel v. Comrs., 98-11; Dare Co. v. Currituck Co., 95-191; McCormac v. Comrs., 90-447; Gooch v. Gregory, 65-143—**and must be strictly construed,** Vaughn v. Comrs., 118-641. **Implied powers restricted to the doing of that which is necessary to the complete exercise of the express powers:** Vaughn v. Comrs., 118-641. **Powers of county are exercised by county commissioners:** Cotton Mills v. Comrs., 108-681; Dare Co. v. Currituck Co., 95-191; State v. Hargrave, 103-335. **For specific powers of counties and of county commissioners, see sections 1310, 1318.**

Legislature can direct counties to do whatever it can empower them to do: Tate v. Comrs., 122-812.

1310. Corporate powers. A county is authorized—

A county's powers are such as are given by statute, see section 1309.

1. To sue and be sued in the name of the county.

Rights of action against counties are ordinarily such only as are given by statute: Hitch v. Comrs., 132-573; Jones v. Comrs., 130-451; Moody v. State's Prison, 128-16; Bell v. Comrs., 127-85; Prichard v. Comrs., 126-912; Threadgill v. Comrs., 99-352; Manuel v. Comrs., 98-9; White v. Comrs., 90-437; Winslow v. Comrs., 64-218. **Counties are sued through the commissioners:** State v. Hargrove, 103-328; State v. Wilkerson, 98-701; Wins-

low v. Comrs., 64-218 (**but note that since these decisions this subsection has been amended**). **Counties have corporate capacity to sue and be sued:** Comrs. v. Comrs., 107-297. **A county is never liable for tort:** Moffitt v. Asheville, 103-258; White v. Comrs., 90-437. **Commissioners must be sued in their own county:** Steele v. Comrs., 70-137.

2. To purchase and hold lands within its limits and for the use of its inhabitants, subject to the supervision of the general assembly.

3. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its powers.

See generally the powers and duties of the county commissioners, section 1318.

4. To make such orders for the disposition or use of its property as the interests of its inhabitants require.

Code, s. 704; 1868, c. 20, s. 3.

For power to purchase land at public sales, see s. 2916. See Vaughn v. Comrs., 118-636.

II. Election of.

Acts 1909 Ch. 68 Ch. 225 Ch. 352

1311. By qualified voters; number. There shall be elected in each county of the state, except those mentioned in section one thousand three hundred and twelve, at the general election to be held in the year one thousand eight hundred and ninety-six, and every two years thereafter, by the duly qualified electors thereof, three persons to be chosen from the body of the county, who shall be styled "the board of commissioners for the county of....." and shall hold their office for two years from date of their qualification and until their successors shall be elected and qualified: Provided, the number of commissioners shall be five instead of three in the counties of Alamance, Bertie, Buncombe, Cabarrus, Carteret, Catawba, Chowan, Columbus, Craven, Cumberland, Durham, Edgecombe, Franklin, Granville, Guilford, Halifax, Harnett, Hertford, Iredell, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, New Hanover, Northampton, Pasquotank, Perquimans, Richmond, Robeson, Rockingham, Rowan, Tyrrell, Vance, Warren, Wayne and Wilson; and in the county of Beaufort seven. In the county of Gaston six, one of whom must be a resident of Dallas township, one a resident of Gastonia township, one a resident of River Bend township, one a resident of South Point township, one a resident of Crowder's Mountain township and one a resident of Cherryville township. If at any time said board of commissioners for the county of Gaston shall be equally divided upon any question pending before them and there shall be a tie vote, then and in that event the clerk of said board is authorized and empowered to cast the

deciding vote and to determine such question. At the general election to be held in the year one thousand nine hundred and eight there shall be elected in the county of Wake by the duly qualified voters thereof five commissioners, divided into two classes, three of whom shall compose one class, whose term of office shall commence on the first Monday in December, one thousand nine hundred and eight, and expire at the end of two years thereafter, or on the first Monday in December, one thousand nine hundred and ten; and two of whom shall compose another class, whose term of office shall commence on the first Monday in December, one thousand nine hundred and eight, and expire four years thereafter, or on the first Monday in December, one thousand nine hundred and twelve; and upon the expiration of the term of office of both classes of said commissioners, their successors shall be elected and hold office four years and until their successors are elected and qualified.

1895, c. 135, s. 4; 1899, cc. 103, 147, 153, 187, 297, 301, 346, 450, 467, 609; 1901, cc. 14, 60, 328, 330, 581; 1903, cc. 4, 7, 14, 36, 46, 59, 137, 203, 206, 207, 228, 265, 446, 515, 790; 1905, cc. 58, 73, 148, 338, 346, 397, 553; 1907, cc. 2, 16, 55, 61, 125, 291, 350.

1312. By justices of peace. The justices of the peace for Montgomery county on the first Monday in June, one thousand nine hundred and five and on the first Monday in June every two years thereafter, shall assemble at the courthouse of said county, and a majority being present, shall proceed to the election of not less than three nor more than five persons, to be chosen from the body of the county, excluding the justices themselves, who shall be styled "the board of commissioners for the county of Montgomery," and shall hold their offices for two years from the date of their qualification, and until their successors shall be elected and qualified.

Code, s. 716; 1899, c. 488; 1887, c. 307; 1903, cc. 191, 207, 790; 1876-7; c. 141, s. 5; 1905, cc. 37, 44, 58, 73, 148, 340, 422; 1907, c. 61. **A majority of a majority sufficient to elect:** Cotton Mills v. Comrs., 108-682; see also concurring opinion of Merrimon, C. J., on page 692.

1313. Meetings of justices of the peace in certain counties. For the proper discharge of their duties, the justices of the peace shall meet annually with the board of commissioners on the first Monday in June, unless they shall be oftener convened by the board of commissioners, which is empowered to call together the justices of the peace not oftener than once in three months. For attending such meetings, the justices of the peace shall receive no compensation; but they shall keep a record of their meetings. The register of deeds shall be ex officio the clerk of the justices of the peace,

and he shall receive such compensation for his services as the board of commissioners shall provide. This section shall apply only to the county of Vance.

Code, s. 717; 1899, c. 488; 1901, c. 680; 1903, cc. 191, 40, 207, 790; 1876-7, c. 141, s. 5; 1905, cc. 37, 44, 58, 73, 148, 340. **This joint meeting is a court of record:** Guilford v. Georgia Co., 112-36. **Meetings can not take place more than once in three months:** Moore v. Comrs., 113-128; Cotton Mills v. Comrs., 108-682—**and must be called by commissioners,** Ibid.

A concurrence of a majority of the justices of the peace is expressly required only whenever taxes are to be levied, debts contracted and obligations incurred. In other matters, whenever they cooperate with commissioners a majority of a majority is sufficient: Cotton Mills v. Comrs., 108-692 (concurring opinion of Merrimon, C. J.).

1314. Vacancies in board, how filled. In case of a vacancy occurring in the board of commissioners of a county, the clerk of the superior court for the county shall appoint to said office for the unexpired term.

Code, s. 719; 1895, c. 135, s. 7.

1316. When board to qualify; oath to be filed. The board of commissioners shall qualify and enter upon the duties of their office on the first Monday of December next succeeding their election, and they may take the oaths of office before the clerk of the superior court, or some judge, or justice of the peace or other person qualified by law to administer oaths. The oaths of office severally taken and subscribed by them shall be deposited with the clerk of the superior court.

Code, s. 708; 1895, c. 135, s. 4. **De facto board of commissioners exercise all appropriate functions until new board qualifies:** Jones v. Jones, 80-127.

Necessity of taking oath of office: Worthy v. Barrett, 63-199.

III. Meetings.

1317. Meetings of the board. The board of commissioners in each county shall hold a regular meeting at the courthouse, on the first Mondays in December and June. Special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days. Meetings may be held at other times for the more convenient dispatch of business at the call of the chairman, on the written request of one member of the board, but public notice of the time and place of all such called meetings shall be posted at the courthouse door for not less than six days, and published one time in a county newspaper, if there is one. The board shall receive no compensation for attending such called meet-

ings. The board may adjourn its regular meetings in December and June from day to day until the business before it is disposed of. Every meeting shall be open to all persons. A majority of the board shall constitute a quorum. At each regular December meeting the board shall choose one of its members as chairman for the ensuing year; in his absence the members present shall choose a temporary chairman.

Code, s. 706. **Meetings in certain counties are governed by special laws as follows: Mecklenburg, 1893, c. 199; Clay, 1889, c. 184; Forsyth, 1897, c. 437; Wake, 1899, c. 297; Durham, 1901, c. 309; Edgecombe, 1901, c. 429; Gaston, 1903, c. 34; Union, 1907, c. 347.**

For compensation of commissioners, see section 2785. County commissioners are not prohibited from meeting on other day than specified, after giving notice to all concerned, but they can not get compensation: People v. Green, 75-329; but see section 2785 where **in certain counties they are compensated.**

IV. Powers and Duties.

1318. Powers given board. The board of commissioners of the several counties shall have power—

Has only those powers conferred by statute: Fidelity Co. v. Fleming, 132-337. **Court has jurisdiction to compel commissioners to perform their duty:** Comrs. v. Comrs., 107-291; also Jones v. Comrs., 137-579. **Succeeding commissioners must obey mandamus issued against predecessors:** Pegram v. Comrs., 65-114. **Mandamus lies to compel commissioners to issue bonds when required by the legislature:** Jones v. Comrs., 137-579. **Statutes embracing words "authorize and empower" when mandatory on commissioners:** Ibid. **As to powers exercised jointly with justices, see sections 1313, 1319;** also Cotton Mills v. Comrs., 108-678, 692. **Not fraudulent for commissioners to lend their personal credit to county, when:** Long v. Comrs., 76-278.

Commissioners are responsible for failure to exercise their powers as to the public buildings and property of the county: Threadgill v. Comrs., 99-352; Moffitt v. Asheville, 103-258—**or bridges and highways,** White v Comrs., 90-437. **County commissioners' liability defined generally:** Staton v. Wimberly, 122-107.

A majority of the governing body of a county can exercise its powers: Cotton Mills v. Comrs., 108-678; see Comrs. v. Trust Co., 143-115. **Commissioners can not defend mandamus for tax levy on ground that claim is void:** Bear v. Comrs., 122-434.

1. TO EXEMPT FROM CAPITATION TAX.

To exempt from capitation tax in special cases, on account of poverty and infirmity.

2. TO PROVIDE FOR THE PAYMENT OF DEBT.

To provide by taxation or otherwise, for the prompt and regular payment, with interest, of any existing debt owing by any county.

To provide for debt incurred for necessities no legislative authority necessary, unless constitutional limit is reached: Smathers v. Comrs., 125-487; Herring v. Dixon, 122-420; McCless v. Meekins, 117-34; Cromartie v. Comrs., 87-139. **No election need be held when debt incurred for necessaries:** Smathers v. Comrs., 125-487; McCless v. Meekins, 117-34; Herring v. Dixon, 122-420; Tate v. Comrs., 122-812; Tucker v. Raleigh, 75-267—**and this is so even when constitutional limit exceeded, if legislature authorizes,** Herring v. Dixon, 122-420—**but if debt is not for necessaries, legislature must authorize levy and people must vote it,** Ibid; also Cotton Mills v. Waxhaw, 130-298; Tate v. Comrs., 122-812.

Mandamus lies to compel commissioners to pay debt: Hughes v. Comrs., 107-598; Fry v. Comrs., 82-304; Gas Co. v. Raleigh, 75-274; McLendon v. Comrs., 71-38; Lutterloh v. Comrs., 65-403; Pegram v. Comrs., 64-557; Winslow v. Comrs., 64-223—**but it will not warrant commissioners levying tax in manner or at times other than law specifies:** Mauney v. Comrs., 71-486; Cromartie v. Comrs., 87-139. **As to levying of taxes generally, see subsection 25. As to issuing of bonds for necessary expenses, see under subsection 27.**

3. TO SUBMIT PROPOSITIONS TO CONTRACT DEBT TO A VOTE OF ELECTORS.

To submit to a vote of the qualified electors in the county, after having obtained the approval of the general assembly, any proposition to contract a debt, or loan the credit of the county, under section seven, article seven, of the constitution; to order the time for voting upon such proposition, which shall be upon public notice thereof at one or more places in each township in the county, and publication in one or more county newspapers, if there be any, for three months next immediately preceding the time fixed on; and such election shall take place and be conducted under the laws as prescribed for the election of members of the general assembly; and the commissioners shall provide for giving effect, in case of the adoption of the proposition, to the expressed will of a majority of the qualified voters in such election.

As to who are qualified voters, see annotations under section 2974.

In all elections in municipal corporations, (word "municipal" intending to include counties) as to incurring debt for special purposes, a majority of the qualified voters is necessary before incurring same: R. R. v. Comrs., 109-159; Riggsbee v. Durham, 99-341, 98-81; Wood v. Oxford, 97-227; McDowell v. Construction Co., 96-514; Markham v. Manning, 96 132; Duke v. Brown, 96-127; Southerland v. Goldsboro, 96-49.

Public schools not being a necessary expense, special county taxes for their support can not be levied except after approval of majority of qualified voters, inferred from Rodman v. Washington, 122-39.

Where debt contracted for purposes other than necessaries, legislature must authorize levy and people must approve it in election, even though the constitutional limitation not reached: Cotton Mills v. Waxhaw, 130-298; Herring v. Dixon, 122-420; Tate v. Comrs., 122-812.

Where legislature authorizes election for issuing bonds for necessary expenses it must be held; but, if it does not so authorize, it is not to be held: Black v. Comrs., 129-121.

As to validity of bond election for special purposes when there is a defect in passage of act authorizing: Comrs. v. Trust Co., 143-110; Graves v. Comrs., 135-49; Cotton Mills v. Waxhaw, 130-293; Comrs. v. DeRossett, 129-275; Comrs. v. Snuggs, 121-394; Bank v. Comrs., 119-214; Comrs. v Payne, 123-432; Comrs. v. Call, 123-308; Charlotte v. Shepard, 122-602—when return indicated a "majority of votes cast" instead of "majority of qualified voters:" R. R. v. Comrs., 109-159—or when there are other irregularities, Jones v. Comrs., 107-248.

Where bonds properly authorized and issued, commissioners have implied power to levy tax to pay off: Charlotte v. Shepard, 122-602—overruling same case in 120-411.

Townships may subscribe for capital stock of railroad by consent of a majority of the qualified voters, after legislature authorizes: Jones v. Comrs., 107-248; Brown v. Comrs., 100-92; Wood v. Oxford, 97-227—but county commissioners can not order such election nor issue bonds on the credit of a township under section 2558: Graves v. Comrs., 135-57.

Where a township voted and issued bonds for a railroad, the legislature can require county commissioners to apply taxes from the railroad property in that township to the building of bridges, schoolhouses, etc., in such township until entire fund is repaid the township: Jones v. Comrs., 143-59.

Where commissioners authorized to issue bonds, they have sole power to determine whether conditions hereunder have been complied with: Belo v. Comrs., 76-489—and a finding of court below that majority of qualified voters approve bonds is conclusive, Norment v. Charlotte, 85-387.

4. TO MAKE ORDERS RESPECTING CORPORATE PROPERTY.

To make such orders respecting the corporate property of the county as may be deemed expedient.

County commissioners' liability for failing to make proper orders for the repairing of buildings outlined in Moffitt v. Asheville, 103-258—and failing to protect health of prisoners, Moffitt v. Asheville, 103-237—and for failing to have privy cleaned, Threadgill v. Comrs., 99-355.

5. TO AUDIT ACCOUNTS.

To audit accounts against the county, and direct the raising of the moneys necessary to defray them.

Commissioners must audit claims at regular meetings: Bank v. Warlick, 125-594—but must first have them itemized and verified, Turner v. McKee, 137-251. Civil action proper to test rejected claim: Jones v. Comrs., 88-56.

6. TO PURCHASE PROPERTY FOR ANY PUBLIC BUILDING, AND AT EXECUTION SALE.

To purchase real property necessary for any public county building, and for the support of the poor; and to determine the site thereof, where it has not been already located; and to purchase land at any execution sale, when it shall be deemed expedient to do so, to secure a debt due the county. The deed shall be made to the county, and the board may, in its discretion, sell any lands so purchased.

As to locating public buildings, see subsection 28. Can only acquire and hold property for necessary public purposes and for benefit of all its citizens: Hughes v. Comrs., 107-598; Gooch v. Gregory, 65-142. **It is assumed that commissioners hold county property as trutees:** Threadgill v. Comrs., 99-355.

7. TO DIVIDE COUNTY INTO TOWNSHIPS.

To divide each county into convenient districts, called townships, and to determine the boundaries, and prescribe the names of said townships. A map and survey of said townships shall be filed in the office of the clerk of the board of commissioners, and also in the office of the secretary of state.

See subsection 30.

8. TO ORDER THE LAYING OUT, ALTERATION OR DISCONTINUING OF HIGHWAYS.

To exercise authority in laying out, altering, repairing and discontinuing highways; in establishing and settling ferries; in building and keeping up bridges; in laying off or discontinuing cartways; in providing draws in all bridges, where the same may be necessary for the convenient passage of vessels; in appointing overseers of highways; in excusing persons from working on the highways; in allowing and contracting for the building of toll-bridges, and taking bond from the builders thereof; and in licensing the erection of gates across highways. This authority shall be exercised under the rules, regulations, restrictions and penalties in all respects prescribed and imposed in the chapter entitled "Roads, Bridges, Ferries."

See chapter 65, "Roads, Bridges, Ferries."

Power of commissioners to establish ferries does not deprive legislature of that power: In re Spease Ferry, 138-219. **Legislature making it unlawful to operate a ferry within a certain distance of one established, is a limitation on power of commissioners:** Ibid. **Commissioners can not bind successors as to establishment of bridge:** Glenn v. Comrs., 139-412.

Public bridge or ferry must be part of public road: Greenleaf v. Comrs, 123-30; see also chapter 65, Roads, etc.

Commissioners can not delegate their powers hereunder; effect if they do: McPhail v. Comrs., 119-330.

Commissioners not liable for honest error of judgment in placing or refusing drawbridge: Staton v. Wimberly, 122-107.

Remedy of anyone injured by the erroneous discharge of duty hereunder by commissioners: McArthur v. McEachin, 64-454.

9. TO RAISE HIGHWAY MONEYS.

To raise by tax the necessary highway moneys, in such manner as may be prescribed by law.

This duty obligatory: Long v. Comrs., 76-278. **When specific fund provided, general fund can not be used:** Hornthall v. Comrs., 126-26.

10. TO APPOINT AN INSPECTOR OF HIGHWAYS AND BRIDGES.

To appoint an inspector of highways and bridges for the county, if deemed necessary; to fix and provide for his compensation and regulate his duties, not inconsistent with the laws of the state. The commissioners of two or more counties may unite in employing an inspector of highways and bridges, and appropriating his compensation between the respective counties as may be agreed upon.

11. TO PROVIDE FOR THE EMPLOYMENT OF PRISONERS.

To provide for the employment on the highway or public works in the county of all persons condemned to imprisonment with hard labor, and not sent to the penitentiary.

Can hire out prisoner to his wife under certain circumstances: State v. Shaft, 78-463.

12. TO APPOINT PROXIES TO REPRESENT COUNTY.

To appoint proxies to represent in any annual or other meeting, the shares or interest held by any county in a railroad company, or other corporation, under the charter of such corporation, or under any special acts of the general assembly, authorizing county subscriptions in such cases.

13. TO SELL OR LEASE REAL PROPERTY.

To sell or lease any real property of the county and to make deeds or leases for the same to any purchaser or lessee.

Question of mortgaging courthouse to pay contractors: Vaughn v. Comrs., 118-636. **Power to sell is not power to mortgage:** Ibid. **Taxpayer could**

restrain execution of mortgage: Ibid. **Majority of governing body of county can exercise power to sell, etc.:** Cotton Mills v. Comrs., 108-678.

14. TO PROVIDE FOR THE MAINTENANCE OF THE POOR.

To provide by tax for the maintenance, comfort and well-ordering of the poor; to employ, biennially, by public letting or otherwise, some compentent person as overseer of the poor, to institute proceedings by the warrant of the chairman against any person coming into the county who is likely to become chargeable thereto, and cause the removal of such poor person to the county where he was last legally settled; and to recover by action in the superior court from the said county, all the charges and expenses whatever, incurred for the maintenance or removal of such poor person.

Where tax levy for support of poor was deficient because commissioners levied tax to repair courthouse: Long v. Comrs., 76-273. **Anyone officiously providing for pauper can not recover of county:** Copple v. Comrs., 138-132. **Commissioners may require all paupers who are a county charge to go to home for aged and infirm:** Ibid.

Liability of county for support of pauper depends upon residence or settlement: Comrs. of Burke v. Comrs. of Buncombe, 101-520. **Commissioners may remove pauper to place of last legal settlement and recover therefor:** Ibid.

15. TO ESTABLISH PUBLIC HOSPITALS.

Laws 1909 c. 49

To establish public hospitals for the county in cases of necessity, and to make rules, regulations and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the state; and to raise by taxation the necessary moneys to defray the charges and expenses so incurred.

No action lies against commissioners in their corporate capacity for failing to establish hospital: Bell v. Comrs., 127-90. **Commissioners' power to prevent spread of contagious disease stated** in Prichard v. Comrs., 126-911.

16. TO PROCURE WEIGHTS AND MEASURES.

To procure for each county sealed weights and measures, according to the standard prescribed by the congress of the United States; and to elect a standard keeper, who shall qualify before the board and give bond approved by the board, as prescribed by law.

17. TO APPOINT COMMISSIONERS TO OPEN RIVERS AND CREEKS.

To appoint a commissioner to open and clear the rivers and creeks within the county, or where such river or creek forms a county

line or a part thereof. For this purpose the board is authorized to withdraw from the public roads such hands as may be deemed necessary, and allot them to such work under overseers and the direction of the commissioner. The board may impose the duties of this subdivision on the inspector of highways and bridges when appointed; and shall in all respects conduct the opening and clearing of such rivers and creeks as prescribed by law.

18. TO LICENSE PEDDLERS AND RETAILERS OF SPIRITUOUS LIQUORS.

To license peddlers and retailers of spirituous and other liquors as prescribed by law. No license shall be good for more than one year, nor granted to two or more persons to peddle as partners in trade. And the board of commissioners shall grant licenses for the sale of spirituous liquors to all persons possessing the qualifications required by law, except in those localities where the sale of spirituous liquors shall be prohibited by law.

See chapter on Liquors for prohibitory law abridging powers.

Mandamus will not lie to control discretion of commissioners hereunder: Howell v. Comrs., 135-26; Bridgers v. Comrs., 135-25; Barnes v. Comrs., 135-27; Mathis v. Comrs., 122-416; Jones v. Comrs., 106-436; Maxton v. Robeson, 107-335; Muller v. Buncombe, 89-171—**but will lie to compel them to issue license if refusal is arbitrary:** Ibid. **May revoke license:** State v. Voight, 90-741. **Discretion is a limited legal one:** Hillsboro v. Smith, 110-417; Muller v. Comrs., 89-171.

19. TO ESTABLISH PUBLIC LANDINGS, PLACES OF INSPECTION AND INSPECTORS.

To establish such public landings and places of inspection as the board of commissioners may think proper; and to appoint such inspectors in any town or city as may be authorized by law.

20. TO LICENSE AUCTIONEERS.

To license for the term of one year any number of persons to exercise the trade and business of auctioneers in each county, and to take their bonds as prescribed by law.

21. TO REQUIRE FROM ANY COUNTY OFFICER A REPORT UNDER OATH.

To require from any county officer, or other person employed and paid by the county, a report under oath at any time, on any matters connected with his duties.

22. TO AUTHORIZE CHAIRMAN TO ISSUE SUBPOENAS.

To authorize chairman to issue subpœnas to compel the attendance before the board of persons, and the production of books and papers relating to the affairs of the county for the purpose of

examination, on any matter within the jurisdiction of the board. The subpœna shall be served by the sheriff or any constable to whom it is delivered; and upon return of personal service thereof, whoever neglects to comply with the subpœna or refuses to answer any proper question, shall be guilty of contempt and punishable therefor by the board. A witness is bound in such case to answer all the questions which he would be bound to answer in like case in a court of justice; but his testimony given before the board shall not be used against the witness on the trial of any criminal prosecution other than for perjury committed on the examination; the chairman of the board of county commissioners for each county is authorized in his official capacity to administer oaths in any matter coming before either of such boards. Any member of such board while temporarily acting as such chairman shall have and exercise like authority.

23. TO APPROVE BONDS OF COUNTY OFFICERS AND INDUCT THEM INTO OFFICE.

To qualify and induct into office at the meeting of the board, on the first Monday in the month next preceding their election or appointment, the following named county officers, to-wit: Clerk of the superior court, sheriff, coroner, treasurer, register of deeds, surveyor, and constable; and to take and approve the official bonds of such officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds, for safe-keeping: Provided, however, that if the said board shall declare the official bonds of any of said county officers to be insufficient, or shall decline to receive the same, the said officers may appeal to the superior court judge riding the district in which said county is, or to the resident judge of said district, as he may elect, who shall hear said appeal in chambers, at any place in said district which he shall designate, within ten days after notice by him of the same, and if, upon the hearing of said appeal, the judge shall be of the opinion that the said bond is sufficient, he shall issue an order to the said board of commissioners to induct the said officer into office, or that he shall be retained in office, as the case may be; but if, upon the hearing of said appeal, the judge shall be of the opinion that the bond is insufficient, he shall give the appellant ten days in which to file before him an additional bond, and if the appellant shall within the said ten days file before the said judge a good and sufficient bond, in the opinion of said judge, he shall so declare and issue his order to said board directing and requiring them to induct the appellant into office, or retain him, as the case may be; but if, in the opinion of the said

judge, both the original and the additional bonds are insufficient, he shall declare the said office vacant and notify the said commissioners, who shall notify the clerk of the superior court, who shall appoint to fill the vacancy, except in cases of the clerk of the superior court, which vacancy shall be filled by the resident judge. The judgment of the superior court judge shall be final. The appeal and the finding and judgment of the superior court judge shall be recorded on the minutes of the board of commissioners.

For duty of commissioners in renewing bonds, see section 308-315.

Failure of officer to give bond hereunder; effect: Bray v. Barnard, 109-44; Cole v. Patterson, 97-360; Kilburn v. Latham, 81-312; Worley v. Smith, 81-304; Dixon v. Comrs., 80-118.

Duty of commissioners to qualify, induct county officers into office and fill all vacancies: Jones v. Jones, 80-127—**to induct those whose election has been announced by canvassers,** Swain v. McRae, 80-111. **All three of sheriff's bonds must be approved before inducting him:** Dixon v. Comrs., 80-118. **The duty to induct officers into office is quasi-judicial, and for an honest error the commissioners are not liable:** Hannon v. Grizzard, 99-161.

Commissioners can not be compelled to induct a person plainly inelligible: McNeill v. Somers, 96-473; Hannon v. Grizzard, 96-293. **Bonds must be approved before officers inducted:** Worley v. Smith, 81-304. **Commissioners may refuse time in which to fortify bond that is insufficient and from their refusal there is no appeal:** Cole v. Patterson, 97-364.

Where sheriff inducted into office without giving bonds required subsequently gives bonds, defect cured: Worley v. Smith, 81-304.

24. TO ADOPT A COUNTY SEAL.

To adopt a seal for the county, a description and impression whereof shall be filed in the office of superior court clerk and of the secretary of state.

25. TO LEVY COUNTY TAXES.

To levy, in like manner with the state taxes, the necessary taxes for county purposes; but the taxes so levied shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the general assembly. All county taxes shall be levied at the regular meeting of the board on the first Monday in June. The board may extend the time for the collection and settlement of the county taxes to such time as may be deemed expedient, not beyond the first day of May next after the taxes were levied.

Board, when sitting with justices as required in some counties, has power of old county court in matters of taxation; within its jurisdiction it is a court of record: Guilford v. Georgia Co., 112-34.

The constitutional requirement that every act passed levying taxes shall

state the object to which they shall be appropriated has no application to "county taxes:" Parker v. Comrs., 104-166—the tax levy "for county purposes" being sufficient, Ibid.

As to constitutional limitation upon county taxation, see French v. Comrs., 74-692; Jones v. Comrs., 107-248; Blanton v. Comrs., 101-532; Cromartie v. Comrs., 87-134; Mauney v. Comrs., 71-486; Trull v. Comrs., 72-388; Clifton v. Wynne, 80-145.

As to tax levy on territory taken from one county and annexed to another, see Watson v. Comrs., 82-17; Commissioners of Currituck v. Commissioners of Dare, 79-565.

The statute makes no difference in grade or necessity among the several necessary expenditures of a county for which commissioners must provide by taxation: Long v. Comrs., 76-278.

Mandamus to compel commissioners to levy tax to pay off debts of county does not warrant them in levying taxes in any other manner or at any other time than law prescribes: Mauney v. Comrs., 71-486; Cromartie v. Comrs., 87-139.

Commissioners have implied power, after making assessment for taxes on unlisted property, to authorize collection by sheriff: Lumber Co. v. Smith, 146-

For an action to have tax levied for special purpose applied thereto, see McCless v. Meekins, 117-34. Where legislature authorized tax for special purpose beyond the constitutional limitation and part of it was to be "for meeting other current expenses," held invalid: Williams v Comrs., 119-520.

Where tax, levied for special purpose beyond the limitation, provides more funds than necessary, the remnant can be turned into the general fund if the statute authorizing it is infra vires; but if for a special purpose and a general purpose together the statute would be ultra vires and void: Williams v. Comrs., 119-520.

There is no constitutional requirement that tax rate for county purposes should be the same in the several counties, townships, etc.: Jones v. Comrs., 143-59.

What property subject to tax levy stated in Jones v. Comrs., 107-248.

It is not required that poll tax be levied except when taxes are levied for ordinary state and county purposes: Jones v. Comrs., 107-248.

A majority of the governing body of a county can levy the tax: Cotton Mills v. Comrs., 108-678; State v. Woodside, 30-104—and the record must show it, Dudley v. Oliver, 27-227. Where bonds properly authorized and issued, commissioners have implied power to levy tax to pay: Charlotte v. Shepard, 122-602; overruling same case in 120-411.

The constitutional limitation must be taken into consideration in levying taxes sufficient to comply with the consitutional provision to keep the common schools open four months: Barksdale v. Comrs., 93-472 (this is understood to be overruled by a decision just handed down as this goes to press).

Taxes for county purposes are to be levied only once a year: Bradshaw v. Comrs., 92-278.

Commissioners can levy tax for necessary expenses and to pay bonds issued therefor up to the constitutional limitation. They can levy be-

yond limitation when legislature authorizes, and no vote of the people is required. But they can not levy for any purpose not necessary without the legislature authorizes and a majority of the qualified voters vote for it: Cotton Mills v. Waxhaw, 130-298; Smathers v. Comrs., 125-488; Herring v. Dixon, 122-420; McCless v. Meekins, 117-34; Cromartie v. Comrs., 87-139; Tate v. Comrs., 122-812; Tucker v. Raleigh, 75-267.

Where county pledges its faith or lends its credit it must levy taxes on all property in the same, except such as is exempt: Jones v. Comrs., 107-248.

Courts have the right to say what are necessary expenses, but can not control the discretion of commissioners in incurring the debt when the expense is necessary: Black v. Comrs., 129-121; also see annotations under section 1379.

See also subsections 2, 3, 8, 9, 14, 26, 27, 29 and annotations thereunder.

26. TO ERECT AND REPAIR COUNTY BUILDINGS.

To erect and repair the necessary county buildings, and to raise, by taxation, the moneys therefor. 146-655

This duty obligatory: Long v. Comrs., 76-273.

Cost of building a courthouse is a necessary county expense and discretionary act of commissioners in levying tax to pay for the building of one is not reviewable: Vaughn v. Comrs., 117-429; Brodnax v. Comrs., 64-244; Satterwaite v. Comrs,. 76-153; also see section 1379. Commissioners can not mortgage courthouse to secure contractors for building it: Vaughn v. Comrs., 118-636.

As to number of commissioners necessary to act hereunder, see Cotton Mills v. Comrs., 108-678. Court can not control discretion of commissioners as to what kind of courthouse is needed: Vaughn v. Comrs., 117-434.

Commissioners must provide for the repair of buildings; liable if they neglect; county not liable: Moffitt v. Asheville, 103-258; Threadgill v. Comrs., 99-352.

27. TO BORROW MONEY.

To borrow money for the necessary expenses of the county, and to provide for its payment, with interest, in periodical instalments, by taxation.

As to what are necessary expenses of a county, see under section 1379. As to funding county indebtedness, see McCless v. Meekins, 117-34. As to issuing bonds in place of orders previously issued for necessary expenses without vote of the people: McCless v. Meekins, 117-34; Tucker v. Raleigh, 75-267; see also subsection 2.

Majority of governing body of county can exercise power hereunder: Cotton Mills v. Comrs., 108-678. For raising money by taxation with which to pay off debts for money borrowed for necessary expenses, see under subsections 2 and 27 of this section.

Legislature has power to authorize commissioners to issue bonds with which to pay indebtedness incurred for necessary expenses: Comrs. v. Stafford, 138-453.

28. TO DESIGNATE SITE FOR COUNTY BUILDINGS.

To remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by an unanimous vote of all the members of the board at the regular December meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months, next immediately preceding the annual meeting, at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the general assembly.

A majority of the governing body of a county necessary to act hereunder: Cotton Mills v. Comrs., 108-678.

A jail is not a nuisance per se, and its location at a certain place can not be enjoined: Burwell v. Comrs., 93-73.

29. TO CONSTRUCT AND REPAIR BRIDGES.

To construct and repair bridges in the county, and to raise by tax the money necessary therefor, and when a bridge is necessary over a stream, which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge; and the charge thereof shall be defrayed by the counties concerned, in proportion to the number of taxable polls in each.

151-215

Duty to raise money for this purpose obligatory: Long v. Comrs., 76-278; Cromartie v. Comrs., 87-138. **Bridge between counties must be authorized by both counties and built at joint expense:** McPeeters v. Blankenship, 123-651. **Remedy, when a county refuses to join, is by an enabling act:** Ibid.

Number of commissioners necessary to act on matters within this subsection: Cotton Mills v. Comrs., 108-678.

Commissioners alone determine necessity for construction and repair of bridges and can not delegate their powers: McPhail v. Comrs., 119-330.

As to contracts for bridge construction, see Bridge Co. v. Comrs., 111-317; McPhail v. Comrs., 119-330.

30. TO ERECT, DIVIDE OR ALTER TOWNSHIPS.

To erect, divide, change the names of, or alter townships in the manner following: In any county any three freeholders of each township to be affected, may, after the notice presently to be mentioned, apply by petition to the board of commissioners, to erect a new township, or divide an existing township, or change the name

of or alter the boundaries thereof. Notice of the application shall be posted in one or more public places in each of such townships, and published in a newspaper printed in the county, if there is one, for at least four weeks preceding the meeting at which the application is made to the board. No township shall have or exercise any corporate powers whatsoever, unless authorized by an act of the general assembly, to be exercised under the supervision of the board of commissioners.

For power of the legislature of itself or through its agencies to divide up the state into counties, townships, school districts, etc., see McCormac v. Comrs., 90-441. **For political relation of township,** see Jones v. Comrs., 107-265. **For the legal status of a township,** see Goldsboro v. Broadhurst, 109-231; Brown v. Comrs., 100-92; Wallace v. Trustees, 84-164. **Has no corporate powers except such as are authorized by the legislature:** Graves v. Comrs., 135-55.

Necessary expenses of a township defined in Goldsboro v. Broadhurst, 109-231.

For power of township to subscribe to the capital stock of a railroad, see Jones v. Comrs., 107-265; Brown v. Comrs., 100-92; Wood v. Oxford, 97-227.

31. TO PROVIDE FOR A HOUSE OF CORRECTION.

To make provision for the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed; to regulate the employment of labor therein; to appoint a superintendent thereof, and such assistants as may be deemed necessary, and to fix their compensation.

A majority of governing body of a county can exercise this power: Cotton Mills v. Comrs., 108-678. **Remarks of Dillard, J., upon houses of correction:** State v. Garrell, 82-580. **Referred to merely** in State v. Williams, 97-416.

32. TO REGULATE SPEED OF AUTOMOBILES.

To regulate the speed of automobiles, motor-cycles and other like vehicles on the public roads and bridges, and make such ordinances as they may deem necessary governing the same. This subsection shall not apply to the counties of Mecklenburg and New Hanover.

1319. Powers in certain counties. In the counties of Montgomery and Vance, the powers conferred by subsections twenty-five and twenty-eight of the preceding sections shall be exercised only with the concurrence of a majority of the justices of the peace, sitting with them; and the powers conferred by subsections thirteen, twenty-six, twenty-seven, thirty and thirty-one of the preceding

section shall be exercised only with the concurrence, or assent of a majority of the justices of the peace; and the powers conferred in subsection twenty-nine of the preceding section shall not be exercised without the concurrence of the justices of the peace, where the costs exceeds five hundred dollars; and in said counties subsection twenty-three of the preceding section shall not be enforced, but the following shall govern, to-wit: To qualify and induct into office at the meeting of the board on the first Monday in the month next succeeding their election or appointment the following-named county officers, to-wit: Clerk of the superior court, sheriff, coroner, treasurer, register of deeds, surveyor and constable; and to take and approve the official bonds of said officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds for safe-keeping.

Code, s. 707; 1895, c. 135; 1899, c. 89; 1899, c. 166; 1899, c. 488; 1901, c. 680; 1903, c. 790; 1905, c. 422. **"Only with the concurrence of a majority of the justices:"** Cotton Mills v. Comrs., 108-681.

See annotations under the different subsections of 1318.

1320. Purchase of county indebtedness. The board of commissioners may purchase at any price, not exceeding their par value and accumulated interest, any of the outstanding bonds or other indebtedness of the county.

Code, s. 718.

1321. To fill vacancies in certain offices. Whenever a vacancy shall occur in the offices of sheriff, constable, coroner, register of deeds, county treasurer or county surveyor, the board of commissioners of the county shall fill the same by appointment.

Code, s. 720. **For power to declare office vacant, see section 309.**

Upon failure to give or renew bond, as the case may be, office declared vacant: Bray v. Barnard, 109-44; Kilburn v. Latham, 81-312; Worley v. Smith, 81-304; Jones v. Jones, 80-127; People v. Green, 75-329. **Sheriff failing to give bond, commissioners should declare vacancy and appoint:** Sneed v. Bullock, 80-132—**but a sheriff can not be deprived of his office without a day in court,** Vann v. Pipkin, 77-408.

Commissioners are liable to penalty for failure to declare office vacant and fill same when they should have done so: Bray v. Creekmore, 109-49.

Vacancy in office of treasurer filled by commissioners: Rhodes v. Hampton, 101-633. **De facto board can appoint:** Jones v. Jones, 80-127.

1322. To settle disputed county lines. Whenever there shall be any dispute concerning the dividing line between counties, the board of commissioners of each county interested in the adjust-

ment of said line, a majority of the board consenting thereto, may appoint one or more commissioners, on the part of each county, to settle and fix the line in dispute; and their report, when ratified by a majority of the commissioners in each county, shall be conclusive of the location of the true line, and shall be recorded in the register's office of each county, and in the office of the secretary of state.

Code, s. 721; R. C., c. 27; 1836, c. 3.

1323. Such commissioners, how sworn and paid. Such commissioners, before entering on the duties assigned them, shall be sworn before a justice of the peace; and they, with all others employed, shall be allowed reasonable pay for their labors.

Code, s. 722.

NOTE. County commissioners failing to discharge duty guilty of misdemeanor, see sections 3573, 3574, 3576, 3592.

County commissioners liable for taxes, see section 2814.

V. Clerk to Board.

1324. Register of deeds ex officio; compensation. The register of deeds shall be ex officio clerk of, and his compensation shall be fixed by, the board of commissioners.

Code, s. 710; 1895, c. 135, s. 4.

1325. Duties. It is the clerk's duty—

1. To record in a book to be provided for the purpose all the proceedings of the board.
2. To enter every resolution or decision concerning the payment of money.
3. To record the vote of each commissioner on any question submitted to the board, if required by any member present.
4. To preserve and file in alphabetical, or other due order, all accounts presented or acted on by the board, and to designate upon every account audited the amount allowed and the charges for which it was allowed.
5. To keep the books and papers of the board free for the examination of all persons.
6. To administer oaths to all persons presenting claims against the county, but he shall receive no fee therefor.

Code, s. 712; 1905, c. 530.

1326. To publish annual statement. The clerk shall annually, on or within five days next before the first Monday of December, make out and certify, and cause to be posted at the courthouse,

and published in a newspaper printed in the county, if there be one, for at least four weeks, a statement for the preceding year, showing—

1. The amount, items and nature of all compensation audited by the board to the members thereof severally.

2. The number of days the board was in session, and the distance travelled by the members respectively in attending the same.

3. Whether any unverified accounts were audited, and if any, how much and for what.

Code, s. 713.

NOTE. Failure to publish statement required a misdemeanor, see section 3592.

For record to be kept of accounts of funds by clerk of superior court, see section 919.

For courthouse, see section 1335.

For limit on county and other municipal indebtedness, see section 2977.

VI. County Poor.

1327. County commissioners to provide for support of; superintendent. The board of commissioners of each county is authorized to provide by taxation for the maintenance, and to do all such matters and things as may be deemed expedient for the comfort and well ordering of the poor; to employ biennially some competent person as superintendent of the county home for the aged and infirm, with power to remove him for cause; to institute proceedings against any person coming into the county who is likely to become chargeable thereto, and to cause the removal of such person to the county where he was last legally settled; and to recover by action from such county, all charges and expenses whatever incurred for the maintenance or removal of such poor person.

Code, s. 3540; 1891, c. 138. **The general duty is imposed of providing for the poor; the place, method and extent of relief are vested in the judgment and discretion of the county commissioners:** Copple v. Comrs., 138-132.

Under this section to provide for the poor, in order that there may be a binding pecuniary obligation on the county, there must be an express contract to that effect, or service must be done at express request of proper county officer or agent: Copple v. Comrs., 138-127.

It is the exclusive right of the legislature to determine and declare by whom and how the indigent of the state entitled to support shall be ascertained and from what fund and by whom allowances for their support shall be made: Board v. Comrs., 113-379.

1328. County home for aged and infirm. All persons who may become chargeable to any county shall be maintained at the county

home for the aged and infirm, or at such place or places as the board of commissioners may select or agree upon.

Code, s. 3541; 1891, c. 138. **Commissioners may require all poor for whom they care to be placed in the home:** Copple v. Comrs., 138-132.

1329. How county home supported. The board of commissioners may provide for the support of the persons admitted by them to the home for the aged and infirm by employing a superintendent at a certain sum, or by paying a specified sum for the support of such persons to any one who will take charge of the county home for the aged and infirm, as said board may deem for the best interest of the county and the cause of humanity.

Code, s. 3543; 1876-7, c. 277, s. 3. **The overseer of the poor is a public officer and liable to indictment at common law for any neglect of his duties or abuse of powers:** State v. Hawkins, 77-494.

1330. Indigent persons owning property. Whenever any indigent person becomes chargeable to a county for maintenance and support in accordance with the provisions of this chapter, owning any estate, it shall be the duty of the board of commissioners of any county liable to pay the expenses of such indigent person, to cause the same to be sold for its indemnity or reinvestment in the manner provided in the chapter entitled "Idiots, Inebriates and Lunatics," or they may take possession thereof and rent the same out and apply the rent toward the support of such indigent person.

Code, s. 3547; 1866, c. 49.

1331. Families of militiamen supported by county. When any citizen of the state is absent on service as a militiaman or member of the state guard, and his family are unable to support themselves during his absence, the board of commissioners of his county, on application, shall make towards their maintenance such allowance as may be deemed reasonable.

Code, s. 3546; R. C., c. 86, s. 14; 1779, c. 152.

1332. Paupers not to be hired out by auction. No pauper shall be let out at public auction, but the board of commissioners may make such arrangements for the support of paupers with their friends or other persons, when not maintained at the county home for the aged and infirm, as may be deemed best.

Code, s. 3542; 1876-7, c. 277, s. 2.

1333. Legal settlements, how acquired. Legal settlements may be acquired in any county, so as to entitle the party to be supported by such county, in the manner following, and not otherwise:

The county of settlement is liable for a pauper: Comrs. of Burke v. Comrs. of Buncombe, 101-520; Comrs. v. Comrs., 121-295.

1. BY ONE YEAR'S RESIDENCE.

Every person, who shall have resided continuously in any county for one year, shall be deemed legally settled in that county.

Twelve months' continuous residence gives legal settlement: Comrs. v. Comrs., 121-295; State v. Giles, 103-394; State v. Elam, 61-460.

2. MARRIED WOMEN TO HAVE SETTLEMENT OF THEIR HUSBANDS.

A married woman shall always follow and have the settlement of her husband, if he have any in the state; otherwise, her own at the time of her marriage, if she then had any, shall not be lost or suspended by the marriage, but shall be that of her husband, till another is acquired by him, which shall then be the settlement of both.

3. LEGITIMATE CHILDREN TO HAVE SETTLEMENT OF FATHER.

Legitimate children shall follow and have the settlement of their father, if he have any in the state, until they gain a settlement of their own; but if he have none, they shall, in like manner, follow and have the settlement of their mother, if she have any.

4. ILLEGITIMATE CHILDREN, THAT OF THEIR MOTHER.

Illegitimate children shall follow and have the settlement of their mother, at the time of their birth, if she then have any in the state. But neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein.

County of legal settlement of mother chargeable for bastard: State v. Giles, 103-391; State v. Elam, 61-460—**but where mother has no legal settlement in state, bastard is chargeable on county in which born,** State v. McQuaig, 63-550.

Bastard without settlement to be apprenticed by county of mother's settlement at birth: Ferrell v. Boykin, 61-9.

5. SETTLEMENT TO CONTINUE UNTIL NEW ONE ACQUIRED.

Every legal settlement shall continue till it shall be lost or defeated by acquiring a new one, within or without the state; and upon acquiring such new settlement, all former settlements shall be defeated and lost.

Old settlement continues until new one acquired: Comrs. v. Comrs., 121-295.

Code, s. 3544; R. C., c. 86, s. 12; 1777, c. 117, s. 16.

1334. Removed to proper county, at cost of that county; housekeepers entertaining poor. Upon complaint made by the chairman of the board of county commissioners, before a justice of the peace, that any person has come into the county, who is likely to become chargeable thereto, the justice by his warrant shall cause such poor person to be removed to the county where he was last legally settled; but if such poor person be sick or disabled, and can not be removed without danger of life, the board of commissioners shall provide for his maintenance and cure at the charge of the county; and after his recovery shall cause him to be removed, and pay the charges of his removal; and the county, wherein he was last legally settled, shall repay all charges occasioned by his sickness, maintenance, cure, and removal, and all charges and expenses whatever, if such person shall die before removal. And if the board of commissioners of the county, to which such poor person belongs, shall refuse to receive and provide for him when removed as aforesaid, every commissioner so refusing shall forfeit and pay forty dollars, for the use of the county whence the removal was made; moreover, if the board of commissioners of the county, where such person was legally settled, shall refuse to pay the charges and expenses aforesaid, they shall be liable for the same; and if any housekeeper shall entertain such poor person, and shall not give notice thereof to the board of commissioners of his county, or one of them, within one month, the person so offending shall forfeit and pay ten dollars.

Code, s. 3545; R. C., c. 86, s. 13; 1777, c. 117, s. 17; 1834, c. 21. **County not bound to pay for services to paupers unless there is an express contract:** Copple v. Comrs., 138-127.

Where a pauper temporarily absent from county of "settlement" is so disabled as to require immediate medical services and is furnished by authorities of another county with such attention and board, the latter county is entitled to recover expenses thereof from county of settlement: Comrs. v. Comrs., 121-295.

Counties are not liable for torts unless such liability is imposed by statute: Moffitt v. Asheville, 103-258; Threadgill v. Comrs., 99-352.

Difference between status and liability of towns and counties illustrated in Lewis v. Raleigh, 77-229; Moffitt v. Asheville, 103-237; see also Shields v. Durham, 118-456.

Section merely referred to in McKenzie v. Buchanan, 51-31; State v. Justices, 11-196.

CHAPTER 24.

COUNTY PRISONS.

I. Jails.

1335. Built and repaired by commissioners. There shall be kept and maintained in good and sufficient repair in every county, a courthouse and common jail, at the expense of the county, wherein the same is situated; and the boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building, repairing and furnishing their several courthouses and jails, in such manner as they shall think proper; and from time to time shall order and establish such rules and regulations for the preservation of the courthouse, and for the government and management of the prisons, as may be conducive to the interests of the public, and the security and comfort of the persons confined.

Code, s. 782; R. C., c. 30, s. 1; 1741, c. 33, ss. 1, 2; 1795, c. 433, s. 1; 1816, c. 911, s. 1. **Noxious air of city guard house "accelerating" the death of prisoner, city liable:** Lewis v. Raleigh, 77-229; Shields v. Durham, 118-456. **The least that is required is that persons confined in public prison shall have a clean place, comfortable bedding, wholesome food and drink, and necessary attendance:** Ibid; Moffitt v. Asheville, 103-237; see Shields v. Durham, 118-456.

In the absence of statutory provision, counties are not liable for damages sustained by negligent acts of their agents and servants: Manuel v. Comrs., 98-9; White v. Comrs., 90-437; Jones v. Comrs., 130-452; Prichard v. Comrs., 126-908; Moody v. State's Prison, 128-12. **County not liable for damages to prisoner for neglect of commissioners to furnish adequate means for his health and protection:** Manuel v. Comrs., 98-9; see Shields v. Durham, 118-456—**and as to whether commissioners personally liable, quaere,** Ibid.

1336. Five apartments. The common jails of the several counties shall be provided with at least five separate and suitable apartments, one for the confinement of white male criminals, one for white female criminals, one for colored male criminals, one for colored female criminals, and one for other prisoners.

Code, s. 783; R. C., c. 30, s. 2; 1795, c. 433, s. 4; 1816, c. 911. **Misdemeanor to confine prisoners in improper apartment, see section 3660.**

1336a. Separate cells for prisoners having tuberculosis. The board of county commissioners of the respective counties shall provide in the jail-house or in any camp or place where prisoners are

committed for keeping or sentenced to a term of imprisonment in any county, separate cells or rooms or a place in which shall be confined any prisoner or prisoners who may be committed for keeping or sentenced to said prison or place of confinement for a term of imprisonment, who has been examined by the county superintendent of health and pronounced by the said county superintendent of health as being affected with tuberculosis. But nothing herein shall be construed as to interfere with or prevent the county or state authorities from working together all prisoners on public works as now provided by law.

1907, c. 567, ss. 1, 6.

1337. Heated. It shall be the duty of the board of commissioners in every county to have the common jails so heated by furnaces, stoves, or otherwise, as to render them warm and comfortable.

Code, s. 784; 1879, c. 25. **Commissioners liable to indictment for failure to heat, see section 3574. See annotations under section 1335.**

1338. Bedding furnished. The board of county commissioners, from time to time, as may be necessary, shall order the sheriff of the county to purchase, for the use of their jail, a certain number of good warm blankets or other suitable bedclothing, which shall be securely preserved by the jailer, and furnished to the prisoners for their use and comfort, as the season or other circumstances may require; and the sheriff, at least once in every year, shall report to the board of commissioners the condition and number of such blankets and bedclothing.

Code, s. 3465; R. C., c. 87, s. 10; 1822, c. 1136. **As to duty of county or town to furnish proper bedding, etc.,** see Moffitt v. Asheville, 103-237; Threadgill v. Comrs., 99-352; Manuel v. Comrs., 98-9.

1339. Prison bounds. For the preservation of the health of such persons as shall be committed to jail, the board of commissioners of each county shall mark out such a parcel of the land as they shall think fit, not exceeding six acres, adjoining the prison, for the rules thereof; and every prisoner not committed for treason or felony, giving bond with good security to the sheriff of the county to keep within the rules, shall have liberty to walk therein, out of the prison, for the preservation of his health; and on keeping continually within the said rules, shall be deemed to be in law a true prisoner; and that every person may know the true bounds of said rules, they shall be recorded in the county records, and the marks thereof shall be renewed as occasion may require.

Code, s. 3466; R. C., c. 87, s. 11; 1741, c. 33, s. 3. **For construction of former similar statute,** see Ex parte Bradley, 26-544. **Prison bounds not**

allowed to one in execution for criminal offense: State v. Pearson, 100-414; Ex parte Bradley, 26-544. **Allowed only to prisoners in civil actions and in criminal cases where prisoner committed in default of bail:** State v. Pearson, 100-417. **Bond to keep prison bounds, taken before prisoner committed to close custody is invalid:** Northam v. Terry, 30-175.

Sheriff liable where he refuses to accept bond to keep prison bounds or to admit prisoner to rules: Mann v. Vick, 8-427. **Sheriff's duty to furnish blank bond:** Ibid.

Defendant arrested while in prison bounds by another creditor and confined within prison may be released as insolvent: In re Huntington, 6-369.

1340. Bonds returned to court. Every bond taken of any person confined for an offense, or otherwise than on process issuing in a civil case, shall be returned to the court by whose order or process such person is confined, or which may be entitled to cognizance of the matter, and shall be of the force and effect of a recognizance; and on breach thereof shall be forfeited, and shall be collected as a forfeiture, in the name and for the use of the state, and applied as other forfeited recognizances.

Code, s. 3467; R. C., c. 87, s. 12. **Bond to keep prison bounds need not be proved by subscribing witness, for it must be deemed a record so far as concerns proof of execution:** Wynn v. Buckett, 1-93.

In summary proceedings on bond to keep prison bounds, defendant, pleading matters in pais, entitled to jury trial: Whitley v. Gaylord, 48-286.

Sureties to bond not liable for breach thereof, where prisoner released after taking insolvent debtor's oath: Howard v. Pasteur, 7-270.

A prisoner's going out of the limits of the rules, after being arrested and put back in close prison by another creditor and discharged as an insolvent debtor, was lawful, although he was in close jail at instance of another creditor, the order of liberation extending to discharge him from all imprisonment for debt: Ibid.

1341. Bond on capias in civil action. Every bond given by any person committed in arrest and bail, or in custody after final judgment, shall be assigned by the sheriff to the party at whose instance such person was committed to jail, and shall be returned to the office of the clerk of the court where the judgment was rendered, and shall have the force of a judgment; and if any person, who shall obtain the rules of any prison, as aforesaid, shall escape out of the same, before he shall have paid the debt or damages and costs according to the condition of his bond, the court where the bond is filed, upon motion of the assignee thereof, shall award execution against such person and his sureties for the debt or damages and costs, with interest from the time of escape till payment; and no person committed to jail on such execution shall be allowed the rules of prison: Provided, the obligors have ten days' pre-

vious notice of such motion, in writing; but they shall not be admitted to deny the making of the bond in their answer, unless by affidavit they prove the truth of the plea.

Code, s. 3469; R. C., c. 87, s. 14; 1759, c. 65, ss. 2, 3. **Proper procedure on bond is by motion:** Brown v. Frazier, 5-421. **The above section gives to bond the force of a judgment and it can not be treated as a common deed and action brought upon, but need only to have execution issued, on motion:** Ibid.

II. Prisoners Kept and Cared For.

1342. United States prisoners kept. When a prisoner shall be delivered to the keeper of any jail by the authority of the United States, such keeper shall receive the prisoner, and commit him accordingly; and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid, shall be subject to the same pains and penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state. And the allowance for the maintenance of any prisoner committed as aforesaid shall be equal to that made for prisoners committed under the authority of the state.

Code, s. 3456; R. C., c. 87, s. 1; 1790, c. 322, ss. 1, 2.

1343. Jailer to cleanse jail, furnish food and water. The sheriff or keeper of any jail shall, every day, cleanse the room of the prison in which any prisoner shall be confined, and cause all filth to be removed therefrom; and shall also furnish the prisoner plenty of good and wholesome water, three times in every day; and shall furnish each prisoner fuel, not less than one pound of wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance.

Code, s. 3464; R. C., c. 87, s. 9; 1816, c. 911, s. 2. **For annotations touching upon subject matter of this section, see under section 1335. Statute referred to in** Lewis v. Raleigh, 77-229; Moffitt v. Asheville, 103-256.

1343a. Tuberculous prisoner separated from others. It shall be the duty of any sheriff of any county when a prisoner is placed in his custody for the purpose of being committed to jail or any place of confinement who said sheriff has been informed or has any reason to believe or suspect is suffering with tuberculosis, to have any such prisoner examined by the county superintendent of health, and if said prisoner shall be pronounced by said county superintendent of health as a tuberculous prisoner, then said prisoner shall be separated from the other prisoners and confined in a separate cell or place provided for by section one thousand three hundred and thirty-six (a).

1907, c. 567, s. 2.

1343b. Cells for tuberculous prisoners not used for others until fumigated. The cells and places of confinement in jails, the state prison, or other camp or place where prisoners are committed provided for prisoners affected with tuberculosis shall be kept exclusively for said tuberculous prisoners, and under no circumstances or conditions shall any other prisoner be committed or sentenced to the institutions and places of imprisonment mentioned, who is well and not affected with tuberculosis, be confined in the cells or places of confinement therein provided for tuberculous prisoners: Provided further, when said cells or places of confinement provided for either in the county jail or camps or the state's prison have been used and occupied by any prisoner affected with tuberculosis, the said cells or places of confinement shall not be used for any other prisoners until the county superintendent of health or the physician in charge and health authorities of the state's prison have been notified, and the said cells or places of confinement have been thoroughly fumigated and disinfected under the supervision of the said county superintendent of health or the physician in charge and the health authorities of said state's prison, in the manner prescribed and required by the state board of health.

1907, c. 567, s. 4.

1343c. Sheriff or warden of state prison to have prisoners suspected of tuberculosis examined. Whenever any prisoner or prisoners shall be committed to any jail, camp, the state prison or other place to which prisoners are committed for safe keeping, it shall be the duty of the sheriff of the county or the warden of the state's prison, as the case may be, in the event any such prisoner or prisoners be known or suspected by said authorities to be suffering with tuberculosis, to have any such prisoner or prisoners examined by the county superintendent of health or the physician in charge within five days after they have been committed or sentenced to said prison.

1907, c. 567, s. 5.

1344. May purchase necessaries. Prisoners shall be allowed to purchase and procure such necessaries, in addition to the diet furnished by the jailer, as they may think proper; and to provide their own bedding, linen and clothing, without paying any perquisite to the jailer for such indulgence.

Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6. **Jailer injuring prisoner liable for treble damages and guilty of misdemeanor, see section 3661.**

1345. Escape apprehended, guard; compensation. Whenever the sheriff of the county, or keeper of the jail, shall apprehend that

there is danger of a prisoner escaping, through the insufficiency of the jail or other cause, it shall be his duty, without delay, to make information thereof to a judge of the superior court, the attorney general, or a solicitor, if any of those officers be in the county, and if not, then to three justices of the peace, and they are authorized, if they deem it advisable, to furnish the sheriff or keeper of the jail with an order in writing, addressed to the commanding officer of the militia of the county, setting forth the danger, and requiring him forthwith to furnish such guard as to him may appear to be suitable for the occasion. For which service the persons ordered on guard shall receive such compensation as militiamen in actual service for defense of the state; and on application for pay, the letter to the commanding officer, on which the guard was ordered, and the certificate of such officer, countersigned by the sheriff or jailer, together with the deposition of the officer of the guard, stating the time of service, and that it was faithfully performed, shall be sufficient to authorize the payment of the same.

Code, s. 3460; R. C., c. 87, s. 5; 1795, c. 433, s. 8. **As to payment of expenses of guard furnished for prison,** see Comrs. v. Comrs., 75-240.

1346. Prisoners to pay charges. Every person committed by lawful authority, for any criminal offense or misdemeanor, shall bear all reasonable charges for guarding and carrying him to jail, and also for his support therein until released; and all the estate which such person possessed at the time of committing the offense shall be subjected to the payment of such charges and other prison fees, in preference to all other debts and demands; and if there be no visible estate whereon to levy such fees and charges, the amount shall be paid by the county.

Code, s. 3461; R. C., c. 87, s. 6; 1795, c. 433, s. 7. **Consult** State v. Peter, 53-346; State v. Isaac, 13-47.

1347. Guarding and removing, by what county paid. The expense for guarding prisons shall be paid by the county wherein the prison is situated; and for conveying prisoners, as also the expense attending such prisoners while in jail, when the same may be chargeable on the county, shall be paid by the county from which the prisoner is removed.

Code, s. 3462; R. C., c. 87, s. 7; 1808, c. 757, s. 2. **Expense of guarding prisoner chargeable on county from which he was removed:** Comrs. v. Comrs., 75-240.

1348. Transferred to successor by indenture. The delivery of prisoners, by indenture between the late and present sheriff, or the entering on record in court the names of the several prisoners, and

the causes of their commitment, delivered over to the present sheriff, shall be sufficient to discharge the late sheriff from all liability for any escape that shall happen.

Code, s. 3470; R. C., c. 87, s. 15; 1777, c. 118, s. 12.

III. Of Adjoining County Used.

1349. By ministerial officers, when. The sheriffs, constables, and other ministerial officers of any county, in which there may be no jail, shall have authority to confine any prisoner arrested on process, civil or criminal, and held in custody for want of bail, in the jail of any adjoining county, until bail be given or tendered. And any sheriff or jailer having a prisoner in his custody, by virtue of any mode of commitment provided in this chapter, shall be liable, civilly and criminally, for his escape, in the same manner as if such prisoner had been confined in the prison of his proper county.

Code, s. 3459; R. C., c. 87, s. 4; 1835, c. 2, s. 3.

1350. When no jail, or jail unsafe. Whenever it shall happen that there shall be no jail, or an unfit or insecure jail, in any county, the superior court judges, justices of the peace, and all judicial officers of such county may commit all persons who may be brought before them, whether in a criminal or civil proceeding, to the jail of any adjoining county, for the same causes, and under the like regulations that they might have ordered commitments to the usual jail; and the sheriffs, constables, and other officers of such county, in which there may be no jail, or an unfit one, and the sheriffs or keepers of the jails of the adjoining counties, shall obey any order of commitment so made.

Code, s. 3458; R. C., c. 87, s. 3; 1835, c. 2, s. 2. **Failure to obey order of commitment, see section 3603.**

1351. When jail destroyed. Whenever the jail of any county shall be destroyed by fire or other accident, any justice of the peace of such county may cause all prisoners who may then be confined therein to be brought before him; and upon the production of the process, under which any prisoner was confined, shall order his commitment to the jail of any adjacent county; and the sheriff, constable or other officer of the county, deputed for that purpose, shall obey the order; and the sheriff or keeper of the common jail of such adjacent county shall receive such prisoners upon the order aforesaid.

Code, s. 3457; R. C., c. 87, s. 2; 1835, c. 2, s. 1.

IV. Farming Out Prisoners.

1352. Counties and towns may. The board of commissioners of the several counties, within their respective jurisdictions, or such other county authorities therein as may be established, and the mayor and intendant of the several cities and towns of the state, shall have power to provide under such rules and regulations as they may deem best for the employment on the public streets, public highways, public works, or other labor for individuals or corporations, of all persons imprisoned in the jails of their respective counties, cities and towns, upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace or for good behavior, and who fail to pay all the costs which they are adjudged to pay, or to give good and sufficient security therefor: Provided, such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court: Provided further, the amount realized from hiring out such persons shall be credited to them for the fine and bill of costs in all cases of conviction: Provided also, it shall not be lawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court before whom the trial is had shall in its judgment so authorize.

Code, s. 3448; 1866-7, c. 30; 1872-3, c. 174, s. 10; 1874-5, c. 113; 1876-7, c. 196, s. 1; 1879, c. 218. **See also section 1355 containing annotations of interest. This section to be construed with sections 1519, 1773 and 1355:** State v. Morgan, 141-726. **Statute constitutional:** State v. Weathers, 98 685.

Prisoner can not be farmed out unless judge before whom tried shall so authorize: State v. Pearson, 100-414. **The provision prohibiting the farming out of certain prisoners without court's authority refers to farming them to individuals and private corporations:** State v. Yandle, 119-874; State v. Sneed, 94-806.

Persons imprisoned for failure to pay costs in criminal cases can be worked out: State v. Morgan, 141-726—**and their disposition is left in the discretion of the county commissioners,** State v. Norwood, 93-578—**but they can not be detained beyond time fixed by court:** State v. Williams, 97-416.

Putative father in bastardy can not be worked upon the public roads for failure to pay costs and maintenance: State v. Addington, 143-683; State v. Morgan, 141-726, **overruling** Myers v. Stafford, 114-234. **Persons sentenced to house of correction can not be worked out under this section:** State v. Morgan, 141-726.

The placing of prisoner to work on the roads is not an additional punishment but merely incident to the sentence: State v. Yandle, 119-875.

Legislative power to authorize certain counties to employ on roads certain classes of convicts discussed in Herring v. Dixon, 122-420.

Section merely referred to in State v. White, 125-678; State v. Nelson, 119-801.

1353. Party hiring may prevent escape. The party in whose service said convicts may be, may use the necessary means to hold and keep them in custody, and to prevent their escape.

Code, s. 3454; 1876-7, c. 196, s. 3.

1354. Sheriff has control. All convicts hired or farmed out by the county or other municipal authorities shall at all times be under the supervision and control, as to their government and discipline, of the sheriff, or his deputy, of the county in which they were convicted and imprisoned, and the sheriff, or his deputy, shall be deemd a state officer for the purpose of this section.

Code, s. 3453; 1876-7, c. 196, s. 2.

V. Convicts on Public Roads.

1355. What convicts so sentenced. When any county has made provision for the working of convicts upon the public roads, or when any number of counties have jointly made provision for working convicts upon the public roads, it shall be lawful for, and the duty of the judge holding court in such counties, to sentence to imprisonment at hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jail or in the state's prison, the following classes of convicts: First, all persons convicted of offenses the punishment whereof would otherwise be wholly, or in part, imprisonment in the common jail; second, all persons convicted of crimes the punishment whereof would otherwise wholly or in part be imprisonment in the state's prison for a term not exceeding ten years. In such counties there may also be worked on the public roads, in like manner, all persons sentenced to imprisonment in jail by any magistrate, and also all insolvents who shall be imprisoned by any court in said counties for nonpayment of costs in criminal causes may be retained in imprisonment and worked on the public roads until they shall have repaid the county to the extent of the half fees charged up against the county for each person taking the insolvent oath. The rate of compensation to be allowed each insolvent for work on the public roads shall be fixed by the county commissioners at a just and fair compensation, regard being had to the amount of work of which each insolvent is capable.

1887, c. 355; 1889, c. 419. **See annotations under section 1352. For a full discussion of this section,** see State v. Young, 138-571.

Prisoner properly assigned by court to work on public roads: State v. Young, 138-571 and cases cited: State v. Smith, 126-107; State v. Haynie,

118-1265—**of another county,** State v. Hamby, 126-1066. **Judge's duty to assign to roads when provision made by county:** State v. Saunders, 146-.

Where convict imprisoned for nonpayment of costs he is to be detained only until he has repaid county the "half fees" charged up against it: State v. Saunders, 146-.

Where judgment has been rendered that prisoner be worked upon the public roads it is presumed that county commissioners have made provision for its enforcement: State v. Hicks, 101-747. **Statutes authorizing working of prisoners on public roads by county authorities are constitutional:** State v. Weathers, 98-685.

Where a person who is unable to pay cost is convicted of criminal offense not within the exceptions to section 1283 and sentenced to work on public roads, county is liable only for one-half fees: State v. Saunders, 146- .

1356. Under control of county authorities. The convicts sentenced to hard labor upon the public roads, under the provisions of the preceding section, shall be under the control of the county authorities, and the county authorities shall have power to enact all needful rules and regulations for the successful working of convicts upon the public roads: Provided, the county commissioners shall have power to work such convicts on the public roads or in canaling the main drains and swamps or on other public work of the county.

1887, c. 355, s. 2; 1891, c. 164. **Statute merely referred to in** State v. Young, 138-573.

1357. When sentenced to state's prison. In all cases where the judge presiding shall be satisfied that there is good reason to fear that an attempt might be made to release or to injure any person convicted of any of the offenses mentioned in the second class, it shall be lawful for the judge to sentence such convicts to imprisonment in the state's prison, as is now provided by law: Provided, that no person who has been convicted and sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson, shall be assigned to county roads under this chapter.

1887, c. 355, s. 4.

1358. When state's prison to send convicts to county. In addition to the convicts mentioned in section one thousand three hundred and fifty-five, the board of directors of the state's prison is authorized and directed to furnish to the authorities of any county within the state, convicts, not exceeding twenty-five in number during any one year, for the purpose of working the public roads in said county. The said convicts shall be at all times under the supervision and control as to their government and discipline of the

board of directors of the state's prison as in case of hiring convicts to railroad companies. Any county applying for convicts under this chapter shall erect suitable stockades for their safe-keeping and protection, and shall pay the expense of their transportation from and to the state's prison.

1887, c. 355, s. 5.

1359. Taxes levied to maintain. The board of county commissioners of the several counties in the state taking advantage of this chapter shall levy a special tax annually as other taxes are levied for the purpose of paying the expenses of said convicts, building of stockades, etc., and the expenses shall be paid by the counties taking advantage of this subchapter.

1887, c. 355, s. 6.

VI. Houses of Correction.

1360. Commissioners may establish. The board of commissioners may, when they deem it necessary, establish within their respective counties, one or more convenient houses of correction, with work shops and other suitable buildings for the safe keeping, correcting, governing, and employing of offenders legally committed thereto. They may also, to that end, procure machinery and material suitable for such employment in said houses, or on the premises; and moreover attach thereto a farm or farms; and all lands purchased for the purposes aforesaid, shall vest in the directors hereinafter provided for, and their successors in office. The said board shall also have power to make, from time to time, such rules and regulations as it may deem proper, for the kind and mode of labor, and the general management of the said houses.

Code, s. 786; 1866, c. 35, s. 1. **Prisoner committed to workhouse entitled to be discharged upon taking insolvent debtor's oath:** State v. Williams, 97-414. **Where prisoner committed to house of correction, officer can not justify for escape by alleging that prisoner should have been confined in county jail:** State v. Garrell, 82-580.

1361. Taxes may be levied. The board of commissioners, in addition to the ordinary county taxes, shall also, at the time said taxes are laid, lay such tax as may be necessary to carry into effect this subchapter, which shall be collected and paid to the manager at the same time as other county taxes are to be paid; for which, and such other funds as may come into his hands as manager, he shall be accountable; and he shall disburse the same under the authority of the directors.

Code, s. 790; 1866, c. 35, s. 5.

1362. Bonds may be issued. The board of commissioners may, if deemed advisable by them, issue county bonds to raise money to establish the houses and farms herein provided for.

Code, s. 796; 1866, c. 35, s. 11.

1363. Governor notified of establishment of. Whenever any work house or house of correction shall be established in pursuance of this chapter, it shall be the duty of the chairman of the board of commissioners of the county wherein the same shall be established, to certify the fact to the governor, who shall cause it to be noted in a book kept for that purpose.

Code, s. 797; 1866, c. 35, s. 12.

1364. Directors appointed; duties. The board of commissioners shall, annually, appoint not less than five nor more than nine directors for each house of correction which may be established, whose duty it shall be to superintend and direct the manager hereinafter named in the discharge of his duties; to visit said houses at least once in every three months; to see that the laws, rules and regulations relating thereto are duly executed and enforced, and that the persons committed to his charge are properly cared for, and not abused or oppressed. The directors shall keep a journal of their proceedings, and publish annually an account of the receipts and expenditures. They shall further make a quarterly report to their respective county commissioners of the general condition of their charge, and of the receipts and expenditures of the institution. They shall also make such by-laws and regulations for the government thereof as shall be necessary, which shall be reported to, and approved by, the said commissioners. The directors shall be paid for the services rendered by the county treasurer, each director first making it appear to the satisfaction of the board of county commissioners, by his oath, the character and extent of the services rendered for which he claims compensation; and such payment shall be made by the county treasurer out of any funds in his hands not otherwise appropriated.

Code, s. 787; 1866, c. 35, s. 2.

1365. Term of office of directors. The directors shall continue in office until others shall be appointed; and if any vacancy happens among them, it shall be filled by the residue of the directors.

Code, s. 795; 1866, c. 35, s. 10.

1366. Manager appointed; bond given. The board of commissioners shall appoint a manager for each house or establishment, who shall give a bond, with two or more solvent sureties, in such sum

as may be required, payable to the state of North Carolina, conditioned for the faithful discharge of his duties. He shall hold his office during the pleasure of the board, and be at all times under the supervision of the directors; and in case of his misconduct, of which they shall be the sole judges, he may be forthwith removed by them and a successor appointed, who shall discharge the duties of the office until another manager shall be appointed by the board of commissioners. It shall be the duty of the manager to receive all persons sent to the house of correction, to keep them during the time of their sentence, and to employ and control them according to the rules and regulations established therefor. He shall have the direction and control over the subordinate officers, assistants and servants, who may be appointed by the directors. He shall make monthly reports to the directors of his management of the institution and his receipts and expenditures.

Code, s. 788; 1866, c. 35, s. 3.

1367. Manager to assign employment. The manager shall assign to each person sent to the work house the kind of work in which such person is to be employed.

Code, s. 794; 1866, c. 35, s. 9.

1368. Compensation of officers. The said board of commissioners shall direct what compensation the manager and such subordinate officers, assistants and servants, as shall be appointed, shall receive, and shall provide the payment thereof.

Code, s. 789; 1866, c. 35, s. 4.

1369. Sheriff to convey persons committed. Whenever any person shall be sentenced to a work house, he shall forthwith be committed by the court to the custody of the sheriff, to whom the clerk shall immediately furnish a certified copy of the sentence, in which it shall be stated (if the fact be so) that the offender is committed as a vagrant. The sheriff shall convey the offender to the work house, and deliver him to the manager with the certified copy aforesaid, and take the manager's receipt for the body; which receipt the sheriff shall return to the clerk of the board of commissioners, with his indorsement of the times when the offender was committed to him and delivered to the manager, and the clerk shall record the same in a book kept for that purpose, and file the original with the papers in the case.

Code, s. 793; 1866, c. 35, s. 8.

1370. Absconding offenders punished. If any offender shall abscond, escape or depart from any house of correction without

license, the manager shall have power to pursue, retake and bring him back, and to require all necessary aid for that purpose; and when brought back, the manager may confine him to his work by fetters or shackles, or in such manner as he may judge necessary, or may put him in close confinement in the county jail or elsewhere, until he shall submit to the regulations of the house of correction; and for every escape each offender shall be held to labor in the house of correction for the term of one month in addition to the time for which he was first committed.

Code, s. 791; 1866, c. 35, s. 6.

1371. Vagrants may be released, when. If any person committed as a vagrant shall behave well and reform, he may, on the certificate of the manager, be released by the directors. But if otherwise committed, he may be released by the committing authority, upon the certificate of the manager and directors, upon such conditions as they may deem proper.

Code, s. 792; 1866, c. 35, s. 7.

1372. Suits in name of county. All suits brought on behalf of the institution shall, unless it be otherwise prescribed, be brought in the name of the county, to the use of the directors of the work house, without designating such directors by name.

Code, s. 798; 1866, c. 35, s. 13.

VII. Joint Houses of Correction.

1373. Two or more may join. Any two or more counties, acting through their respective boards of commissioners, may jointly establish one or more convenient houses of correction, as is provided in the preceding sections, for the joint use of the counties so agreeing together; and the same may be established at such place or places, and be in all respects managed under such by-laws, rules and regulations as a majority of the general board of directors, to be appointed as hereinafter directed, shall determine.

Code, s. 799; 1866-7, c. 130, s. 1.

1374. Board of directors appointed. The board of commissioners of each of the respective counties agreeing as aforesaid to the establishment of one or more houses of correction for use jointly with any other county or counties shall annually appoint five directors in behalf of their several counties, and the directors so appointed by each of such counties shall together constitute the general board of directors of any such joint establishment.

Code, s. 800; 1866-7, c. 130, s. 2.

1375. General managers appointed. Said general board of directors shall appoint a manager or superintendent for every such joint establishment, and such assistants and servants as they may deem necessary. The manager shall give bond with two or more able sureties, to be approved by said board, in such sum as may be required, payable to the state of North Carolina, and conditioned for the faithful performance of his duties. He shall hold his office during the pleasure of the general board of directors, and be, at all times, under their supervision; and of his misconduct they shall be the sole judges, and they may at any time remove him. He shall perform all such duties as may be prescribed by such general board of directors, and all such as may be incident to the office of manager by virtue of this chapter. The compensation of the manager and such subordinate officers, assistants and servants, as may be appointed by the general board, shall be fixed by said general board.

Code, s. 801; 1866-7, c. 130, s. 3.

CHAPTER 25.

COUNTY REVENUE.

I. Taxes and Fines.

1376. Taxes collected by sheriff. The county taxes shall be collected by the sheriff of the county, who shall be entitled to the same commissions and be subject to the same rules and regulations in respect to his settlement of the said taxes with the county treasurer as he is in his settlement of the public taxes with the treasurer of the state; and he shall also settle with the county treasurer or board of commissioners for the taxes on the unlisted property in his county, under the same rules and regulations as he accounts with the auditor of the state.

Code, s. 723; R. C., c. 28, s. 2; 1798, c. 509, s. 2; 1811, c. 823. **See also sections 2867, 4378, 5241-5253. For construction of the words "county taxes,"** see Board v. Comrs., 137-66.

County taxes must be collected by sheriff: Board v. Comrs., 137-65; King v. Hunter, 65-603. **Legislature cannot deprive him of right to collect:** King v. Hunter, 65-603; see also the "office holding cases" cited under section 827 and especially Mial v. Ellington, 134-138, which gives as reason why sheriff can not be deprived of right to collect that it is fixed by the constitution, not that sheriff has property right in office.

Sheriff insane, his sureties may collect current tax list: Somers v.

Comrs., 123-582. **Sheriff or tax collector is an insurer of the safety of all money officially received by him against loss by any means whatever, including such losses as arise from act of God or public enemy:** Comrs. v. Clarke, 73-255; Smith v. Patton, 131-397, and cases there cited.

All school taxes are included in the accounting to be made between county treasurer and sheriff: Tillery v. Candler, 118-888.

No appeal lies from refusal of commissioners to allow a credit to sheriff in his settlement of taxes; remedy of sheriff is by civil action: McMillan v. Comrs., 90-28; Jones v. Comrs., 88-56, and cases cited. **Commissioners have no power to release sheriff from liability to pay over county taxes:** Fidelity Co. v. Fleming, 132-337; Comrs. v. Clarke, 73-255. **As to commissions allowed, see section 5246.**

1377. Statement of fines kept by clerk. It shall be the duty of the clerks of the several courts, and of the several justices of the peace, to enter in a book, to be supplied by the county, an itemized and detailed statement of the respective amounts received by them in the way of fines, penalties, amercements and forfeitures, and said books shall at all times be open to the inspection of the public.

Code, s. 725; 1873-4, c. 116, s. 4; 1879, c. 96, s. 1.

1378. Fines paid treasurer, when; for schools. All fines, forfeitures, penalties and amercements collected in the several counties by any court or otherwise, shall be accounted for and paid to the county treasurer by the officials receiving them within sixty days after receipt thereof, and shall be faithfully appropriated by the county board of education for the establishment and maintenance of free public schools; and the amounts collected in each county shall be annually reported to the superintendent of public instruction on or before the first Monday in January, by the board of commissioners.

Const., Art. IX, s. 5; Code, ss. 724, 726; R. C., c. 28, s. 3; 1879, c. 96, ss. 2, 5. **See also section 5194. Only clear proceeds of all penalties that accrue to the state to go to school fund:** State v. Maultsby, 139-583; School Directors v. Asheville, 128-249, 137-508; Carter v. R. R., 126-445; Bd. of Ed. v. Henderson, 126-695; Goodwin v. Fertilizer Co., 119-122; Sutton v. Phillips, 116-502; Hodge v. R. R., 108-30; Katzenstein v. R. R., 84-688—**and likewise as to fines, the "clear proceeds" of which are indicated,** State v. Maultsby, 139-585; Bd. of Ed. v. Henderson, 126-695; School Directors v. Asheville, 137-508. **Power of legislature to appropriate or give fines and penalties to other causes discussed** in State v. Maultsby, 139-583; School Directors v. Asheville, 137-503. **For liability of municipalities for fines, penalties and forfeitures hereunder,** see School Directors v. Asheville, 128-249; Bd. of Ed. v. Henderson, 126-689; Comrs. v. Raleigh, 88-120.

1379. Commissioners expend county funds. The board of commissioners is invested with full power to direct the application of

all moneys arising by virtue of this chapter for the purposes herein mentioned, and to any other good and necessary purpose for the use of the county.

Code, s. 753; R. C., c. 28, s. 16; 1777, c. 129, s. 4. **For additional important annotations on this subject, see section 1318, subsections 2, 25, 27. Courts have right to say what are necessary expenses, but can not control discretion of commissioners in incurring debt when expenses are necessary:** Black v. Comrs., 129-121; Mayo v. Comrs., 122-5; Vaughn v. Comrs., 117-429; but see McKethan v. Comrs., 92-243; Evans v. Comrs., 89-154; Satterthwaite v. Comrs., 76-153; Brodnax v. Groom, 64-244.

Legislature may confer upon county the right to create debts for necessary expenses without consent of majority of qualified voters of county: Evans v. Comrs., 89-154; Halcombe v. Comrs., 89-346. **Neither county nor commissioners individually liable for misapplication of funds, where they act in good faith, but under mistake of law:** Bd. of Ed. v. Comrs., 113-387. **Expense of convicts is paid out of county fund:** Chambers v. Walker, 120-401.

EXPENSES HELD NECESSARY. Working public roads: Crocker v. Moore, 140-429; Tate v. Comrs., 122-812. **Building courthouse:** Black v. Comrs., 129-121; Vaughn v. Comrs., 117-429; Halcombe v. Comrs., 89-350. **Constructing public roads:** Herring v. Dixon, 122-420. **Building and repairing bridges:** Herring v. Dixon, 122-420; Evans v. Comrs., 89-158; Satterthwaite v. Comrs., 76-153; Brodnax v. Groom, 64-244.

Summary of constitutional rules as to the levying of taxes for necessary expenses in Tate v. Comrs., 122-815.

II. Reports of Officers.

1380. Made annually. Sheriffs, treasurers, clerks of any court, register of deeds and all other officers of the several counties, into whose hands any public funds may come by virtue or under color of their office, shall make an annual account and report of the amount and management of the same, on the first Monday of December, or oftener if required, in each year, to the board of commissioners. Such report shall give an itemized and detailed account of the public funds received and disbursed, the amount, date and source from which it was received, and the amount, date and person to whom paid; shall be addressed to the chairman of the board of commissioners for the county, and shall be subscribed and verified by the oath of the party making the same, before any person authorized to administer oaths.

Code, s. 728; 1874-5, c. 151, s. 1; 1876-7, c. 276, s. 1. **For sheriff's settlement of taxes, see sections 5241-5253.**

1381. Compelled. If any person required to make any of the reports hereinbefore provided for shall fail to do so, or if, after a report has been made, the board of commissioners shall disapprove

the same, such board may take such legal steps to compel a proper report to be made, either by suit on the bond of such officer failing to comply or otherwise, as said board may deem best.

Code, s. 730; 1874-5, c. 151, s. 3; 1876-7, c. 276, s. 3.

For liability and actions on bonds of county officers, see chapter "Bonds."

1382. Registered. The board of commissioners, if it shall approve of any of the said reports, shall cause the same to be registered in the office of the register of deeds in a book to be furnished to the register of deeds by the county, which book shall be marked and styled "Record of Official Reports," with a proper index of all reports recorded therein, and each official report shall, if approved, be indorsed by the chairman of the board with the word "approved," with the date of approval, and when recorded by the register of deeds he shall indorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office.

Code, s. 729; 1874-5, c. 151, s. 2; 1876-7, c. 276, s. 2.

1383. Penalty for failure to make. If any clerk, sheriff, justice of the peace, or other officer, shall fail or neglect to account for and pay over as required by law any taxes on suits, or any fines, forfeitures and amercements as required by this chapter, or shall fail to make the returns herein specified, he shall forfeit and pay five hundred dollars, to be recovered in the name of the board of commissioners for the use of the public schools of the county.

Code, s. 764; R. C., c. 28, s. 7; 1808, c. 756; 1809, c. 769; 1813, c. 864; 1830, c. 1, ss. 11-13. **"Account" defined:** State v. Dunn, 134-668. **Penalty statutes must be strictly construed:** Alexander v. R. R., 144-93. **"Penalty" defined:** Board v. Henderson, 126-689. **As to actions for recovery of penalties, see sections 378, 420, 1521.**

III. Claims.

1384. Demand before suit. No person shall sue any city, county, town, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint shall be verified and contain the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so allowed and audited, and that such treasurer had notwithstanding neglected to pay it.

Code, s. 757. For time in which such demand made and action brought, see section 396. For additional annotations, see section 1385.

DEMAND. Claims must be audited and presented for payment and refused before action will lie: Leach v. Comrs., 84-830; Jones v. Comrs., 73-182; Alexander v. Comrs., 67-330; Love v. Comrs., 64-706—but only necessary where claim ex contractu; never applicable to actions ex delicto, Neal v. Marion, 126-412; Sheldon v. Asheville, 119-606; Frisby v. Marshall, 119-570; Shields v. Durham, 118-450. Complaint against county or town must allege demand upon proper officers. Williams v. Smith, 134-252; School Directors v. Greenville, 130-87; Leach v. Comrs., 84-830; Jones v. Comrs., 73-182; Love v. Comrs., 64-706.

MANDAMUS TO ENFORCE PAYMENT. Debt reduced to judgment, creditor entitled to mandamus to compel payment: Fry v. Comrs., 82-304; Hughes v. Comrs., 107-598; Cromartie v. Comrs., 85-211, 87-134; Gas Co. v. Raleigh, 75-274; McLendon v. Comrs., 71-38; Johnston v. Comrs., 67-101; Askew v. Pollock, 66-49; Gooch v. Comrs., 65-142; Lutterloh v. Comrs., 65-403; Pegram v. Comrs., 64-557; Winslow v. Comrs., 64-223—and that without prior demand, Nicholson v. Comrs., 121-27—and mandamus should be addressed to commissioners as board and not as individuals: Thomas v. Comrs. of Carteret, 66-521; Askew v. Pollock, 66-49. A writ of mandamus does not authorize commissioners to levy and collect taxes otherwise than as prescribed by law: Mauney v. Comrs., 71-486; see Hughes v. Comrs., 107-598; Cromartie v. Comrs., 85-211, 87-134.

When peremptory mandamus issues: Fry v. Comrs., 82-304; Edwards v. Comrs., 70-571; Uzzle v. Comrs., 70-564; Lutterloh v. Comrs., 65-405—mandamus failing, debtor moves for attachment Fry v. Comrs., 82-307. Facts which must be shown before mandamus issues: Bear v. Comrs., 124-204; Hughes v. Comrs., 107-598.

That constitutional limit of taxation has been reached is a sufficient answer by commissioners to a writ of mandamus: Hughes v. Comrs., 107-598; Cromartie v. Comrs., 85-211, 87-134—but alias mandamus should issue to the end that any excess of revenue raised may be applied to debt, Cromartie v. Comrs., 87-134. That claim upon which judgment based is void is no defense to writ; unless claim shown not to be for necessary expenses: Bear v. Comrs., 122-434, modified by the same case in 124-204.

Action of debt may be maintained against county without asking for mandamus where it appears that county has property subject to trusts or such as can be reached only by supplementary proceedings: Hughes v. Comrs., 107-598.

As to enforcing judgment against county property where mandamus unavailable because tax rate up to constitutional limitation, see Hughes v. Comrs., 107-598; Winslow v. Comrs., 64-223.

Legislature can compel county to issue bonds to fund indebtedness for necessary expenses: Jones v. Comrs., 137-579—and mandamus is the proper remedy to force commissioners to comply with act "authorizing and empowering" them to fund it, same being mandatory, Ibid, overruling Jones v. Comrs., 135-218 and Bank v. Comrs., 135-230.

School orders are no charge upon public funds and payment can not be

enforced by mandamus: Bear v. Comrs., 124-204. **County warrant must be paid by treasurer; he can not dispute its validity except on constitutional grounds:** Martin v. Clark, 135-180.

For practice in mandamus proceedings, see sections 822-824.

1385. Itemized and verified. No account shall be audited by the board for any services or disbursements, unless it is first made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied. Each account shall state the nature of the services, and where no specific compensation is provided by law, it shall also state the time necessarily devoted to the performance thereof. The board may disallow or require further evidence of the account, notwithstanding the verification. All county commissioners acting on January the twenty-seventh, one thousand nine hundred and five, or elected theretofore, are released, whether as individuals or in their corporate capacity, from any and all penalties incurred by reason of failure to comply with the provisions of this section, prior to said date.

Code, s. 754; 1905, c. 55; 1868, c. 20, s. 10. **See annotations under section 1384. Complaint against commissioner for penalty under section 3590, alleging failure to require itemized and verified account before auditing and approving claim, states cause of action:** Turner v. McKee, 137-251. **Provision that no account shall be audited by commissioners unless itemized and verified is mandatory,** Ibid. **Unadjusted claims are required to be audited and ordered paid, but absolute and unconditional obligations already ascertained and audited are per se order and authority to officer to pay:** Leach v. Comrs., 84-830.

Claims must be audited at regular meeting of board: Bank v. Warlick, 125-594. **Allowance of claim only prima facie evidence of correctness and order making same may be modified or annulled:** Abernathy v. Pfifer, 84-711; Wright v. Kinney, 123-618. **Mandamus lies to compel commissioners to consider claim:** Martin v. Clark, 135-179; Bennett v. Comrs., 125-469; Koonce v. Comrs., 106-192.

County warrants are not negotiable in the sense of the law merchant, though transferable so as to authorize the holder to demand payment, with or without action, in his own name: Wright v. Kinney, 123-618; Bank v. Warlick, 125-594; McPeeters v. Blankenship, 123-651.

Treasurer can not refuse to pay county warrant except on ground that its issue unconstitutional: Martin v. Clark, 135-180.

Holder of valid county warrant, who is refused payment, has two remedies against county treasurer, either to sue on his bond or apply for mandamus, of neither of which has a magistrate jurisdiction: Wright v. Kinney, 123-618.

Unauthorized endorsement of "approved," signed by chairman, of an order invalid upon its face will not render commissioner personally liable

in absence of fraud or misrepresentation: Ibid. **County orders are presumed to be for necessary expenses:** McCless v. Meekins, 117-34.

1386. Numbered as presented. All accounts presented in any year, beginning at each regular meeting in December, shall be numbered from one upwards, in the order in which they are presented, and the time of presentation, the names of the persons in whose favor they are made out, and by whom presented, and shall be carefully entered on the minutes of the board; and no such account shall be withdrawn from the custody of the board or its clerk, except to be used as evidence in a judicial proceeding, and after being so used it shall be promptly returned.

Code, s. 755; 1868, c. 20, s. 12.

1387. Numbered as allowed, when. The clerk of the board of commissioners, if so ordered by the board, shall number all claims, orders and certificates that may be allowed by the board in a book kept for that purpose, and he shall annually, the day before the board proceeds to lay a county tax for the ensuing year, furnish the chairman of the board with a copy of the same.

Code, s. 751; R. C., c. 28, s. 12; 1793, c. 387.

1388. Annual statement published. The board shall cause to be posted at the courthouse within five days after each regular December meeting and for at least four successive weeks, or after each regular monthly meeting, if they deem it advisable, and for one week, the name of every individual whose account has been audited, the amount claimed and the amount allowed; and also at the same time and in the same manner post a full statement of county revenue and charges, showing by items the income from every source and the disbursements on every account for the past year, together with the permanent debt of the county, if any, when contracted, and the interest paid or remaining unpaid thereon. The board shall also publish the said statement in some newspaper in the county: Provided, the cost of such publication shall not exceed one-half of a cent a word.

Code, s. 752; 1901, c. 196; 1905, c. 227. **This section does not subject a commissioner, whose term of office expired on the day of the meeting designated, to the penalty for failure to publish:** Shelton v. Moody, 146-626

IV. Finance Committee.

1389. Election and duties. The board of commissioners may elect by ballot three discreet, intelligent tax-paying citizens, to be known as the "finance committee," whose duty it shall be to inquire into, investigate and report by public advertisement, at the courthouse

and one public place in each township of the county, or in a newspaper, at their option, if one be published in the county, a detailed and itemized account of the condition of the county finances, together with any other information appertaining to any funds, misappropriation of county funds, or any malfeasance in office by any county officers.

Code, s. 758; 1897, c. 513; R. C., c. 28, s. 17; 1838, c. 31, s. 1; 1871-2, c. 71, s. 1. **For special provision for Robeson county, see 1907, c. 488.**

Mistake made in report of finance committee, money refunded to officer paying same: Moore v. Comrs., 87-209.

1390. Oath. The members of the finance committee before entering upon their duties shall, before the clerk of the superior court, subscribe to the following oath or affirmation:

"I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality. So help me, God."

Code, s. 762; 1871-2, c. 71, s. 4.

1391. Powers of. The finance committee shall have power and authority to send for persons and papers, and to administer oaths; and any person failing to obey their summons, or to produce promptly any paper relating or supposed to relate to any matter appertaining to the duties of the finance committee, shall be guilty of a misdemeanor, and on conviction in the superior court, shall be fined and imprisoned at the discretion of the court.

Code, s. 759; 1831, c. 31; 1871-2, c. 71, s. 2; R. C., c, 28, s. 17; 1883, c. 252.

1392. Penalty on officer failing to settle. If any clerk, sheriff, constable, county treasurer, register of deeds, justice of the peace, or other officer or commissioner, who may hold any county money, shall fail duly to account for the same, the finance committee shall give such person ten days' previous notice, in writing, of the time and place at which they will attend to make a settlement; and every officer receiving notice and failing to make settlement as required by this chapter shall forfeit the sum of five hundred dollars, to be sued for in the name of the state and prosecuted for the use and at the expense of the county, unless the court shall release the officers from the forfeiture.

Code, s. 760; R. C., c. 28, s. 19; 1831, c. 31, s. 3.

1393. Statement by, published. It shall be the duty of the finance committee to make and publish their report as hereinbefore directed on or before the first Monday of December in each year.

Code, s. 761; 1871-2, c. 71, s. 3.

For criminal costs for which county is liable, see section 1283 et seq. For general revenue act, see Vol. II, Revenue. For statute of limitations in claim against county, see section 396.

CHAPTER 26.

COUNTY TREASURER.

1394. When elected. In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, * * * a treasurer.

Const., Art. VII, s. 1. **Treasurer's term of office two years:** Aderholt v. McKee, 65-257.

1395. How abolished. The justices of the peace in any county may abolish the office of county treasurer; and thereupon the duties and liabilities attached to the office shall devolve upon the sheriff, who shall be ex officio county treasurer. And in any county where the office of treasurer has been abolished, the justices of the peace may also, if they shall deem it expedient to do so, restore the office of treasurer.

Code, s. 768; R. C., c. 29, s. 10; 1852, c. 6; 1876-7, c. 141; 1881, c. 362. **Where there is no treasurer, sheriff is ex officio treasurer:** Koonce v. Comrs., 106-198; Rhodes v. Hampton, 101-629. **Justices may abolish or restore office of treasurer whenever they think desirable:** Ibid. **No person to fill office of treasurer when restored, county commissioners may fill until next regular election:** Ibid.

Sheriff has no vested interest in office and, upon restoration of same, another person may be appointed to fill it: Ibid.

Term of office of a treasurer appointed by board of commissioners to fill a vacancy is only that of unoccupied term of his predecessor: Aderholt v. McKee, 65-257.

1396. Includes person acting as such; treasurer of county board of education. The office of county treasurer shall always be construed to refer to, and include, the person authorized by law to perform the duties of that office in any county, if there is no county treasurer therein. The county treasurer shall be ex officio the treasurer of the county board of education.

Code, s. 770. **For duties as treasurer of county board of education see sections 4152-4160. County treasurer ex officio treasurer of county board of education:** Koonce v. Comrs., 106-198; Comrs. v. Magnin, 86-288, 78-183.

1397. Sheriff acting as such, bond liable. In counties where the office of county treasurer may be abolished, and where the sheriff is authorized to perform the duties of county treasurer, the bond he gives as sheriff shall be construed to include his liabilities and duties as such county treasurer, and may be increased to such amount by the board of commissioners as may be deemed necessary to cover the trust funds coming to his hands.

Code, s. 769; 1879, c. 202. **For liability on sheriff's bond as treasurer, see sections 297 and 298.**

1398. Duties. It shall be the duty of the treasurer—

1. TO KEEP COUNTY MONEYS.

To receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, to keep them separate and apart from his own affairs, and to apply them and render account of them as required by law.

Treasurer's duty to pay warrant drawn by commissioners on specific fund: Martin v. Clark, 135-178—**to receive money belonging to county; and for money not belonging to county which he attempts to care for he is personally liable, not the county,** Burbank v. Comrs., 92-259—**to pay claims audited and allowed by commissioners,** Jones v. Comrs., 73-182.

For general view of treasurer's duties and county's liability for his acts, see Burbank v. Comrs., 92-259.

Not within power or duty of treasurer to refuse to pay county order issued by commissioners because he does not think it a just and lawful claim or for any other reason, which has been passed upon by board and within its power to act: Martin v. Clark, 135-178.

2. TO KEEP TRUE ACCOUNTS.

To keep a true account of the receipts and expenditures of all such moneys, taking proper vouchers in every case in books provided for that purpose at the expense of the county; which said books shall at all times show the date, amount, and from whom he shall have received such moneys; the date, amount and to whom he has paid out any of the said moneys, the total amount received and the total amount paid out during the current fiscal year for school purposes, for general county purposes, for jury fund, and for each special purpose, all separately kept, so that at all times his said books shall correctly and accurately show the condition of the said several accounts. His account of expenditures for general county purposes shall also show separately the amounts expended each year on account of the county home, indigent persons, jails, work-houses, courthouse, bridges, insolvent fees, courts, and such other special accounts as shall be required by the board of commissioners of the

county, the total of said accounts being the aggregate amount expended during the fiscal year for general county purposes. He shall post at the courthouse door on the first Monday in each month a correct statement of such receipts and expenditures, showing the amount received, and from what source, and the amounts paid out, and to whom, and for what purpose, and the balance in his hands belonging to the county.

3. TO CALL ON COUNTY OFFICERS FOR FUNDS IN THEIR HANDS.

To call on the sheriff, or the clerk of the superior court, or other officer having county moneys in his hands, at least once in each month, or oftener if necessary, to pay over to him, and to account for all such moneys.

For actions on official bonds, see section 281.

4. TO KEEP ACCOUNTS OF FINES, ETC.

To enter in a book to be kept by him the exact amount of any fine, penalty or forfeiture paid over to him, giving the date of payment, the name of the clerk or other person so paying the same, the name of the party from whom such fine, penalty or forfeiture was collected, and in what case.

5. TO EXHIBIT TO THE BOARD OF COMMISSIONERS HIS BOOKS AND ACCOUNTS, AS TREASURER, FOR EXAMINATION.

To exhibit his books and accounts and moneys once every three months, or oftener, if the board of commissioners of his county deem it necessary, to a committee to be composed of the chairman of the board of commissioners and one other person to be selected by the board of commissioners, who shall be an expert accountant; and it shall be the duty of this committee to examine the books and accounts of his office, and to see that the accounts are correctly and properly kept, and to count the money in the hands of the treasurer, and to see that it corresponds with the amount shown by the books to be in his hands. And at every such examination of the books and accounts of his office the county treasurer shall exhibit a full, perfect and itemized statement to said committee of the use he has made of every dollar of public funds in his hands since the last exhibition of his books to said committee, and if any part of said funds has been loaned out this statement shall state to whom loaned and on what security and the amount of interest paid on said loan, and such interest shall be by the treasurer covered into the county treasury. This statement shall be sworn to and published in a county newspaper or at the courthouse door: Provided, that nothing

herein contained shall be construed to authorize the county treasurer to lend any public funds. And if at any time there shall be a deficit in the amount of money in the hands of the treasurer, the committee shall so report to the board of commissioners, whose duty it shall be to institute proceedings in the superior court against said treasurer for violation of his official duties.

Code, ss. 96, 773; 1889, c. 242. **For action against treasurer on his official bond, see section 297.**

1399. Not to speculate in county claims; forfeits office thereby. No county treasurer purchasing a claim against the county at less than its face value shall be entitled to charge the county a greater sum than what he actually paid for the same; and the board of commissioners may examine him as well as any other person on oath concerning the matter; and any county treasurer who shall be concerned or interested in any such speculation shall forfeit his office.

Code, s. 772; 1868-9, c. 157, s. 8.

1400. Administers property held in trust for county. In all cases where any property, real or personal, shall have been held by deed, will or otherwise, by any person or officer in trust for any county, or for any charitable use to be administered in, and for, the benefit of such county, or the citizens thereof, such property shall be transferred to, and vest in the county treasurer, to be administered and applied by him under the direction of the board of commissioners, upon the same uses, purposes and trusts as declared by the grantor, testator, or other person in the original deed, devise or other instrument of donation.

Code, s. 778; 1869-70, c. 85.

1401. To take charge of county trust funds; additional bond required. It shall be the duty of the county treasurer to take charge of all such trust funds and property; but he shall not do so, without giving a bond payable to the state, in a penalty double the estimated value of said property or funds, with three or more sureties, each of whom shall be worth at least the amount of the penalty of the bond, over and above all his liabilities and property exempt from execution, which bond shall be taken by the board of commissioners, and shall be recorded and otherwise treated and dealt with as the official bond of the treasurer.

Code, s. 779; 1869-70, c. 85, s. 2.

1402. Commissioners to keep a record of trust funds. The board of commissioners shall keep a proper record of all such trust prop-

erty or charitable funds, and when necessary shall institute proceedings to recover for the treasurer all such as may be unjustly withheld.

Code, s. 780; 1869-70, c. 85, s. 3.

1403. Exhibits amounts and condition of trust funds. The county treasurer, whenever he is required to exhibit to the board of commissioners the financial condition of the county, shall exhibit also distinctly and separately the amount and condition of all such trust funds and property, how invested, secured, used, and other particulars concerning the same.

Code, s. 781; 1869-70, c. 85, s. 4.

1404. Pays no claim unless audited. It shall not be lawful for the county treasurer to pay a claim against the county, unless the same shall have been audited and allowed by the board of commissioners.

Code, s. 777; 1868, c. 19. **Duty to pay claim when audited and allowed by commissioners:** Jones v. Comrs., 73-182.

County treasurer can not refuse to pay a warrant drawn by commissioners because he does not think claim lawful or just or for any other reason passed upon by the board and within its power to act: Martin v. Clark, 135-180.

Section referred to in State v. Wilkerson, 98-701.

1405. Books, papers and moneys delivered to successor. Whenever the right of any county treasurer to his office expires, the books and papers belonging to his office, and all moneys in his hands by virtue of his office shall, upon his oath, or in case of his death upon the oath of his personal representative, be delivered to his successor.

Code, s. 767; 1868-9, c. 157. **It is treasurer's duty to know what moneys remain in his hands at the expiration of his term and to what funds they belong, and, until these moneys are paid, the bond is liable; and a settlement with county is not conclusive of the amounts, but is open to correction:** Comrs. v. MacRae, 89-95.

No demand upon treasurer is necessary before bringing suit for funds he should have turned over to his successor: Comrs. v. Magnin, 86-286.

As to actions on treasurer's bond, see section 297.

1406. Action on bond, brought by commissioners. The board of commissioners shall bring an action on the treasurer's bond, whenever they have knowledge or a reasonable belief of any breach of the bond.

Code, s. 771; 1868-9, c. 157. **County commissioners are proper parties relator in action on treasurer's bond:** Comrs. v. Magnin, 86-286. **For ex-**

ample of bond held sufficient to protect school moneys see Ibid. **Where new duty, added by statute, of being treasurer of board of education, with requirement of special bond, old official bond not liable for school moneys:** Bd. Education v. Bateman, 102-52. **A settlement of outgoing treasurer does not discharge liability on bond:** Comrs. v. MacRae, 89-95.

Section cited in Koonce v. Comrs., 106-199. **For annotations on official bonds generally, see sections 281, 283.**

1407. Officers failing to account to treasurer sued by county commissioners. In case of the failure or refusal of a sheriff, clerk, or other officer to account and pay over, when called on as directed in this chapter, the treasurer shall report the facts to the board of commissioners, who may forthwith bring suit on the official bond of such delinquent officer, and the said board is also allowed to bring suit on the official bond of the clerk of the superior court of any adjoining county.

Code, s. 775; 1868-9, c. 157, s. 10. **For actions on official bonds generally, see section 281. For liability of clerk, see section 296—of county treasurer, see section 297—of sheriff, see section 298—of register of deeds, see section 301—of constable, see section 302—and of other officers, see section prescribing their bonds. Where after giving bond, new duties are added to office by statute, effect on liability:** Daniel v. Grizzard, 117-110; County Bd. Education v. Bateman, 102-52; Prairie v. Worth, 78-169; State v. Bradshaw, 32-229. **The bond of a public officer is liable for money that comes into his hands as an insurer and not merely for exercise of good faith:** Smith v. Patton, 131-396; Presson v. Boone, 108-78; Bd. Education v. Bateman, 102-52; Morgan v. Smith, 95-396; Havens v. Lathene, 75-505; Bd. Comrs. v. Clarke, 73-257; and cases therein cited. **Even though public officer may not be liable on bond, he may be personally liable:** Holt v. McLean, 75-346.

CHAPTER 27.

COURTS—JUSTICES'.

I. General Provisions.

1408. Constitution, article seven, abrogated; exceptions. All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven, nine and thirteen, are hereby abrogated, and the provisions of this chapter substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this

chapter, and to substitute others in their stead, as provided in section fourteen of article seven of the constitution.

Code, s. 818; 1876-7, c. 141, s. 7. **Courts of justices were created by constitution and legislature can not abolish them:** Rhyne v. Lipscombe, 122-650—**though may give inferior courts concurrent original jurisdiction with justice's,** Ibid.

Acts 1909 c. 192 page 1108

1409. When and how justices elected. At every general election held for members of the general assembly, there shall be elected in each township (except those in the counties of Bertie, Caswell, Chowan, Forsyth, Franklin, Granville, Harnett, Montgomery and Vance, in which counties justices of the peace shall be elected by the general assembly), three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such town or city (except in the city of Wilmington, where the number shall be twenty-five), except that in the county of Edgecombe there shall be elected one justice of the peace for each and every one hundred duly qualified electors in each township, and for every fraction of one hundred over fifty, who shall hold office for a term of two years from and after the first Monday in December next after their election.

1895, c. 157, s. 4; 1899, c. 392; 1903, cc. 191, 207, 790; 1876-7, c. 141; Code, s. 819; 1905, cc. 37, 44, 73, s. 2; 1905, c. 148, s. 2; 1905, c. 447; 1907, cc. 225, 293.

For special provision as to time of election in Washington county, see 1905, c. 148, s. 2. Justices elected by townships: Edenton v. Wool, 65-379; Wilmington v. Davis, 63-582. **A ticket containing more names than entitled to be voted for is void:** Mitchell v. Alley, 126-84.

Section merely referred to in Gilmer v. Holton, 98-27

1410. How justices elected in Warren county. Upon a petition of two-thirds of the qualified electors in any township in Warren county, the board of commissioners of said county shall call an election at the time and in the manner appointed for the election of members of the general assembly in the year one thousand nine hundred and six, and every two years thereafter, for the election of not more than five nor less than three justices of the peace, as the petition shall designate, to be voted for and elected by the voters of the said township in which they reside, and who shall hold their office for two years, and until their successors are elected and qualified. The said justices of the peace shall be qualified by taking the oath of office before the clerk of the superior court of said Warren county.

1905, c. 73, s. 2.

1411. When justices shall qualify; vacancies. Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oath of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the general assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the office of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the governor. All other vacancies shall be filled by the clerk of the superior court.

Code, s. 821; 1901, c. 37. **Provisions of section authorizing governor to fill vacancies caused by failure of appointee of legislature to qualify within prescribed time held constitutional:** Gilmer v. Holton, 98-26.

Duty of clerk of court to administer oath to justice: Ibid—**and duty of justice to take such oath,** Ibid—**though failure to qualify, where he exercises duties of office, will not relieve him from liability for misbehavior in office,** State v. Cansler, 75-442.

Authority of clerk to appoint justices of the peace to fill vacancies is confined to those vacancies caused by death, resignation or other causes during term: Gilmer v. Holton, 98-26.

1412. Office forfeited by removal from township. When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office.

Code, s. 822.

1413. Resignation. Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same.

Code, s. 823.

1414. Punishment on conviction of infamous crimes. Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Code, s. 826. **Where justice acting ministerially, if he acts corruptly, oppressively or from other bad motive he is liable criminally:** State v. Sneed, 84-816.

It is a misdemeanor for justice to sell or transfer judgment in his possession by virtue of the office: State v. Zachary, 44-432—**whether same rendered by himself or by another justice,** Ibid. **Where justice attempts to take cognizance of offense which he knows is already in superior court and has party arrested, he is amenable to the law:** State v. Sneed, 84-816.

Sufficiency of indictment charging justice with corruption in office discussed in State v. Zachary, 44-432.

Upon trial of an indictment against public officer for neglect or omission of duty, evidence of acts of positive misfeasance is inadmissible: State v. Hawkins, 77-494.

1415. Office under the United States. Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident.

Code, s. 825; Const., Art. XIV, s. 7. **Section merely referred to** in Barnhill v. Thompson, 122-496.

Our state constitution does not prohibit a justice from being also recorder of the city of Charlotte: State v. Lord, 145-479 (inapplicable hereunder, but of interest).

II. Dockets.

1416. Furnished by county commissioners. A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice.

Code, s. 831. **Justices' courts are not courts of record:** Williams v. Bowling, 111-295; Whitehurst v. Transportation Co., 109-342; Reeves v. Davis, 80-209—**and proceedings before justice in civil action are not strictly a record,** Bailey v. Hester, 101-538—**yet they possess many attributes of a record,** Ibid.

Although the court of a justice is not a court of record, its proceedings are authoritative and judicial in their nature: Whitehurst v. Transportation Co., 109-344—**and it possesses and may exercise many of the powers of such tribunals:** Bailey v. Hester, 101-538.

1417. Filed with clerks. Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county.

Code, s. 827. **Section merely referred to** in Williams v. Bowling, 111-296; Bailey v. Hester, 101-540.

1418. Dockets, papers and books delivered to clerk for successor. When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers to the clerk of the superior court for his succes-

sor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor.

Code, s. 828; 1885, c. 372. **Section merely referred to** in Whitehurst v. Transportation Co., 109-344; Bailey v. Hester, 101-540.

III. Civil Jurisdiction.

1419. Actions on contract. Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—

1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars. 150-689

2. Wherein the title to real estate is in controversy.

Const., Art. IV, s. 27; Code, s. 834.

GENERAL OBSERVATIONS. **For a general review of the jurisdiction of justices under the constitution,** see Rhyne v. Lipscombe, 122-650. **Legislature can not confer on mayor of town judicial powers of justice in civil actions:** Washington v. Hammond, 76-34; Edenton v. Wool, 65-379; Wilmington v. Davis, 63-582. **Where two causes of action set out in only one of which justice has jurisdiction, he may try that, treating other as surplusage:** Railroad v. Hardware Co., 135-73; Hargrove v. Harris, 116-418; Starke v. Cotten, 115-81; Mfg. Co. v. Barrett, 95-36; Deloatch v. Coman, 90-186; Ashe v. Gray, 90-137. **A judgment is a contract under this section:** Moore v. Nowell, 94-265; see McDonald v. Dickson, 87-404.

The summons as a substitute for a complaint must show upon its face that cause of action is within justice's legal cognizance: Leathers v. Morris, 101-184; Allen v. Jackson, 86-322.

The court will ex mero motu take notice of the want of jurisdiction: Hannah v. R. R., 87-351. **Where a justice takes cognizance of an action of which he has no jurisdiction and it goes by appeal to superior court, that court acquires no jurisdiction:** State v. Wiseman, 131-797; Ijames v. McClamrock, 92-362; Raisin v. Thomas, 88-150; Boing v. R. R., 87-364; Boyette v. Vaughan, 85-365. **The legal existence of a court cannot be drawn in question by a plea to the jurisdiction, for such a plea presupposes that court was regularly called and organized:** State v. Hall, 142-710.

DETERMINING JURISDICTION IN ACTIONS ON CONTRACT. **In action on contract jurisdiction of justice determined by sum demanded:** Knight v. Taylor, 131-84; Shankle v. Ingram, 133-259; Boyd v. R. R., 132-184; Sloan v. R. R., 126-487, and cases cited on page 490; Cromer v. Marsha, 122-563; Martin v. Goode, 111-288; Brantley v. Finch, 97-91; Morris v. O'Briant, 94-72; Moore v. Nowell, 94-265; Wiseman v. Witherow, 90-140; see also Thompson v. Express Co., 144-389; Watson v. Farmer, 141-452—**which demand must be made in good faith and not for purpose of conferring jurisdiction,** Wiseman v. Witherow, 90-140. **Words "sum demanded" defined** in Brantley v. Finch, 97-91; Hedgecock v. Davis, 64-651; Coggins v. Harrell, 86-317; Morris v. Saunders, 85-140; Brickell v. Bell, 84-85; Derr v. Stubbs, 83-539; Dalton v. Webster, 82-283; Bryan v. Rous-

seau, 71 194; Froelich v. Express Co., 67-3; Fell v. Porter, 69-142. **Without averment in summons of amount demanded court acquires no jurisdiction and judgment is void:** Leathers v. Morris, 101-184—**but where it appears that court would have jurisdiction, though proper allegations omitted in summons by mistake or inadvertence, court may permit necessary amendment pending action,** Ibid; McPhail v. Johnson, 115-298; Cox v. Grisham, 113-279; Singer Mfg. Co. v. Barrett, 95-40; Allen v. Jackson, 86-323.

Where the sum demanded in good faith does not exceed $200, a justice of the peace has exclusive original jurisdiction: Davis v. Evans, 142-464; McPeters v. English, 141-492; Parker v. Express Co., 132-128; Railroad v. Hardware Co., 135-73; Exchange Bank v. Land and Lumber Co., 128-193; Calloway v. Angel, 127-414; Kiser v. Blanton, 123-400; Cromer v. Marsha, 122-563; Proctor v. Finley, 119-536; Slocumb v. Shingle Co., 110-24; Hartness v. Wallace, 106-427; Brantley v. Finch, 97-91; Norville v. Dew, 94-43; Burbank v. Comrs., 92-257; Deloatch v. Coman, 90-186; Wiseman v. Witherow, 90-140; Hannah v. R. R., 87-351; Lowery v. Perry, 85-131; Katzenstein v. R. R., 84-688; Latham v. Rollins, 72-454; Templeton v. Summers, 71-269; Froelich v. Express Co., 67-1; Edenton v. Wool, 65-380; Hedgecock v. Davis, 64-650; Wilmington v. Davis, 63-582—**and where sum demanded in good faith exceeds $200 the superior court has jurisdiction,** Carter v. R. R., 126-437; Horner School v. Wescott, 124-519; Burrell v. Hughes, 116-430; Martin v. Goode, 111-288; McPhail v. Johnson, 109-571; Maggett v. Roberts, 108-174; Kearns v. Heitman, 104-332; Moore v. Nowell, 94-265; Usry v. Suit, 91-406; Coggins v. Harrell, 86-317; Morris v. Saunders, 85-138; Brickell v. Bell, 84-82; Dalton v. Webster, 82-279; Bryan v. Rousseau, 71-194; Fell v. Porter, 69-140. **Though there may be several causes of action, each of which is for less than $200, if aggregate demand is for more than $200, superior court has jurisdiction, whenever causes of action are such as can be joined in one action:** Boyd v. R. R., 132-184; Sloan v. R. R., 126-487; Carter v. R. R., 126-437; Burrell v. Hughes, 116-430; Martin v. Goode, 111-289; Maggett v. Roberts, 108-174; Moore v. Nowell, 94-265—**but should demand be reduced under $200 by failure of proof or by sustaining a demurrer to any part thereof or to some of the causes of action, jurisdiction would not thereby be ousted,** Brown v. Southerland, 142-227; Boyd v. R. R., 132-184; Shankle v. Ingram, 133-259; Martin v. Goode, 111-289; Usry v. Suit, 91-406; Brickell v. Bell, 84-82—**except where sum demanded is so palpably in bad faith as to amount to a fraud on jurisdiction:** Martin v. Goode, 111-289; Wiseman v. Witherow, 90-140—**or where there is misjoinder of parties,** Martin v. Goode, 111-289; Mitchell v. Mitchell, 96-14.

Where action before justice for breach of contract by express company to deliver package was appealed and in superior court jury found that defendant "negligently failed to deliver the package," it was action on contract and justice had jurisdiction, amount sued for not exceeding $200: Parker v. Express Co., 132-128, citing Froelich v. Express Co., 67-1.

Justice has jurisdiction of action on note for purchase money of land where amount demanded does not exceed $200: Davis v. Evans, 142-464;

McPeters v. English, 141-492; Proctor v. Finley, 119-536—also in action on note given for a contract to convey land, the only defense being that payments had been made on note, Patterson v. Freeman, 132-357.

In action on bond justice has jurisdiction where penalty of bond does not exceed $200, same being an action ex contractu: Railroad v. Hardware Co., 135-73; Darden v. Blount, 126-251; Joyner v. Roberts, 112-114; Coggins v. Harrell, 86-317; Bryan v. Rousseau, 71-194; Fell v. Porter, 69-140—likewise has jurisdiction for the recovery of a penalty given by statute not over $200, Henderson v. Davis, 106-88; Doughty v. R. R., 78-22; Maggett v. Roberts, 108-174; Carter v. R. R., 126-437; Katzenstein v. R. R., 84-688—and in action on penal bond he can not make remittance to bring it down to justice's jurisdiction, Coggins v. Harrell, 86-317; Morris v. Saunders, 85-140.

A counterclaim, in order to entitle one to affirmative relief in a justice's court in action on contract, must be one on which judgment might be had in the action and therefore must come within justice's jurisdiction: Electric Co. v. Williams, 123-51; Boyett v. Vaughan, 85-363; Derr v. Stubbs, 83-539; see also section 481—and, where several counterclaims pleaded, the aggregate sum will be taken as jurisdictional amount, Electric Co. v. Williams, 123-51.

Where the pleadings before a justice do not show want of jurisdiction and no objection was made thereto, such objection can not be made on appeal to superior court: Cromer v. Marsha, 122-563.

Remitting the excess over $200 in order to come within justice's jurisdiction: Cromer v. Marsha, 122-563; McPhail v. Johnson, 115-298; Brantley v. Finch, 97-91; Ijames v. McClamroch, 92-362; Dalton v. Webster, 82-279; Derr v. Stubbs, 83-539; see section 1421—however, in actions on penal bond, no remittance can be made, Coggins v. Harrell, 86-317; Morris v. Saunders, 85-140.

SPLITTING UP CAUSES TO COME WITHIN JURISDICTION. An indivisible cause of action can not be split in order that separate suits may be brought for the various parts before a justice: Norvell v. Mecke, 127-401; Fort v. Penny, 122-230; Cotton Mills v. Cotton Mills, 115-475; Magruder v. Randolph, 77-79; Boyle v. Robbins, 71-130.

Where items of account are incurred under different contracts, an action can be brought on each item before a justice, the separate items being less than $200: Copland v. Tel. Co., 136-11; Simpson v. Elwood, 114-528; Boyle v. Robbins, 71-130; Caldwell v. Beatty, 69-370. Where, in executing an express contract under which plaintiff was to receive compensation for services, plaintiff advanced money at request of defendant, former may sue separately on contract and for money advanced: Fort v. Penny, 122-230. An account for a bill of goods purchased on one day is taken as one entire transaction, unless otherwise appears: Magruder v. Randolph, 77-79. Where dealings were continuous and nothing appears indicating that either party intended that each item should constitute separate transaction, it can not be split: Ibid.

The fact that demand arose out of an indivisible contract which was split for jurisdictional purposes must be taken advantage of by plea in abate-

ment before pleading to merits: Fort v. Penny, 122-230; Blackwell v. Dibbrell, 103-270—and can not be taken advantage of on appeal, Cotton Mills v. Cotton Mills, 115-475; Blackwell v. Dibbrell, 103-270—and where, on appeal of several actions brought on split-up accounts all due under single contract cognizable in superior court, the actions were consolidated, held that superior court did not thereby gain jurisdiction, its appellate jurisdiction being derived solely from the rightful one assumed by court below, Jarrett v. Self, 90-478; Ijames v. McClamrock, 92-362; Robeson v. Hodges, 105-51; Allen v. Jackson, 86-321; Boyette v. Vaughan, 85-363.

WAVING TORT AND SUING ON CONTRACT. Where complaint can be either construed to be in tort or contract it will be construed to be according to the election of plaintiff so as to uphold jurisdiction: White v. Eley, 145-36; Schulhofer v. R. R., 118-1097; Bowers v. R. R., 107-721; Stokes v. Taylor, 104-394.

Where property is tortiously taken and sold, owner may waive tort and maintain an action to recover proceeds of sale if do not exceed $200: Brittain v. Payne, 118-989; Land Co. v. Brooks, 109-698; Wall v. Williams, 91-477; McDonald v. Cannon, 82-245; Bullinger v. Marshall, 70-526; Winslow v. Weith, 66-432—or where property was delivered to express company and negligently lost, tort may be waived and action brought on contract to carry and deliver, Froelich v. Express Co., 67-1—but where the right to recover involves a question of title, the question of jurisdiction is determined and plaintiff can not avoid it by waiving tort and declaring on contract, Edwards v. Cowper, 99-421.

EQUITY CLAIMS AND DEFENSES GENERALLY. Justice has no jurisdiction to administer or enforce an equitable cause of action: Levin v. Gladstein, 142-482; Markham v. McCown, 124-163; Weathers v. Borders, 124-612; Kiser v. Blanton, 123-400; Holden v. Warren, 118-326; Cotton Mills v. Cotton Mills, 116-649, and cases cited; Bell v. Howerton, 111-69; Hunter v. Yarborough, 92-68; Dougherty v. Sprinkle, 88-300; Lutz v. Thompson, 87-337; McAdoo v. Callum, 86-419; Fisher v. Webb, 84-50—though defendant may interpose equitable defense before him, Levin v. Gladstein, 142-482; Holden v. Warren, 118-326; Bell v. Howerton, 111-69; Hurst v. Everett, 91-405; Lutz v. Thompson, 87-334; McAdoo v. Callum, 86-419; Mebane v. Layton, 86-575; Fisher v. Webb, 84-44.

Justice has no jurisdiction of action by assignee to recover partnership assets disposed of by one partner, where amount claimed is less than $200: Hartness v. Wallace, 106-427—or of action upon county treasurer's bond, Wright v. Kinney, 123-618—or of application for mandamus against treasurer, Ibid; Robinson v. Howard, 84-151—or of action to foresclose mortgage, although debt secured less than $200, Murphy v. McNeill, 82-221—or of counterclaim consisting of alleged indebtedness arising out of unadjusted partnership dealings, Love v. Rhyne, 86-576. Equitable powers of justice discussed in Fisher v. Webb, 84-44.

Justice has jurisdiction if action is for $200 and less which equitably belongs to a party: Markham v. McCown, 124-163—of action upon a lost note where sum demanded does not exceed $200, Fisher v. Webb, 84-44—of action for balance due on account where through mistake plaintiff had

accepted less than was due him, notwithstanding plaintiff prayed for equitable relief, Holden v. Warren, 118-326. Where defendant's liability depends upon articles of partnership and no equities to adjust, justice has jurisdiction: Davis v. Sanderlin, 119-84.

WHERE MARRIED WOMAN IS A PARTY. It is not true that a justice has no jurisdiction in any case of a married woman. She may be sued before a justice for a debt due by her, or on a contract made by her, before marriage: McAfee v. Gregg, 140-449; Beville v. Cox, 109-269; Hodges v. Hill, 105-130; Neville v. Pope, 95-346—or to enforce lien under section 2016 for materials used in building house, being for less than $200, Finger v. Hunter, 130-529; Smaw v. Cohen, 95-85—but justice has no jurisdiction in action to charge her separate personal property, Patterson v. Gooch, 108-503—or in action upon promise to pay for work done on separate real estate, Dougherty v. Sprinkle, 88-300; Berry v. Henderson, 102-525—or to enforce payment out of separate estate for her contracts, Smaw v. Cohen, 95-85; Planing Mills v. McNinch, 99-517—or to enforce her contracts generally unless she be a free trader, whether she has separate property which she has charged or not, Berry v. Henderson, 102-525; Moore v. Wolfe, 122-711.

What must be shown in order to render judgment of a justice against married woman void discussed in McAfee v. Gregg, 140-448.

WHERE TITLE TO LAND IN CONTROVERSY. Justice has no jurisdiction of action where title to land in controversy: Brown v. Southerland, 142-225; Smith v. Garris, 131-36; Alexander v. Gibbon, 118-805; Wright v. Harris, 116-460; Boone v. Drake, 109-83; Edwards v. Cowper, 99-421; Forsythe v. Bullock, 74-135; see sections 1422 and 1423—and the controversy referred to must be between the parties, Davis v. Davis, 83-71; Evans v. Williams, 79-86—and jurisdiction once acquired can not be divested by intervenor claiming paramount title, Davis v. Davis, 83-71.

Mere allegation of defendant that title is in controversy will not oust justice's jurisdiction: Pasterfield v. Sawyer, 132-258; McDonald v. Ingram, 124-272; Alexander v. Gibbon, 118-805; Paine v. Cureton, 114-608; Hahn v. Guilford, 87-172—but justice should proceed with trial until evidence shows title is involved, McDonald v. Ingram, 124-272; Smith v. Garris, 131-36; Parker v. Allen, 84-466.

In a proceeding to recover penalty prescribed by town charter for obstructing street, title to land is not in controversy: Town of Henderson v. Davis, 106-88.

Proceedings before justice where title in controversy may be treated as a nullity by defendant, but it does not follow that plaintiff, who initiated and took benefit of them, can: Dulin v. Howard, 66-433.

In action for forcible entry and detainer justice has no jurisdiction: Perry v. Shepherd, 78-83; State v. Yarborough, 70-250; Railroad v. Sharpe, 70-509.

Justice has no jurisdiction of action of vendor against vendee for possession: Johnson v. Hauser, 82-375—and where vendor brought summary ejectment against vendee, claiming that vendee had abandoned his rights and sustained the relation of tenant, justice had no jurisdiction if evidence

of abandonment insufficient, Boone v. Drake, 109-79. In summary ejectment by mortgagor to oust mortgagee, justice has no jurisdiction: Smith v. Garris, 131-36; Greer v. Wilbar, 72-592—and mere allegation that defendant is tenant of plaintiff will not give jurisdiction, Smith v. Garris, 131-36.

In summary ejectment under landlord and tenant act the issue is only as to tenacy and title to land is not drawn in question: Hahn v. Guilford, 87-172; Davis v. Davis, 83-71; see McDonald v. Ingram, 124-272.

1420. Actions not on contract. Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars.

Const., Art. IV, s. 27; Code, s. 887. This section comprehends all actions ex delicto: Duckworth v. Mull, 143-461. The phrase "property in controversy" means the value of the injury complained of and involved in the litigation: Ibid, Malloy v. Fayetteville, 122-480; but see Noville v. Dew, 94-43; Pippin v. Ellison, 34-61; Smith v. Campbell, 10-590.

Where action can be sustained either as ex delicto or ex contractu, it will be construed according to election of plaintiff so as to sustain jurisdiction of court: White v. Eley, 145-36; Schulhofer v. R. R., 118-1096, and cases cited on page 1097—and where complaint contains causes of action of which court has not, and others of which it has, jurisdiction, it will disregard former and try latter, Hargrove v. Harris, 116-418; Starke v. Cotten, 115-81; Railroad v. Hardware Co., 135-73; Mfg. Co. v. Barrett, 95-36; Deloatch v. Coman, 90-186; Ashe v. Gray, 90-137.

As to splitting up damages or value of property to obtain jurisdiction, see Kiser v. Blanton, 123-400; Johnson v. Williams, 115-33; Bell v. Howerton, 111-69; see under section 1419.

Where plaintiff demanded $75 due as rent and asked for delivery to him of crop upon which it was a lien, held that in absence of allegation that crop was worth "not more than $50" justice was not deprived of jurisdiction and correctly gave judgment for the debt and disregarded ancillary remedy: Hargrove v. Harris, 116-418.

Where action brought for tort in justice's court goes up to superior court on appeal, the jurisdiction being concurrent, that court will take cognizance however irregular the proceedings in the justice's court may have been: Boing v. R. R., 87-364.

Where jury renders verdict for over $50 the excess can be remitted and judgment taken for sum demanded: Watson v. Farmer, 141-452; Noville v. Dew, 94-43—but in claim and delivery there can be no remitter of excess over $50, Ibid.

DETERMINING THE JURISDICTION. In all actions ex delicto where the value of the injury complained of and involved in the litigation does not exceed $50, a justice of the peace has jurisdiction concurrent with superior court: Duckworth v. Mull, 143-461; Watson v. Farmer, 141-452; Thomas v. Cooksey, 130-148; Kiser v. Blanton, 123-400; Malloy v. Fayetteville, 122-480; Johnson v. Williams, 115-33; Crinkley v. Egerton, 113-142;

Bell v. Howerton, 111-69; Harvey v. Hambright, 98-446; Montague v. Mial, 89-137; Noville v. Dew, 94-43—**but where value exceeds $50 he has no jurisdiction,** Spencer v. Bell, 109-39; Bowers v. R. R., 107-722; Asher v. Reizenstein, 105-213; Long v. Fields, 104-221; Edwards v. Cowper, 99-421; Noville v. Dew, 94-43; Barneycastle v. Walker, 92-198.

The jurisdiction is determined by the damages claimed or the value of the property involved, being the amount demanded in good faith in the warrant or complaint: Thompson v. Express Co., 144-389; Watson v. Farmer, 141-452; Noville v. Dew, 94-45; see also Knight v. Taylor, 131-84; Sloan v. R. R., 126-487, and cases cited on page 490; Cromer v. Marsha, 122-563; Martin v. Goode, 111-288; Brantley v. Finch, 97-91; Morris v. O'Briant, 94-72; Moore v. Nowell, 94-265; Wiseman v. Witherow, 90-140—**and summons should set out the amount,** Leathers v. Morris, 101-184; Noville v. Dew, 94-43; Allen v. Jackson, 86-321—**for without such averment in summons the court acquires no jurisdiction and judgment void,** Leathers v. Morris, 101-184.

Mortgagor, being entitled to the possession of the articles included in mortgage aggregating value over $50, may take out papers for each article separately, in which case justice would have jurisdiction where article does not exceed $50 valuation: Kiser v. Blanton, 123-400.

The special jurisdiction under landlord and tenant act does not extend to torts, but is confined to actions for enforcing contracts: Montague v. Mial, 89-137.

1421. Action dismissed, when; remitter for jurisdiction. Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess."

Code, s. 835; 1868-9, c. 159, s. 3; 1876-7, c. 63. **Where principal sum demanded exceeds $200 justice has no jurisdiction unless plaintiff remits excess and same is entered of record:** Dalton v. Webster, 82-279; Knight v. Taylor, 131-84.

Objection that plaintiff did not use statutory formula in making the remitter must be made in justice's court, not on appeal: Cromer v. Marsha, 122-563.

Where sum demanded is not in excess of $200 and account sued on is in excess of $200, no remittance of excess of account required, the amount demanded determining jurisdiction: Knight v. Taylor, 131-85; Cromer v. Marsha, 122-563; Brantley v. Finch, 97-92.

In action on penal bond where penalty over $200, plaintiff can not make remitter: Coggins v. Harrell, 86-317; Morris v. Saunders, 85-140.

Where counterclaim before justice amounted to more than $200, remitter can not be entered in superior court so as to cure jurisdiction: Ijames v. McClamroch, 92-362.

As to what is "principal sum demanded," see annotations under section 1419.

Where summons did not state amount demanded, but plaintiff in his complaint claimed only $200 and forgave and remitted the excess of his account, superior court can allow summons to be amended, not to confer jurisdiction, but only to show it: McPhail v. Johnson, 115-298, and cases cited on page 302.

1422. Where title to real estate is in controversy. In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice.

Code, s. 836. For important annotations on this subject, see under section 1419.

Mere allegation of defendant that title is in controversy will not oust justice's jurisdiction: Pasterfield v. Sawyer, 132-258; McDonald v. Ingram, 124-272; Alexander v. Gibbon, 118-805; Paine v. Cureton, 114-608; Hahn v. Guilford, 87-172; Foster v. Penry, 77-160—but it must also appear by evidence, Pasterfield v. Sawyer, 132-260—and justice should proceed with trial until evidence shows that title to land is involved, McDonald v. Ingram, 124-272; Smith v. Garris, 131-36; Parker v. Allen, 84-466.

It matters not that defendant filed no defense in writing to the effect that title to land would be brought in question, statute requires that when at the trial it appears in controversy, action should be dismissed: Edwards v. Cowper, 99-423, and cases cited.

The requirement that answer showing that title is in controversy shall be in writing and signed is not satisfied by brief memorandum taken down by justice and transmitted with appeal, and would not, if plaintiff should afterwards sue in superior court, estop defendant from denying jurisdiction: Evans v. Williamson, 79-88; see Brown v. Southerland, 142-228.

1423. Title to real estate in controversy, action dismissed. If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs.

Code, s. 837. As to when title to real estate in controversy, see under section 1419; also see section 1422.

As to meaning of words "real estate" in this section, see Foster v. Penry, 77-161.

The allegation in writing that title to land in controversy need not be made: Edwards v. Cowper, 99-423—and if made, justice can not act on it

alone, Pasterfield v. Sawyer, 132-258; McDonald v. Ingram, 124-272; Alexander v. Gibbon, 118-805; Paine v. Cureton, 114-608; Hahn v. Guilford, 87-172; Foster v. Penry, 77-160—**but trial must proceed until evidence shows that title involved,** McDonald v. Ingram, 124-272; Smith v. Garris, 131-36; Parker v. Allen, 84-466—**when it is required of justice that he dismiss the action:** Hudson v. Hodge, 139-308; Edwards v. Cowper, 99-421; Parker v. Allen, 84-466.

1424. Another action may be brought; estoppel by former plea. When an action, before a justice is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court.

Code, s. 838. **Where action before justice was dismissed upon answer and proof that title to real estate comes in controversy, defendant can not question jurisdiction of superior court if action for same cause subsequently brought in that court:** Pasterfield v. Sawyer, 132-260—**and where justice refused to dismiss upon such grounds and judgment reversed and action dismissed in superior court, and another action brought in superior court for same relief, held plaintiff estopped by former judgment from alleging want of jurisdiction in superior court,** Peck v. Culberson, 104-425—**but where written answer alleging that title will come in controversy was not filed before justice, defendant not estopped in superior court from denying jurisdiction by answer contradicting answer before justice,** Evans v. Williamson, 79-88.

Section can not be invoked where it does not appear that action before justice was dismissed upon answer and proof by defendant that title to real estate was in controversy, as this can not be inferred: Brown v. Southerland, 142-225.

1425. May issue process and try causes, where. A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed.

Code, s. 824. **Summons issued by one justice can not be made returnable before another, except in cases of bastardy:** Williams v. Bowling, 111-295—**or of summary ejectment under landlord and tenant act.**

1426. Profane swearing punished as a contempt. If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars.

Code, s. 848; R. C., c. 115; 1741, c. 30.

IV. Criminal Jurisdiction.

1427. Jurisdiction in criminal actions. Justices of the peace shall have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law shall not exceed a fine of fifty dollars, or imprisonment for thirty days: Provided, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: Provided further, that nothing in this section shall prevent the superior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given to justices of the peace if some justice of the peace, within twelve months after the commission of the offense, shall not have proceeded to take official cognizance of the same.

Const., Art. IV, s. 27; Code, s. 892; 1889, c. 504, s. 2. **For criminal procedure in justice's court, see chapter Criminal Procedure.**

Section held constitutional: State v. Johnson, 64-581; State v. Huntley, 31-619.

The legal existence of court can not be drawn in question by a plea to the jurisdiction for such a plea presupposes that court was regularly called and organized: State v. Hall, 142-710.

Justice has jurisdiction of simple assault where no deadly weapon used or serious damage inflicted: State v. Johnson, 94-863—**where statute prescribes fine not less than $10 nor more than $50 and no imprisonment imposed,** State v. Davis, 129-570—**where punishment prescribed is fine of not less than $20 nor more than $40,** State v. Addington, 121-538—**where punishment for offense can not exceed fine of $50 or imprisonment for thirty days,** State v. Harrison, 126-1049; State v. Fesperman, 108-771; State v. Deaton, 101-729; State v. Dalton, 101-682; State v. Lachman, 98-765; State v. Roberts, 98-756; State v. Powell, 86-642; State v. Watts, 85-519; State v. Benthall, 82-665; State v. Edney, 80-360; State v. Heidelburg, 70-496—**of offense of failing to work roads under section 3779;** State v. Craig, 82-668—**of trespass upon land after being forbidden under section 3688,** State v. Dudley, 83-660—**of cruelty to animals,** State v. Bossee, 145-579—**of crime of hunting on Sunday under section 3842,** State v. Wilson, 84-777—**of misdemeanors arising from violations of town ordinances,** State v. Wood, 94-855; State v. Cainan, 94-880—**of affrays, concurrently with superior court, committed within mile of courthouse while court in session,** State v. Battle, 130-656; State v. Bowers, 94-910.

Superior court and not justice has jurisdiction of assaults with deadly weapons: State v. Roseman, 108-766; State v. Phillips, 104-786; State v. Murphy, 101-701; State v. Cunningham, 94-824; State v. Taylor, 84-774;

State v. Moore, 82-659—**of assaults where serious damage done,** State v. Shelly, 98-673; State v. Cunningham, 94-824; State v. Huntley, 91-617; State v. Taylor, 84-773; State v. Moore, 82-659—**of assault with intent to kill or commit rape,** State v. Taylor, 84-773; State v. Moore, 82-659—**of offense of retailing spirituous liquors without license,** State v. Edwards, 113-653; State v. Deaton, 101-728—**of offenses against local option act,** State v. Cooper, 101-689—**of allowing stock to run at large where statute permits fine of $10 for each hog permitted to run at large and warrant charges running at large of ten hogs,** State v. Wiseman, 131-795—**where offense punishable by fine and imprisonment in discretion of court,** State v. Cherry, 72-124; State v. Perry, 71-523; State v. Heidelburg, 70-496—**of misdemeanor punishable by fine of not less than $10 nor more than $50, or by imprisonment of not less than ten days,** State v. Hampton, 77-526.

After expiration of six months [now twelve months] superior court has concurrent jurisdiction with justice of cases which before justice had exclusive jurisdiction: State v. Dalton, 101-682; State v. Roberts, 98-756; State v. Reaves, 85-553; State v. Watts, 85-519; State v. Berry, 83-604; State v. Moore, 82-659; State v. Hooper, 82-663.

Where indictment charges assault with deadly weapon, or other offense of which superior court has jurisdiction, and proof shows simple assault, or other lesser degree of offense, jurisdiction of superior court not ousted: State v. Fritz, 133-725; State v. Price, 111-705; State v. Roseman, 108-765; State v. Fesperman, 108-770; State v. Porter, 101-715; State v. Earnest, 98-740; State v. Johnson, 94-863; State v. Cunningham, 94-824; State v. Russell, 91-624; State v. Speller, 91-526; State v. Ray, 89-587; State v. Reaves, 85-553—**though charge of simple assault in indictment would give superior court prima facie jurisdiction and burden is on defendant to show twelve months had not elapsed since commission of offense and before superior court took jurisdiction,** State v. Shelly, 98-673; State v. Fesperman, 108-771; State v. Porter, 101-714; State v. Earnest, 98-743; State v. Moore, 82-662.

Affray is cognizable in superior court as to both defendants where deadly weapon used by either: State v. Coppersmith, 88-614.

Objection to jurisdiction is a matter of defense and may be taken advantage of under plea of not guilty: State v. Reaves, 85-553; State v. Berry, 83-604; State v. Taylor, 83-601; State v. Moore, 82-659; State v. Hooper, 82-663. **If justice had no jurisdiction, the superior court will have none where the trial is on the warrant:** State v. Wiseman, 131-795.

"DEADLY WEAPON." A deadly weapon is not one that must or may **kill, but one which would likely produce death by manner of its use by defendant:** State v. Sinclair, 120-603; State v. Archbell, 139-537; State v. Norwood, 115-789—**is an instrument capable of producing death,** State v. Huntley, 91-617—**some weapons being deadly per se, others owing to manner of use become deadly,** State v. Archbell, 139-537; State v. Huntley, 91-617—**but a club is ex vi termini a deadly weapon,** State v. Phillips, 104-786; State v. Porter, 101-713—**as is also an axe,** State v. Shields, 110-497—**and court will take judicial notice that a pistol is also a deadly weapon,** State v. Swann, 65-330.

Whether weapon used is a deadly weapon is a question of law for the court where there is no dispute about the facts concerning its character, size, etc.: State v. Sinclair, 120-603; State v. Norwood, 115-789; State v. Phillips, 104-786; State v. Speaks, 94-865; State v. Huntley, 91-617; State v. West, 51-505; State v. Collins, 30-407; State v. Craton, 28-164—and in determining the question, the size, nature and manner of use of weapon, and size and strength of assailant, and person upon whom it is used, should be considered, State v. Sinclair, 120-603—as a penknife, as well as a gun, may, under certain circumstances, be a deadly weapon, Ibid—for even a pin is a deadly weapon where it is pushed down the throat of an infant, producing death, State v. Norwood, 115-789. Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to jury with proper instructions: State v. Archbell, 139-537.

"SERIOUS DAMAGE DONE." It is necessary to describe the serious damage done, its character and extent, so that court can see from face of indictment that the damage was serious: State v. Battle, 130-657; State v. Stafford, 113-635; State v. Phillips, 104-786; State v. Porter, 101-713; State v. Shelly, 98-673; State v. Earnest, 98-740; State v. Russell, 91-624; State v. Moore, 82-659. "Serious damage" must be such physical injury as gives rise to great bodily pain: State v. Nash, 109-824—and also damage to the peace, good order, decencies and proprieties of society, State v. Huntley, 91-620.

AFFRAY. Affray is the fighting together of two or more persons in a public place to the terror of the citizens: State v. Allen, 11-356; State v. Woody, 47-335; State v. Perry, 50-10—or the using of abusive language in a public place bringing on a fight, State v. Perry, 50-9; State v. Robbins, 78-431.

Justice has final original jurisdiction of affrays where no deadly weapon used or serious damage done: State v. Shields, 78-417; State v. Davis, 65-298—but where affray committed within a mile of courthouse while court in session, the justice has concurrent jurisdiction with superior court, State v. Battle, 130-656; State v. Bowers, 94-910.

V. Jurors.

1428. Jury list furnished. The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed.

Code, s. 854. As to how commissioners select jury lists, see sections 1957, 1958.

1429. To keep jury box. Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice.

Code, s. 855. For annotations concerning jury box of county, of interest also in connection with this section, see section 1958.

1430. Names of jurors deposited in box. Each justice shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law.

Code, s. 856. **Consult** State v. Potts, 100-457; State v. Hensley, 94-1026.

1431. Trial by jury waived, if not demanded. A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury.

Code, s. 857. **Quere: Whether principle that on indictments originating in superior court trial by jury can not be waived by accused applies to appeals in criminal actions of which justices have final jurisdiction:** State v. Wells, 142-590.

The provision of the federal constitution that no person shall be deprived of his property without due process of law does not imply that all trials in state courts shall be by jury: Caldwell v. Wilson, 121-425.

For trial by jury in criminal actions before justice, see sections 3257, 3258.

Section merely referred to in Durham v. Wilson, 104-598.

1432. Deposit of jury fees. Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend.

Code, s. 869.

1433. Jury drawn and trial postponed. When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice.

Code, s. 858. **No constitutional limitation upon powers of legislature to prescribe method by which jurors are to be selected and summoned:** State v. Britain, 143-668. **For annotations as to drawing jury for superior court, which may be of interest, see section 1959.**

1434. Summoning the jury. A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other

lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him.

Code, s. 859. **As to summoning the jurors where sheriff interested in action pending, see section 1968 (doubtful if this can be construed to apply to constables).**

1435. Jury for trial, how selected. At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue.

Code, s. 860. **The annotations under sections 1969 and 1974, with reference to drawing the grand jury and special venire in superior court may throw some light upon this section.**

1436. Challenges. Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors.

Code, s. 861. **For challenges in civil actions in superior court, see sections 1964-1968 and annotations thereunder. For challenges in criminal actions in superior court, see sections 3263-3265.**

1437. What names returned to the jury box. The scrolls containing the names of jurors not summoned, if any, and of those summoned, but not drawn, and of those drawn, but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable, or legally qualified to serve as jurors, shall be destroyed.

Code, s. 862.

1438. Tales jurors may be summoned. If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury.

Code, s. 863.

1439. Not compelled to serve out of township. No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman.

Code, s. 867.

1440. Less than six a jury by consent. Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it.

Code, s. 866.

1441. Jurors serving on trial. The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance.

Code, s. 868.

1442. Additional deposit for jury fees for adjournment. No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amounts to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice according to section one thousand four hundred and thirty-two, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto.

Code, s. 870.

1443. Jury sworn; impaneled; verdict; judgment. The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict.

Code, s. 864.

VI. Procedure Before Trial.

1444. Summons, civil action begun by. Civil actions in these courts shall be commenced by the issuing of a summons.

Code, s. 830; 1868-9, c. 159, s. 9. **Civil action shall be commenced by issuing summons, except in cases where defendant is not within reach of process of court and can not be personally served, when it shall be commenced by affidavit to be followed by publication:** Grocery Co. v. Bag Co., 142-174 **(overruling McClure v. Fellows, 131-509);** Best v. Mortgage Co., 128-351; also see Fisher v. Bank, 132-776; Ditmore v. Goins, 128-327; Lyon v. Comrs., 120-242; Webster v. Sharpe, 116-466; Fleming v. Patterson, 99-404; Calvert v. Peebles, 82-338; Belmont v. Reilly, 71-260; Steele v. Comrs., 70-140; Thompson v. Berry, 64-79; Patrick v. Joyner, 63-573.

The office of the summons is to bring party into court: Barneycastle v. Walker, 92-198.

As to name of plaintiff in summons, see Heath v. Morgan, 117-504; Patterson v. Walton, 119-500—**name of defendant in summons,** Fisher v. Ins. Co., 136-217; Plemmons v. Imp. Co., 108-614; Clawson v. Wolfe, 77-100.

Summons is issued, when: Smith v. Lumber Co., 142-26; Houston v. Thornton, 122-366; Currie v. Hawkins, 118-593; Neal v. Nelson, 117-401; Webster v. Sharpe, 116-466; see also section 359. **Appearance waives all defects or irregularities as to summons:** Caldwell v. Wilson, 121-425; Roberts v. Allman, 106-391; Etheridge v. Woodley, 83-11; Wheeler v. Cobb, 75-21; Middleton v. Duffy, 73-72; Duffy v. Averitt, 27-455; Hyatt v. Tomlin, 24-149; also see sections 356 and 447.

1445. Summons, by whom issued and what to contain. The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum demanded by the plaintiff or the value of the property sued for, where specific property is claimed.

Code, s. 832; 1874-5, c. 234. **Summons issued by one justice can not be made returnable before another:** Williams v. Bowling, 111-295; Cherry v. Lilly, 113-26—**except in cases provided by statute, to-wit, bastardy proceedings,** Williams v. Bowling, 111-297—**and in summary proceedings in ejectment,** Ibid.

Summons issued by justice under section 1447 must be issued or addressed to officer of county where same is to be served: Fertilizer Co. v. Marshburn, 122-411—**and to authorize town constable to serve process beyond limit of town, same must be directed to him,** Davis v. Sanderlin, 119-84. **Necessary that summons shall contain statement of sum demanded or value of property sought to be recovered:** Leathers v. Morris, 101-184; Noville v. Dew, 94-43; Allen v. Jackson, 86-321. **Summons presumed to bear true date of issue but it is competent to show that it was not in fact then issued:** Currie v. Hawkins, 118-593; Houston v. Thornton, 122-365; Webster v. Sharpe, 116-466. **Summons improperly issued and served does not bring defendant into court and judgment rendered against him void:** Fertilizer Co. v. Marshburn, 122-411.

As to stating names of parties in summons, see Fisher v. Ins. Co., 136-217; Heath v. Morgan, 117-504; Patterson v. Walton, 119-500; Plemmons v. Imp. Co., 108-614; Kerlee v. Corpening, 97-330; Clawson v. Wolfe, 77-100.

A justice when out of his township may issue summons returnable and hearable in his township: Davis v. Sanderlin, 119-84.

1446. Service and return of summons; fees in advance. The officer to whom the summons is delivered shall execute the same

within five days after its receipt by him, or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same.

Code, s. 833. **How summons executed, see sections 439, 440, 442-447. As to voluntary appearance by defendant dispensing with necessity of service, see section 447.**

1447. When process issues to another county. No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides.

Code, s. 871; 1876-7, c. 287. **This being a restricted legislative grant of power, when exercised it must be strictly pursued:** Fertilizer Co. v. Marshburn, 122-414. **Process under this section must be issued or addressed to officers of county where same is to be served:** Ibid. 150-519

This section does not apply to foreign corporations: Allen-Fleming Co. v. R. R., 145-37. **Where summons issued against a resident of county and a nonresident of county and on trial summons amended by striking out name of resident defendant, justice should dismiss action:** Wooten v. Maultsby, 69-462.

Section merely referred to in Fisher v. Bullard, 109-574.

1448. Process served on foreign corporation. Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in the state, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served.

Sec. 1448, Rev. of 1905; 1907, c. 473.

For agent of foreign corporation upon whom process can be served, see sections 440, 1243 and 4750.

Under this section a summons issued against a foreign corporation to a county where it has a process agent, properly certified under seal of the clerk, served on such corporation or its agent more than twenty days before return day, is valid: Allen-Fleming Co. v. R. R., 145-39.

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which defendant does business or has property, or where plaintiff resides: Ibid.

Section merely referred to in Kelly v. Lefaiver, 144-7.

1449. How process issues to another county. In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to indorse his name on the same, or a duplicate thereof, and such process so indorsed shall be executed in like manner as if it had been originally issued by the justice indorsing it.

Code, s. 872. **Process should be directed to officer of county where it is to be served:** Fertilizer Co. v. Marshburn, 122-415.

Section merely referred to in Lilly v. Purcell, 78-82.

1450. Certificate of clerk on process for another county. In all cases referred to in the preceding section, it shall be lawful for the clerk of the superior court of the county in which the action is brought, to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed, to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued.

Code, s. 873; 1870-1, c. 60, s. 2. **Section merely referred to** in Wooten v. Maultsby, 69-463.

1451. When judgment entered against defendants in another county. No justice of the peace shall enter a judgment under the two preceding sections against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same.

Code, s. 874; 1876-7, c. 57. **Section applies only to cases where justice's summons issued against defendant residing in another county:** Williams v. B. & L. Asso., 131-268.

1452. Attendance of witnesses procured. The justice, on application of either party, shall, by a subpœna or by an order in writing on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness, failing to appear, shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend.

Code, s. 847. **Justice not authorized to put witness under bond to appear at subsequent trial before him:** Lovick v. R. R., 129-427—**and if he does so, he, and those advising him to do so, thereby become trespassers,** Ibid. **Section merely referred to** in State v. Aiken, 113-652.

1453. When subpœnas issue to other counties; costs in advance. Justices of the peace, in all civil cases, may issue subpœnas to counties other than their own; such subpœnas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpœna they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpœnas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of said witness to and returning from place of trial, which amount shall be paid to said witness on his attendance and taxed against the party cast in the trial.

1893, c. 436.

1454. Subpœna duces tecum in case against railroad. When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpœna to any county within the limits of the state, commanding the president or any officer, director, agent, or any one in the employment of such company to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper and to give evidence in said cause; and each witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty

of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1885, c. 221, s. 2.

1455. Removals. In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable, shall, upon affidavit made by either party to the action that he has good reason to believe he is unable to obtain a fair trial before him, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township: Provided, that no cause shall be more than once removed: Provided further, that such motion to remove shall be made before evidence is introduced.

Code, s. 907; 1880, c. 15; 1883, c. 66. **Justice's duty, upon affidavit and motion for removal being filed, to remove case before another justice residing in same township:** State v. Ivie, 118-1227; State v. Warren, 100-489—**though if no other justice in same township can remove case to justice of neighboring township,** State v. Ivie, 118-1227—**but if case removed to justice of neighboring township when another justice in township where action originated, justice to whom removed has no jurisdiction and judgment void,** Ibid. **Section not applicable to mayor's court, and defendant therein not entitled to removal:** State v. Joyner, 127-541.

1456. Removals, justice dead or incapacitated. If any justice of the peace shall die or become incapacitated by removal, resignation or other cause, having any action, civil or criminal, pending before him, which shall not have been finally determined, such action shall not abate or be discontinued, but the plaintiff in such civil action, or any one on behalf of the state in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the same is removed and by giving ten days' notice to the defendant of such removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the plaintiff; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice. The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or cost which have theretofore been properly ad-

vanced by any party to such action. After such removal either party shall be entitled to all the rights given in the preceding section.

1905, c. 121.

VII. Rules of Procedure.

1457. Rule I. Pleadings. The pleadings in these courts are—

1. The complaint of the plaintiff.
2. The answer of the defendant.

Code, s. 840. **Section merely referred to** in Poston v. Rose, 87-282.

1458. Rule II. Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket.

Code, s. 840, Rule 2. **Pleadings may be oral:** Montague v. Brown, 104-161; Little v. McCarter, 89-237—**but if so, substance must be entered on docket,** Montague v. Brown, 104-161. **Section merely referred to** in Durham v. Wilson, 104-598.

1459. Rule III. Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action.

Code, s. 840, Rule 3. **For contents of complaint generally, see section 467. Where no written pleadings before justice, summons constitutes complaint:** Parker v. Southern Express Co., 132-130, and cases there cited; Moore v. Wolfe, 122-711; Cromer v. Marsha, 122-564; Allen v. Jackson, 86-321. **Justice should require plaintiff to state in plain and direct manner facts constituting cause of action:** Smith v. Newberry, 140-385—**and substance of oral pleadings entered by justice on docket must contain in plain and direct manner the ground of action,** Montague v. Brown, 104-161.

1460. Rule IV. Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim.

Code, s. 840, Rule 4. **For important annotations as to answers in general, see section 479. For important and full annotations on counterclaims generally, see section 481.**

Memorandum "general issue" entered on justice's docket as embracing defendant's defense is construed to mean a general denial of plaintiff's cause of action: Blackwell v. Dibbrell, 103-270.

Pendancy of another action must be specially pleaded in answer or is deemed waived: Montague v. Brown, 104-163; Blackwell v. Dibbrell, 103-270; Hawkins v. Hughes, 87-115—**and former judgment must be specially pleaded, for it will not be considered under plea merely denying indebted-**

ness, Smith v. Lumber Co., 140-375; Blackwell v. Dibbrell, 103-270; Harrison v. Hoff, 102-126.

In oral pleadings, if facts relied upon as defense be new matter, notice of same must be given on docket in plain and direct manner: Montague v. Brown, 104-161.

Counterclaim in excess of $200 can not be entertained by justice: Ijames v. McClamroch, 92-362; Hurst v. Everett, 91-403; Raisin v. Thomas, 88-148; Meneely v. Craven, 86-364; Boyett v. Vaughan, 85-363—**and want of jurisdiction can not be cured by entering remitter in superior court,** Ijames v. McClamroch, 92-362; Raisin v. Thomas, 88-148—**nor has justice jurisdiction of counterclaim in damages assessed by jury at more than $200 though voluntarily reduced to that amount,** Raisin v. Thomas, 88-148—**but defendant may recoup damages to amount claimed in complaint,** Hurst v. Everett 91-399—**and where several actions brought on notes, he has right to set up such defense in each until amount of damages exhausted,** Ibid.

Where court has jurisdiction it seems that claim sounding in damages may be used as set-off: Raisin v. Thomas, 88-148—**though counterclaim consisting of alleged indebtedness arising out of unadjusted partnership dealings between partners can not be set up before justice,** Love v. Rhyne, 86-576—**and plaintiff can not set up counterclaim in reply to counterclaim asserted by defendant,** Boyett v. Vaughan, 85-363—**and counterclaim can not be set up for enough to extinguish plaintiff's claim and then recover $200,** Derr v. Stubbs, 83-539—**but claim for funeral expenses may be pleaded as set-off in suit by administrator for debt due intestate,** Barbee v. Green, 86-158.

Equitable defense may be set up before justice: Levin v. Gladstein, 142-482, and cases under section 1419.

Distinction between counterclaim, set-off and recoupment pointed out in Hurst v. Everett, 91-399; Raisin v. Thomas, 88-150.

1461. Rule V. Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true.

Code, s. 840, Rule 11. **For demurrers generally, see sections 470-478.**

1462. Rule VI. When demurrer is sustained. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded.

Code, c. 840, Rule 12. **For amendments generally, see section 507.**

1463. Rule VII. No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant.

Code, s. 840, Rule 5. **Sections merely referred to** in Smith v. Newberry, 140-387; Turner v. McKee, 137-253.

1464. Rule VIII. No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover.

Code, s. 840, Rule 6. **Section merely referred to** in Durham v. Wilson, 104-598; Montague v. Brown, 104-163.

1465. Rule IX. Action on account or note. In an action or defense, founded on an account or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off.

Code, s. 840, Rule 7. **In action before justice on promissory note exhibition of same with statement that specified sum is due thereon, which plaintiff seeks to recover, is sufficient complaint:** Evans v. Williamson, 79-86.

1466. Rule X. Variance between pleading and proof. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby.

Code, s. 840, Rule 8. **See, as to variance generally, sections 515, 516.**

1467. Rule XI. Process not quashed for form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside, for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending, shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment.

Code, s. 908; R. C., c. 3, c. 62, s. 22; 1794, c. 414. **For annotations generally upon subject of amendment of pleading, process, etc., see under sections 505-507.** 152-119 152-793

The power of amendment of criminal process hereunder is not unconstitutional: State v. Crook, 91-536. **For history of power of amendment in justices' courts,** see State v. Vaughan, 91-532.

As justices of the peace are clothed with large jurisdiction in criminal matters and are almost universally men unlearned in the law, very liberal powers of amendment should be accorded them that offenders may not escape just penalties by opposing with technical objections: State v. Bryson, 84-783.

A justice may allow officer to amend the return of a summons, where same manifestly incorrect, by inserting proper date of service: State v. Warren, 113-684. **Justice may allow plaintiff to amend a summons against register of deeds in action for penalty for wrongly issuing marriage license**

by inserting the words "without reasonable inquiry:" Laney v. Mackey, 144-630—may allow amendment of summons in claim and delivery to state value of property when value is not over $50 so as to show jurisdiction, not to give jusisdiction, Cox v. Grisham, 113-279; Leathers v. Morris, 101-184; Singer Mfg. Co. v. Barrett, 95-36.

Civil process served by town constable where same not addressed to him is a nullity, and can not be amended after service: Baker v. Brem, 126-367, 127-322.

In warrant to recover penalty under a statute, an averment alone that amount claimed is "due by penalty," without stating the facts or pointing out particular statute under which penalty is claimed, is insufficient, but judge may allow amendment on appeal to superior court: Stone v. R. R., 144-220.

Justice has power to allow amendment of criminal warrant or affidavit: State v. Sykes, 104-694—but warrant can not be amended by striking out offense charged and inserting new and different offense, State v. Taylor, 118-1262; State v. Crook, 91-539; State v. Vaughan, 91-532. Where amendment does not change nature of action, power to amend is unrestricted: State v. Wernwag, 116-1063, and cases cited.

Where warrant before justice is informal, it may be aided by affidavit if same refers to it, and if court can see from both that offense sufficiently charged, warrant will be sustained: State v. Norman, 110-487; State v. Sykes, 104-694; State v. Winslow, 95-649—but affidavit of complainant does not constitute essential part of warrant issued thereon, State v. Bryson, 84-780—and if warrant charges criminal offense it will be sustained, Ibid.

Superior court, on appeal from justice's court pursues a liberal policy as to amendments, see Shelton v. Kivett, 110-408; Laney v. Mackey, 144-630; McBride v. Welborn, 119-508; Starke v. Cotten, 115-81; McPhail v. Johnson, 115-298; Moore v. Garner, 109-157; State v. Baker, 106-758; Leathers v. Morris, 101-184; Allen v. Jackson, 86-321; Bank v. McArthur, 82-107; Beville v. Cox, 109-265; Thomas v. Simpson, 80-4; Johnson v Rowland, 80-1; Lane v. Morton, 78-7; Hinton v. Deans, 75-18; State v. Cauble, 70-62; Bullard v. Johnson, 65-436. A justice's warrant may be amended in superior court, even after verdict: State v. Smith, 103-410—but it must be made to conform to evidence elicited on trial and shown by record, State v. Baker, 106-758. Superior court may amend affidavit and warrant on appeal from justice: State v. Davis, 111-729; State v. Gillikin, 114-832. The warrant of a justice may be amended in superior court upon the finding of a special verdict: State v. Telfair, 130-645.

Justice's record can be amended on appeal to superior court so as to speak the truth as to what took place in his court: State v. Jenkins, 121-637, and cases cited on page 642; Bank v. McArthur, 82-107.

Summons in action before justice may be amended on appeal by superior court to show, but not to confer, jurisdiction: McPhail v. Johnson, 115-298; Baker v. Brem, 126-367.

Section merely referred to in State v. Hester, 122-1050; Godwin v. Early, 114-12; Green v. Deberry, 24-345; Clark v. Hellen, 23-423; Mead v. Boyd, 19-521.

1468. Rule XII. Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party.

Code, s. 840, Rule 9. **Upon an appeal in civil action from magistrate to superior court, the latter has power to amend the pleadings and allow new pleas, or matters of defense, to be set up and its action in this respect is not ordinarily reviewable:** Moore v. Garner, 109-157; Hinton v. Deans, 75-18, see section 507 for additional cases. **Section referred to in** Cox v. Grisham, 113-280.

1469. Rule XIII. Account or demand exhibited. The justice may at the joining of issue, require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated.

Code, s. 840, Rule 10. **Bill of particulars may be ordered by court if demanded:** McPhail v. Johnson, 115-302. **Section referred to** in Blackwell v. Dibbrell, 103-274.

1470. Rule XIV. Proceedings recorded. The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings or on any other paper in the cause.

Code, s. 840, Rule 13.

1471. Rule XV. Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

Code, s. 840, Rule 16. **Tender must be made, before defense set up, to**

pay specific sum in discharge of plaintiff's claim and not sum in excess of counterclaim: Rand v. Harris, 83-486—**and tender to pay specific amount "as settlement of matter" not sufficient,** Ibid.

Money paid into court as a tender, if taken out by plaintiff, is a settlement of debt, he having accepted same upon conditions and terms annexed: Cline v. Rudisil, 126-523. **Tender by tenant of rent accrued after termination of lease does not preclude landlord from recovering possession:** Vanderford v. Forem, 129-217. **Where plaintiff recovers no more than the tender, he should be taxed with costs:** Pollock v. Warwick, 104-638; see Smith v. B. & L. Asso., 119-256, and cases cited; Russ v. Brown, 113-227. **Offer of compromise not accepted can not be given in evidence:** Hughes v. Boone, 102-137.

1472. Rule XVI. Continuance. Any justice before whom an action is brought, may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days.

Code, s. 840, Rule 17.

1473. Rule XVII. Chapter on civil procedure applicable to forms, limitations and parties. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justice's courts.

Code, s. 840, Rule 15. **The provision that service of summons on a corporation must be by delivering a copy also applies, under this section, to service of process issued from justice's court:** Aaron v. Lumber Co., 112-190; Katzenstein v. R. R., 78-287. **Section referred to** in Ditmore v. Goins, 128-325; Fisher v. Bullard, 109-575; Montague v. Brown, 104-163.

1474. Rule XVIII. Chapter on civil procedure applicable in attachment. The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy.

Code, s. 853. **For proceedings in attachment, see section 758 et seq.**

1475. Rule XIX. Chapter on civil procedure applicable to claim and delivery and in arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words "justice of the peace" for "judge," "clerk" or "clerks of the court," and inserting the words "or constable" after "sheriff," whenever they occur.

Code, ss. 849, 889; 1876-7, c. 251. **See sections 726 et seq. and 790 et seq.**

1476. Rule XX. Damages to real estate and conversion of personalty, same rules. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court.

Code, s. 888; 1876-7, c. 251. **Section authorizing action for "damages" not exceeding $50 to property, though property be of greater value, is constitutional:** Malloy v. City of Fayetteville, 122-480—**but does not authorize actions for slander, libel and other unliquidated damages not arising out of injury to property,** Malloy v. City of Fayetteville, 122-486. **Justice has jurisdiction of action for damages not exceeding $50 for injury to personal property, notwithstanding same of greater value than $50,** Malloy v. City of Fayetteville, 122-480; Watson v. Farmer, 141-452—**and has jurisdiction of action for damages to real estate where sum demanded not more than $50,** Duckworth v. Mull, 143-461.

1477. Rule XXI. Suit on judgment, evidence in. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made.

Code, s. 844. **A judgment of a justice of the peace, if not docketed in superior court within a year of rendition, is dormant and can only be given efficacy by a new action upon it before a justice:** Woodard v. Paxton, 101-26.

Judgment of justice not competent evidence without proof of his handwriting: Patterson v. Freeman, 132-357; Reeves v. Davis, 80-209—**of his being in office at the time, and the rendition of the same within his court,** Ibid.

1478. Rule XXII. When rehearing granted. When a judgment has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer, to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be reheard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith.

Code, s. 845. **See section 1489; also see, as to recordari, annotations under section 584. For annotations of interest as to what constitutes mistake or excusable neglect, see section 513.**

While new trial can not be granted by justice, a rehearing may be allowed by him where sickness, mistake or excusable neglect is shown: Salmon v. McLean, 116-209; Navassa Guano Co. v. Bridgers, 93-439; Gambill v. Gambill, 89-201; Froneburger v. Lee, 66-333—**provided application be made within ten days after date of judgment,** Bullard v. Edwards, 140-644; Navassa Guano Co. v. Bridgers, 93-439; Gambill v. Gambill, 89-201—**but after lapse of that time justice can not rehear such cause,** Navassa Guano Co. v. Bridgers, 93-439—**remedy then by recordari, for annotations on which subject, see section 584.**

Where rehearing wrongly granted to defendant, and on day of rehearing plaintiff moves for a continuance, he does not thereby waive his rights: Bullard v. Edwards, 140-644.

Where agent of corporation appeared and secured continuance before justice, but neglected to employ counsel until trial day, when, on account of delay in mail, counsel was unable to appear, held inexcusable neglect: Finlayson v. Accident Co., 109-196—**and where cause removed at party's request, and he made no inquiry of justice to whom removed but relied upon assurance of officer of court, held not due diligence,** Bullard v. Edwards, 140-644.

Judgment rendered by justice and, upon rehearing by him, similar judgment rendered, statute of limitations begins to run from latter judgment: Salmon v. McLean, 116-209.

Section referred to in Merrell v. McHone, 126-529; Hogan v. Kirkland, 64-251.

VIII. Judgment and Execution.

1479. Docketing justice's judgment; lien; stay of execution; clerk's duty; costs; docketed in other counties. A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the defendant, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of said court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court: Provided, however, that in cases of appeal to the superior court from a judgment so docketed, when

judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of said justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment (prior attachment liens and judgment on same excepted), and the clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. And when judgment is rendered in the superior court, it shall be the duty of the clerk to enter upon the page of the judgment docket where the justice's judgment is docketed, as follows: "Judgment in superior court....day of....., see Judgment Docket...., page...." He shall date same and sign it as clerk: Provided further, that when the judgment of the superior court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall so note such satisfaction on the record of the justice's judgment: Provided, that in case a stay of execution upon such judgment shall be granted, as provided herein, execution upon such judgment shall not be issued by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript.

Code, s. 839; 1903, c. 179.

THE JUDGMENT ITSELF. A justice is under no obligation to write out and sign his judgments with his own hand. He may have them written and his name signed thereto in his presence and under his supervision without making himself liable for delegating his jurisdictional powers: Reeves v. Davis, 80-209. 147-548

Ordinarily it is a justice's duty to pronounce judgment on day of trial, but in cases of difficulty he may reserve his decision until he can be properly advised, and afterwards enter judgment and give parties notice of his action: Ibid; Osborne v. Furn. Co., 121-364.

Justice's judgment is conclusive and binding until legally set aside, modified or reversed: Dunham v. Anders, 128-212; Whitehurst v. Transportation Co., 109-342; Hiatt v. Simpson, 35-72—and though docketed in superior court it remains as before, a judgment of the justice when to be impeached, modified or reversed, Bailey v. Hester, 101-540; Patterson v. Walton, 119-501; Whitehurst v. Transportation Co., 109-344; Cotton Mills v. Cotton Mills, 116-647; Morton v. Rippy, 84-611; Birdsey v. Harris, 68-92; Ledbetter v. Osborne, 66-379.

EFFECT OF DOCKETING THE JUDGMENT. When judgment dock-

eted in superior court it becomes judgment of superior court: Dysart v. Brandreth, 118-968; McIlhenny v. Savings & Trust Co., 108-311; Adams v. Guy, 106-275; Cannon v. Parker, 81-322—though it only becomes a judgment of superior court for purpose of creating lien upon real estate of judgment debtor in county, Whitehurst v. Transportation Co., 109-345; Cannon v. Parker, 81-322; Broyles v. Young, 81-315; Ledbetter v. Osborne, 66-380—and for purpose of enforcing same by execution or otherwise, Whitehurst v. Transportation Co., 109-345; Woodard v. Paxton, 101-29; Surratt v. Crawford, 87-374; Broyles v. Young, 81-315; Cannon v. Parker, 81-322; Ledbetter v. Osborne, 66-380.

When judgment has become dormant it can not be revived by docketing in superior court, Cowen v. Withrow, 114-558; Woodard v. Paxton, 101-26; Williams v. Williams, 85-385. When regularly docketed in superior court judgment can not be collaterally impeached: Moore v. Edwards, 92-43. Judgment may be docketed in superior court, though appeal taken and security given to stay execution, Dysart v. Brandreth, 118-968—and when so docketed in superior court lien is not destroyed by appeal and supersedeas bond, Ibid—but being so docketed does not arrest running of statute of limitations, Daniel v. Laughlin, 87-433. When judgment given in one county it can not be docketed in another, unless previously docketed in county where rendered: McAden v. Banister, 63-479.

The transcript of a judgment need not contain more than essential particulars constituting judgment, Surratt v. Crawford, 87-372—the names of plaintiff and defendant, amount of judgment and costs of action being sufficient, Lee v. Bishop, 89-257. Judgment may be docketed from original papers before justice, instead of from transcript: McAden v. Banister, 63-479.

Where justice's judgments docketed in superior court on same day, they are entitled to priority according to time of day when docketed: Bates v. Hinsdale, 65-423.

Where transcript authenticated by justice's certificate, judgment is presumed to have been regularly taken, though judgment proper not signed by justice: Surratt v. Crawford, 87-372.

Execution on docketed justice's judgment shall be issued to sheriff and be executed in same manner as other executions of superior court: Cannon v. Parker, 81-322; see section 627 et seq.

For annotations with respect to judgments generally, see section 574.

1480. Justice's judgment removed to another county. Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant, must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of said county. On such transcript of the judg-

ment, thus certified, any justice in any other county may award execution for the sum therein expressed.

Code, s. 846. **Judgment rendered by justice in one county can not be docketed in another, unless previously docketed in former county:** McAden v. Banister, 63-479—**and what allowed to be docketed in latter county is transcript of judgment as docketed in former,** Ibid. **For sufficient transcript for docketing in another county,** see Wilson v. Patton, 87-318. **Docketing in another county is only for purpose of giving a lien:** Bernhardt v. Brown, 122-587.

An execution issued to another county and all proceedings under it are void, unless it bears the seal of the clerk of county where rendered: Taylor v. Taylor, 83-116.

1481. Execution, when issued and returnable. Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same.

Code, s. 840, Rule 14. **Justice may issue execution on judgment unless cause has been removed to and docketed in superior court:** Bailey v. Hester, 101-540—**and may also recall execution which has been improvidently issued,** Ibid—**but justice has no jurisdiction to direct application by sheriff of proceeds of execution issued by another justice, upon grounds that same is null and void,** Cary v. Allegood, 121-54.

Judgment of justice not docketed within year of rendition of it is dormant: Cowen v. Withrow, 114-558; Woodard v. Paxton, 101-26—**and vitality can only be restored by new action,** Ibid; Williams v. Williams, 85-383—**and purchaser under execution on justice's judgment docketed after lapse of year acquires no title, though he be a stranger to judgment and without notice,** Cowen v. Withrow, 114-558.

Judgment of justice does not become dormant by failure to issue execution thereon pending an appeal from judgment when bond has been given to stay execution: Dysart v. Brandreth, 118-968.

1482. Execution on, when a lien, and on what. Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court.

Code, s. 841; 1868-9, c. 159, s. 5. **Execution must be directed to any constable or other lawful officer of the county:** McGloughan v. Mitchell, 126-681—**and if it comes into the hands of sheriff he must obey it, though**

constable can not serve process addressed to sheriff, nor can sheriff serve process addressed to constable alone, Ibid. **It is not necessary that judgment should be docketed in superior court to entitle judgment creditor to execution against personal property:** McAuley v. Morris, 101-372. **Judgment of justice when docketed in superior court becomes judgment of that court, and is a lien upon real estate of defendant in county:** Dysart v. Brandreth, 118-968, and cases under section 1479 and 574—**and lien of judgment not extinguished by appeal and supersedeas bond,** Dysart v. Brandreth, 118-968; Dunham v. Anders, 128-212.

Leave to issue execution on justice's judgment docketed in superior court can be granted after lapse of seven years from such docketing, but before lapse of ten years: Broyles v. Young, 81-315; Daniel v. Laughlin, 87-433; Patterson v. Walton, 119-500; Adams v. Guy, 106-275.

Superior court has no jurisdiction of original motion to set aside an execution and order of sale granted by a justice of the peace: Hamer v. McCall, 121-197.

1483. Stay of execution granted by justice. In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceedings fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace.

Code, s. 842; 1868-9, c. 272.

1484. Security on stay of execution. The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgement of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both.

Code, s. 843. **Judgment does not become dormant by failure to issue execution thereon pending appeal from same where bond given to stay execution:** Dysart v. Brandreth, 118-968; see Dunham v. Anders, 128-212.

One who signs stay of execution upon judgment as surety becomes thereby party to judgment and bound in like manner as principal: Barringer v. Allison, 78-79.

1485. Execution stayed; undertaking on appeal before clerk. If an appellant desire a stay of execution of the judgment, he may apply, at any time, to the clerk of the appellate court for leave to give the undertaking, as provided in a subsequent section; who shall, upon the undertaking being given, make an order that all proceedings on the judgment be stayed.

Code, s. 882. **In action on stay bond provided herein, it is not necessary that plaintiff allege that he has sustained damages on account of appeal:** McMinn v. Patton, 92-371.

No execution shall be levied on property of sureties on appeal bond, until execution against principal returned unsatisfied: Rush v. Steamboat Co., 68-72.

Even though a stay bond is given on appeal, the judgment otherwise remains in full force and effect, even retaining its lien upon real estate when properly docketed: Dunham v. Anders, 128-212.

1486. Undertaking on appeal before justice. In all cases of appeal from justices' courts the appellant may give an undertaking for the appeal before the justice who tried the cause, and who shall indorse his approval thereon, instead of before the clerk of the appellate court.

Code, s. 883; 1869-70, c. 187. **No statutory provision allowing mortgage of real or personal property to be given in lieu of undertaking on appeal:** Comron v. Standland, 103-207—**yet if such mortgage given, and is accepted by opposing litigant, mortgage valid and can be enforced,** Ibid.

Section merely referred to in Blair v. Coakley, 136-409; Dunham v. Anders, 128-212.

1487. Undertaking on appeal; what to contain. The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties.

Code, s. 884; 1879, c. 68. **Undertaking with sureties that appellant will pay all costs awarded against him on appeal, and, if judgment affirmed or appeal dismissed, will pay amount adjudged to be paid, is in compliance with section:** Walker v. Williams, 88-7—**and it is not necessary that appellant should sign undertaking in order to bind him,** Ibid.

No statutory provision allowing mortgage to be given in lieu of undertaking on appeal: Comron v. Standland, 103-207—**yet if such mortgage given and accepted by appellee, same valid and can be enforced,** Ibid.

Effect of bankruptcy, pending appeal, upon liability of sureties to appeal undertaking: Laffoon v. Kerner, 138-281; Hamilton v. Mooney, 84-12.

Summary judgment may be given against sureties on bond for amount

of judgment and costs awarded against appellant on appeal: Brown v. Brittain, 84-552—as additional remedy to suit on same as common law bond, Ibid. In action on bond, not necessary to allege that plaintiff had sustained damage on account of the appeal: McMinn v. Patton, 92-371. Sufficiency of bond under this section discussed in McMinn v. Patton, 92-371. Sufficiency of mortgage given in lieu of undertaking on appeal, discussed in Comron v. Standland, 103-207.

Sureties to appeal bond are bound for amount of judgment rendered in superior court and their liability is not restricted to amount of judgment appealed from: Walker v. Williams, 88-7.

Section merely referred to in Dunham v. Anders, 128-212.

1488. Delivery of undertaking, execution stayed; copy served on appellee. A delivery of a certified copy of the order, hereinbefore mentioned, to the justice of the peace, shall stay the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof.

Code, s. 885. Section referred to in Dunham v. Anders, 128-212; Comron v. Standland, 103-211.

IX. Appeal.

1489. New trial not allowed; either party may appeal. A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed.

Code, s. 865. See sections 607, 608, and 1478. New trial can not be had in justice's court, but party dissatisfied with judgment has remedy by appeal: Bullard v. Edwards, 140-647; State v. Lucas, 139-567; Salmon v. McLean, 116-209; Navassa Guano Co. v. Bridgers, 93-441; Gambill v. Gambill, 89-201; Froneburger v. Lee, 66-333—though defendant by voluntarily paying judgment waives right of appeal, Cowell v. Gregory, 130-80.

Appeal allowed either party in bastardy proceedings, as it is a civil action: State v. Liles, 134-742; State v. Crouse, 86-617; Steadman v. Jones, 65-390. Appeal must be taken to next term of superior court: Hahn v. Guilford, 87-172; Ballard v. Gay, 108-544; Sondley v. Asheville, 110-84; Rhyne v. Lipscombe, 122-650. Merely craving an appeal and filing bond is not taking appeal, Love v. Love, 139-363; Blair v. Coakley, 136-409; Wilson v. Seagle, 84-110—for appellant must look after case and see that appeal made effectual, Love v. Love, 139-363—and must at least put officer under obligation to act by paying or tendering fees, Blair v. Coakley, 136-409.

There is no appeal from a confession of judgment: Rush v. Steamboat Co., 67-47—and none from an interlocutory judgment: Phelps v. Worthington, 92-270.

Legislature can not take away right of appeal: Rhyne v. Lipscombe, 122-655.

An appeal from judgment discharging one who has been arrested in a civil action vacates judgment and the order of arrest continues in force pending the appeal: Patton v. Gash, 99-280.

In peace warrant proceedings there is no appeal: State v. Gregory, 118-1199; State v. Walker, 94-857; State v. Lyon, 93-575.

Appeal lies from the taxing of prosecutor with costs: State v. Morgan, 120-563—**but does not lie on the part of the state for a refusal to tax prosecutor,** Ibid; see cases cited on page 564 of case.

For issuance of recordari where appeal lost without fault of party cast, see cases under section 584.

1490. Does not stay execution. No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as hereinafter provided.

Code, s. 875; 1876-7, c. 251, s. 6. **Appeal from justice does not vacate judgment, nor even suspend its operation:** Dunham v. Anders, 128-211—**and party in whose favor judgment rendered has right to have execution issued where no undertaking given,** Comron v. Standland, 103-210.

Section merely referred to in Blair v. Coakley, 136-409; State v. Morgan, 120-564; Moore v. Garner, 109-158; State v. Wallin, 89-580; Marshall v. Lester, 6-227.

1491. Appeal, when and how taken. The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for.

Code, s. 876; 1876-7, c. 251, s. 7. **Appeals from justices of the peace must be taken and notice served within ten days from judgment:** Marion v. Tilley, 119-473; Finlayson v. Accident Co., 109-196; Green v. Hobgood, 74-234; Spaugh v. Boner, 85-208—**but the court may allow it to be taken afterwards,** West v. Reynolds, 94-333; Railroad v. Richardson, 82-343; Marsh v. Cohen, 68-283; see annotations as to recordari under section 584—**and if judgment was given on process not personally served but served by publication, and defendant did not appear at trial, defendant may take fifteen days after notice of judgment in which to serve notice of appeal,** Merrell v. McHone, 126-528; King v. R. R., 112-318; State v. Johnson, 109-855—**but if the adverse party or his attorney is present at the trial, appellant can give notice in open court,** Marion v. Tilley, 119-473; State v. Crouse, 86-617; Richardson v. Debnam, 75-390.

The notice of appeal must be served by an officer: Clark v. Mfg. Co., 110-111; State v. Johnson, 109-852—**and within ten days,** State v. Johnson, 109-852; Spaugh v. Boner, 85-208—**stating the grounds upon which appeal is taken,** Spaugh v. Boner, 85-208—**service to be made both upon justice**

who tried case and upon appellee, State v. Johnson, 109-852—**though justice may by conduct waive service of formal notice,** Osborne v. Furn. Co., 121-365.

If defendant personally served with summons he has notice and bound to take notice of judgment: Spaugh v. Boner, 85-209; Sparrow v. Davidson College, 77-35; McDaniel v. Watkins, 76-399. **What amounts to notice of judgment discussed** in McDaniel v. Watkins, 76-399.

Section referred to in Davenport v. Grissom, 113-40; Montague v. Brown, 104-163; Railroad v. Richardson, 82-344.

1492. Notice in open court sufficient. Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party.

Code, s. 877; 1869-70, c. 187; 1876-7, c. 251, s. 8. **Where appellee present when appeal prayed, no written notice of appeal necessary:** State v. Crouse, 86-620; Richardson v. Debnam, 75-390—**though where not so present, notice as required by section 1491 must be issued and served,** Marion v. Tilley, 119-473—**and where appeal prayed in open court, but appellant afterwards told justice not to send up papers, though afterwards changed his mind and filed appeal bond with clerk of court, he was not estopped to prosecute appeal,** Suttle v. Green, 78-76.

Section referred to in Davenport v. Grissom, 113-40; Clark v. Mfg. Co., 110-113.

1493. Justice to make return of, within ten days. The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for his service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed.

151-276

Code, s. 878. **Justice allowed ten days to send up papers after service of notice of appeal:** Sondley v. Asheville, 110-89—**and if he fail to do so, may be compelled to make return by attachment,** Hawks v. Hall, 139-176. **Statement of testimony heard by justice is not properly part of the return to notice of appeal,** Vinson v. Knight, 137-408. **Failure of justice to sign return does not vitiate proceedings where appellant gave notice and paid fee, and appellee made no motion to dismiss but entered general appearance,** Hawks v. Hall, 139-176. **Motion to dismiss appeal not docketed within ten days properly refused where delay due to counsel of appellee,** Jerman v. Gulledge, 129-242. **Superior court is not bound to recognize supplemental return to notice of appeal, where same voluntarily made by justice,** Beville v. Cox, 109-265. **After justice transmits appeal and papers**

to superior court, he has no power to grant motion to set aside judgment for want of jurisdiction: Forbes v. McGuire, 116-449.

Section referred to in Johnson v. Andrews, 132-378; West v. Reynolds, 94-335; Phelps v. Worthington, 92-271; Poston v. Rose, 87-281; Ledbetter v. Osborne, 66-380.

1494. Defective return amended. If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment.

Code, s. 879. **If return defective, judge may direct further or amended return:** Hawks v. Hall, 139-176.

1495. Restitution, when ordered. If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment.

Code, s. 886. **Section only applicable where payments made involuntarily:** Cowell v. Gregory, 130-81—**for defendant by voluntarily paying judgment before justice waives right of appeal,** Cowell v. Gregory, 130-80.

1495a. Judgment of appellate court entered by clerk on docket. Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall, within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word "Reversed," "Modified," or "Affirmed," as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying or affirming the former judgment. Any clerk failing to perform such duties shall pay to any person all such damages as he may have sustained by such failure.

1907, c. 880, ss. 1, 2.

X. Forms.

1496. Forms to be used in justice's court. The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this chapter:

[No. 1.]

SUMMONS.

North Carolina, ...County, ...Township.

A.....B.....
against
C.....D.....
} Before....., Justice of the Peace.

State of North Carolina, to any constable or other lawful officer of..... county—Greeting:

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of....., on the..... day of .....19....., at his office (or elsewhere, as the justice may appoint the place of trial), in.....township, to answer A. B. in a civil action for the recovery of ..... dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this.....day of.....19.....

G. W. H.....
Justice of the Peace.

For annotations as to issuance and contents of summons, see sections 1444, 1445.

[No. 2.]

SUMMONS ON ALLOWING APPLICATION TO REHEAR.

(Title, etc., as in No. 1.)

Whereas, A. B., plaintiff above named (or C. D., defendant above named) has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the..... day of .....19.....; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of....., on the.....day of.....19....., at....., in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this.....day of.....19.....

G. W. H.....
Justice of the Peace.

For annotations as to rehearing, see section 1478.

[No. 3.]

AFFIDAVIT TO OBTAIN ATTACHMENT.

(Title, etc., as in No. 1.)

A. B., plaintiff above named, being duly sworn, deposes and says:

1 That the defendant C. D., is indebted to the plaintiff in the sum of..... dollars (state any cause of action founded on contract, specifying the amount of the claim and the grounds thereof).

2. That the said defendant (state any fact or facts, so as to bring the case within one of the classes in which an attachment may issue. The facts must be stated positively and affirmatively, not merely upon information and belief, except where a fact is alleged with a particular intent. The intent in such case may be stated as on information and belief. See No. 4.)

A..... B.....

Sworn to and subscribed before me, this.....day of.....19.....

G. W. H.....

Justice of the Peace.

Consult sections 759, 769, 1474, and annotations thereunder.

[No. 4.]

ANOTHER FORM OF AFFIDAVIT TO OBTAIN ATTACHMENT.

(Title, etc., as in No. 1.)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to plaintiff in the sum of ..... dollars for goods sold and delivered to said defendant by the plaintiff on or about the.....day of.....19.....

2. That the said defendant has departed from this state, or keeps himself concealed therein with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, etc., to defraud defendant's creditors).

A. B.....

(Sworn to, etc., as in No. 3.)

Consult sections 759, 769, 1474, and annotations thereunder.

[No. 5.]

AFFIDAVIT AGAINST A FOREIGN CORPORATION.

North Carolina, ...County.

A.....B.....
against
The Highland Mining Co.
} Before ....., Justice of the Peace.

A. B., the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum of .....dollars, for the use and occupation of certain premises, by permission of plaintiff, from the..... day of.....19..... until the.....day of .....19.....

2. That the defendant is a foreign corporation, created under the laws of the state of.....

3. That the cause of action above stated arose in this state.

(Sworn to, etc., as in No. 3.)

A. B.....

[No. 6.]

UNDERTAKING UPON ATTACHMENT.

(Title as in No. 1 or No. 5.)

Whereas, the plaintiff above named is about to apply for a warrant of attachment against the property of the above-named defendant:

Now, therefore, we J. W. B., of ..... county, and W. D. M., of ..... county, undertake in the sum of .....dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B.....

W. D. M.....

Signed and delivered in the presence of G. W. H., Esq., this.....day of .....19.....

G. W. H.....

Justice of the Peace.

Consult sections 763, 1474.

[No. 7.]

WARRANT OF ATTACHMENT.

(Title as in No. 1 or No. 5.)

State of North Carolina, to any constable or other lawful officer of..... county—Greeting:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of.....dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having given the undertaking as required by law;

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the said defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the .....day of..... 19..... with your proceedings hereon.

Witness our said justice, this.....day of.....19.....

G. W. H.....

Justice of the Peace.

Consult sections 765, 769, 1474.

[No. 8.]

OFFICER'S RETURN TO BE ENDORSED ON ATTACHMENT.

I, O. P. M., constable (or sheriff) of ..... county, do hereby return that, by virtue of the within atachment, I have seized and taken into my possession the tangible personal property (or, have levied on the real estate, as the case may be) of the defendant within named, specified in the inventory hereto annexed.

Dated this.....day of.....19.....

O. P. M.....

Consult sections 767, 768, 1474.

[No. 9.]

INVENTORY OF PROPERTY ATTACHED TO ABOVE RETURN.

(Title as in No. 1 or No. 5.)

I do hereby certify that the following is a true and just inventory of all the property seized or levied on by me under a warrant of attachment, issued in

the above-entitled action by G. W. H., Esq., with a statement of the books, vouchers, papers, rights and credits taken into my custody by virtue of said warrant. (Insert list of property by items.)

I do further testify that the following property mentioned in the above inventory is perishable, and that the expense of keeping the same until the termination of the suit would exceed one-fifth of its value; and I do hereby apply to this court for authority to sell the same. (Insert a list of perishable property.)

Dated this.....day of.....19..... O. P. M.....
Constable (or Sheriff).

Consult sections 767, 1474.

[No. 10.]

ORDER DIRECTING SALE OF PERISHABLE PROPERTY.

(Title as in No. 1 or No. 5.)

It appearing by the inventory returned by O. P. M., constable, (or sheriff), under the warrant of atachment granted in this action, that the following property mentioned in said inventory is perishable, to-wit: (Insert here the list of perishable property.)

It is therefore ordered that the said property be sold by the said officer at public auction, at such time and place as he shall deem advisable, and that the said officer give notice of such sale as the sale of personal property on execution.

It is further ordered that the proceeds of such sale be retained by said officer, and disposed of in the same manner as the property itself, if the same had not been sold.

Dated this.....day of..... ....19..... G. W. H.....
Justice of the Peace.

Consult sections 772, 1474.

[No. 11.]

NOTICE OF LEVY ON PROPERTY NOT CAPABLE OF MANUAL DELIVERY.

To H. B.....:

Take notice that by warrant of attachment issued in this action, a certified copy of which is herewith served upon you, I have levied upon, and do hereby levy upon, your indebtedness, amounting to ..... dollars or thereabouts, to the defendant above named. (Describe as particularly as possible the shares, debts or property levied upon.)

Dated this.....day of.....19..... O. P. M.....
Constable (or Sheriff).

The officer will indorse on the copy of the attachment served with the above notice the following certificate:

I do hereby certify that the within is a true copy of the warrant of attachment in my possession, issued in this action, and of the whole thereof.

Dated this.....day of.....19..... O. P. M.....
Constable (or Sheriff).

Consult sections 777, 778, 1474.

[No. 12.]

ORDER DIRECTING THIRD PERSON (H. B.) TO APPEAR AND BE EXAMINED.

(Title as in No. 1 or No. 5.)

It appearing to me by the certificate of O. P. M., constable (or sheriff) of said county, that the said officer, with a warrant of attachment against the property of C. D., the defendant in this action, has applied to H. B. for the purpose of levying upon a debt owing to the defendant by said H. B. (or upon property of said defendant held by said H. B., or otherwise), and that the said H. B. refuses to furnish said officer with a certificate designating the amount of the debt owing by said H. B. to the defendant, or the amount and description of the property held by said H. B. for the benefit of the defendant.

Now, therefore, I do order and require the said H. B. to attend before me at my office on the.....day of.....19....., and be examined on oath concerning the same.

Dated this.....day of.....19.....

G. W. H.....
Justice of the Peace.

Consult sections 779, 1474.

[No. 13.]

ATTACHMENT TO ENFORCE OBEDIENCE TO ABOVE ORDER

(Title as in No. 1 or No. 5.)

State of North Carolina, to any constable or other lawful officer of..... county—Greeting:

Whereas, it appears that H. B. was duly served on the.....day of..... 19..... with an order issued by G. W. H., Esq., one of our justices of the peace for said county, requiring said H. B. to attend before said justice at his office, in said county, on the.....day of.....19..... and be examined on oath concerning a certain debt owing to the defendant, named in the above action, by the said H. B. (or property held by said H. B. for the benefit of the defendant, or otherwise, as the case may be).

And whereas, the said H. B. in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath, as in said order he is required to do;

Now, therefore, we command you that you forthwith attach the said H. B., so as to have his body before G. W. H., Esq., one of our justices of the peace for your county, on the .....day of.....19.... at his office, in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in his behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not, at your peril.

Witness, our said justice, this.....day of.....19.....

G. W. H.....
Justice of the Peace.

Consult sections 780, 1474.

[No. 14.]

UNDERTAKING ON DISCHARGE OF ATTACHMENT.

(Title of the cause as in No. 1.)

Whereas, the property of the above-named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law;

Now, therefore, we, B. B., of..... county, and D. D., of..... county, undertake in the sum of.....dollars (the sum named must be at least double the amount claimed by plaintiff), that if the said attachment be discharged we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this.....day of.....19.....

(Signed.) B. B.....

D. D.....

Signed and delivered in the presence of G. W. H., Esq., this.....day of .....19.....

.....

Justice of the Peace.

ACKNOWLEDGMENT AND AFFIDAVIT OF SURETIES.

North Carolina, ... County.

On this.....day of.....19..... before me personally appeared the above named B. B. and D. D., known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the State of North Carolina and a householder (or freeholder) therein.

B. B.....

D. D.....

Sworn and subscribed before me the day above written.

G. W. H.....

Justice of the Peace.

Consult sections 774, 775, 1474.

[No. 15.]

ORDER VACATING ATTACHMENT ON SECURITY BEING GIVEN.

(Title as in No. 1 or No. 5.)

The defendant having appeared in this action and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court;

It is ordered that the attachment issued in this action on the ..... day of .....19..... be and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered that any

and all proceeds of sales and money collected by O. P. M., constable (or sheriff), and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this.....day of.....19..... G. W. H.....
Justice of the Peace.

Consult sections 774, 1474.

[No. 16.]

FORM OF PUBLICATION TO BE MADE BY PLAINTIFF IN ATTACHMENT.

(Title as in No. 1.)

[Amount sued for] due by note (or otherwise as the fact may be). Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for..... County, North Carolina, at his office (or otherwise as the case may be), on the .....day of.....19...., when and where the defendant is required to appear and answer the complaint.

Dated this.....day of.....19..... A. B.....Plaintiff.

Consult sections 766, 770, 1474.

[No. 17.]

AFFIDAVIT FOR ARREST ON DEBT FRAUDULENTLY CONTRACTED.

(Title as in No. 1.)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of..... dollars on an inland bill of exchange, drawn on the .....day of..... 19..... by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the.....day of.....19..... the defendant applied to the plaintiff to purchase a bill of goods amounting to ..... dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to.....dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the..... day of.....19..... the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B.....

Sworn to and subscribed before me, this.....day of.....19.....
G. W. H.....
Justice of the Peace.

Consult sections 726, 727, 729, 1475.

[No. 18.]

UNDERTAKING ON ARREST.

(Title as in No. 1.)

Whereas, the plaintiff above named is about to apply (or, has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of ..... county, and P. P., of .....county, undertake in the sum of.....dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J. .....

P. P. .....

Signed in my presence, this.....day of.....19.....

G. W. H.....

Justice of the Peace.

Consult sections 730, 1475.

[No. 19.]

ORDER OF ARREST.

(Title as in No. 1.)

North Carolina, ...County, ...Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of..... dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the.....day of....., 19.....; of which return you will give notice to plaintiff or his attorney.

Dated this.....day of.....19..... G. W. H.....

Justice of the Peace.

Consult sections 731, 733, 1475.

[No. 20.]

UNDERTAKING OF BAIL ON ARREST.

(Title as in No. 1.)

Whereas, the above named defendant, C. D., has been arrested in this action;

Now, therefore, we, B. B., of .....county, and D. D., of.....county, undertake in the sum of..... dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B. .....

D. D. .....

Signed in my presence, this.....day of.....19.....

G. W. H.....

Justice of the Peace.

Consult sections 737-740, 1475.

[No. 21.]

NOTICE OF EXCEPTION TO BAIL.

(Title as in No. 1.)

To O. P. M., constable (or sheriff) of the county of.....:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B....., Plaintiff.

(or, M. W. N..... Attorney for Plaintiff.)

Dated this.....day of.....19.....

Consult section 739, 1475.

[No. 22.]

NOTICE OF JUSTIFICATION OF BAIL.

(Title as in No. 1.)

To A. B., plaintiff (or, M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the.....day of.....19.....

C. D.....

(or, attorney for C. D.), Defendant.

Dated this.....day of.....19.....

Consult section 1475.

[No. 23.]

NOTICE OF OTHER BAIL.

(Title, etc., as in No. 1.)

Take notice that R. S., of ..... county (physician), and Y. Y., of ..... county (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, etc.

Consult sections 741, 1475.

[No. 24.]

JUSTIFICATION OF BAIL.

(Title as in No. 1.)

On this.....day of.....19..... before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or free holder) in this state;

2. That he is worth the sum of.....dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

(Signatures of bail.)

Examination taken and sworn to before me, this.....day of.....19.....

G. W. H.....

Justice of the Peace.

Consult sections 740, 742, 1475.

[No. 25.]

ALLOWANCE OF BAIL.

(Title as in No. 1.)

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient and allow the same.

Dated this.....day of.....19..... G. W. H.....

Justice of the Peace.

Consult sections 743, 1475.

[No. 26.]

SUBPOENA TO TESTIFY.

State of North Carolina, ...County.

To S. T.....; greeting: (the justice may insert any number of necessary names).

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the .....day of.....19..... to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).* Herein fail not, under the penalty prescribed by law. Witness our said justice, this.....day of.....19..... G. W. H.....

Justice of the Peace.

Consult sections 1452-1454.

[No. 27.]

N. B.—The justice may, instead of a formal subpœna, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff:.....; and the following as witnesses for the defendant: .....; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this.....day of.....19..... G. W. H.....

Justice of the Peace.

Consult section 1452.

[No. 28.]

SUBPOENA DUCES TECUM.

If any witness has a paper or document, which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk (*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

Consult sections 1454, 1641.

[No. 29.]

FORM OF OATH OF WITNESS.

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30.]

PROCEEDINGS AGAINST DEFAULTING WITNESS.

When a witness, under subpœna, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1.)

To R. P.:

Take notice, that on the .....day of.....19..... the plaintiff in the above action will move, G. W. H., Esq., the justice before whom the trial of said action was had, on the .....day of.....19..... for judgment against you for the sum of.....dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this.....day of.....19.....

A. B....., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A.....B.....
against
C.....D.....
} Motion for penalty against R. P., defaulting witness
Justice's Court.

.....day of.....19..... A. B., above named, appears, and, according to a notice filed and duly served on R. P., moved for the penalty of..... dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the.....day of.....19.....

as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plantiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S. who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says.)

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of.....dollars penalty forfeited by reason of the premises, and the further sum of..... dollars, costs of this motion.

[No. 31.]

FORM OF A VENIRE.

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of.....county:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the.....day of..... 19..... for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this.....day of.....19.....

G. W. H.....
Justice of the Peace.

[No. 32.]

FORM OF JUROR'S OATH.

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

Juror need not repeat words "so help me God:" State v. Paylor, 89-539. See section 1443.

[No. 33.]

FORM OF OATH TO CONSTABLE IN CHARGE OF THE JURY.

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34.]

SUMMONS AGAINST DEFAULTING JUROR TO SHOW CAUSE.

State of North Carolina, to any constable or other lawful officer of.....county—Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the.....day of.....19..... to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the.....day of.....19.... in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this.....day of.....19.....

G. W. H.....
Justice of the Peace.

[No. 35.]

DEMURRER TO COMPLAINT.

(Title as in No. 1.)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it).

(Signature of defendant or defendant's attorney.)

Consult section 1461.

[No. 36.]

DEMURRER TO ANSWER.

(Title as in No. 1 or No. 5.)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or for that the said answer is not sufficiently explicit to make this plaintiff understand it).

(Signature of plaintiff or plaintiff's attorney.)

Consult section 1461.

[No. 37.]

JUDGMENT UPON DEMURRER.

Note.—If the justice thinks the objection raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be).

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He can not give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of.....dollars, costs of this action (or that the plaintiff recover of the defendant the sum of.....dollars, damages, and the further sum of.....dollars, costs of this action.)

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows:

Demurrer to the complaint (or to the answer) filed, heard and overruled, and he will then proceed to the evidence in the cause.

As to allowing amendment to pleadings when demurrer sustained, see sections 505-507, 1462, 1467, 1468.

[No. 38.]

ENTRIES TO BE MADE ON JUSTICE'S DOCKET.

The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

(Title as in No. 1.)

.....19..... Summons issued; returnable on the.....instant at my office.

.....19..... Summons returned, served on defendant by O. P. M., constable, on the.....instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated.....19..... payable one day after date, for $....., and also for goods sold and delivered to the defendant, and claims damages for $.....

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of $..... for wood sold and delivered to the plaintiff, and also of $..... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the.....instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

.....19..... The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground) and rejected.

Having heard the evidence (and the arguments of counsel, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for $..... damages; whereupon, I adjudge that the plaintiff do recover of the defendant—

Damages ..... $.....

Costs .....

.....19..... Execution issued for above judgment to O. P. M., constable.

.....19..... Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

Form merely referred to in Smith v. Newberry, 140-387.

[No. 39.]

FORM OF NOTICE OF APPEAL TO THE SUPERIOR COURT, WHERE A NEW TRIAL OF THE WHOLE MATTER IS TO BE HAD.

(Title as in No. 1.)

To G. W. H., Esq., a justice of the peace for said county:

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the.....day of..... 19..... in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this.....day of.....19..... W. W.....

Attorney for Appellant.

Consult section 1491.

[No. 40.]

RETURN TO NOTICE OF APPEAL.

A.....B.....
against
C.....D.....

County of.....

To the Superior Court of.....County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of

appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of $75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, ...dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of $85 for board and lodging furnished to plaintiff, and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for $.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for $65 damages, and for the further sum of $3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of $1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause.

Dated this 15th day of February, 1904.

G. W. H.....
Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

Consult sections 1493, 1494.

[No. 41.]

WHERE THE SUM DEMANDED EXCEEDS TWO HUNDRED DOLLARS.

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of.....dollars, costs.

(Date and sign.)

Consult section 1419.

[No. 42.]

WHERE THE TITLE TO REAL ESTATE IS IN QUESTION.

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

ANSWER OF TITLE.

(Title as in No. 1.)

The defendant answers to the complaint:

1. That no allegation thereof is true.

2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this.....day of.....19.....

C. D....., Defendant.

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for.....dollars, costs.

Consult sections 1422, 1423.

[No. 43.]

TENDER OF JUDGMENT.

(Title as in No. 1.)

To C. D.....:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this.....day of.....19.....

C. D..... Defendant.

Consult section 1471.

[No. 44.]

ACCEPTANCE OF TENDER OF JUDGMENT.

(Title as in No. 1.)

To A. B.....:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this.....day of.....19..... A. B. ....., Plaintiff.

Consult section 1471.

[No. 45.]

FORM OF JUDGMENT OR TENDER.

(Title as in No. 1.)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed.

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proofs and allegation of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46.]

GENERAL FORM—EXECUTION.

(Title as in No. 1.)

State of North Carolina, to any constable or other lawful officer of.....county—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of..... dollars damages, and the further sum of.....dollars costs, on the.....day of.....19.....;

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this.....day of.....19.....

G. W. H.....
Justice of the Peace.

Consult sections 627, 1481, 1482.

[No. 47.]

EXECUTION IN ATTACHMENT.

(Title as in No. 1.)

State of North Carolina, to any constable or other lawful officer of.....county—Greeting:

Whereas, in pursuance of a warrant of attachment, dated the.....day of

.....19.... issued by G. W. H., Esq., a justice of the peace of said county, in an action wherein A. B. was plaintiff and C. D. defendant, the following property of defendant was, on the.....day of....., 19....., duly levied on and attached.

(Here insert a list of property.)

And whereas, judgment was rendered in said action, on the.....day of..... in favor of said plaintiff, and against the said defendant, in the sum of..... dollars;

Therefore we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this.....day of.....19.....

G. W. H.....
Justice of the Peace.

Consult sections 784, 1474.

[No. 48.]

RECORD OF CONVICTION OF A CONTEMPT.

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on the .....day of.....19.... while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in.....county, M. B. did wilfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used), and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defense thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H.....
Justice of the Peace.

Consult section 1426.

[No. 49.]

WARRANT OF COMMITMENT FOR A CONTEMPT.

(Title as in No. 1.)

State of North Carolina, to the keeper of the common jail of..... county—Greeting:

Whereas, etc., (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law. Herein fail not.

Dated this.....day of.....19.....

G. W. H.....
Justice of the Peace.

Code, s. 909. **Consult section 1426.**

CHAPTER 28.

COURTS—SUPERIOR.

I. Officers of.

1497. Judges to take oath of office. Every judge before he shall act as such, shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, take the oath appointed for public officers, and also an oath of office. The officer or court before whom said judge shall qualify, shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return said oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one-half to the use of the state and the other half to the person who shall sue for the same.

Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45.

1498. Vacancies, how filled. All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general

assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission.

1899, c. 613. **Cases of interest hereunder rendered prior to this enactment:** Cloud v. Wilson, 72-155; Hargrove v. Hilliard, 72-169.

1499. Power to discharge drunken solicitor. When any state solicitor, authorized by election or appointment to act as prosecuting attorney for, or in behalf of the state of North Carolina, in any of the courts of said state, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor, whose duty it is to represent the state at such court, is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge, and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some competent attorney to act as state solicitor for the term of said court. Said appointee shall be allowed all the fees and compensations belonging to the solicitor for such term.

1901, c. 717.

II. Jurisdiction.

1500. Original. The superior court shall have original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

Code, s. 922; 1889, c. 504, s. 2; Const., Art. IV, ss. 12, 27; 1879, c. 92, s. 11; 1881, c. 210.

GENERAL OBSERVATIONS. As to meaning of term "superior court" in interpreting legislation establishing inferior courts, see Rhyne v. Lipscombe, 122-650. **Legislature has power to establish, limit and define jurisdiction of superior courts:** Bynum v. Powe, 97-374—**and to prescribe extent, manner, time and place of exercising their jurisdiction,** Ibid—**but it can not deprive them of any constitutional or inherent powers essential to their existence,** Ex Parte McCown, 139-95; Mott v. Comrs., 126-866; Scott v. Fishblate, 117-275 and cases cited—**nor can it abolish them in**

whole or in part, Pate v. R. R., 122-877; Ryhne v. Lipscombe, 122-650. While jurisdiction of superior court may be made largely appellate by conferring such part of its original jurisdiction on such inferior courts as legislature may provide, yet its jurisdiction must be retained by original or appellate process: Rhyne v. Lipscombe, 122-650. The legislature can confer upon courts established by it inferior to supreme court exclusive original jurisdiction, or jurisdiction concurrent with superior court, of matters heretofore cognizable in superior court (except appellate jurisdiction over justices of the peace): Pate v. R. R., 122-877; Tate v. Comrs., 122-661—yet it can not change status of superior court as head of superior court system, Pate v. R. R., 122-877—nor can it emasculate the superior courts by transferring concurrent jurisdiction of cases, which have originated and are pending in them, down to circuit or other inferior court, Tate v. Comrs., 122-661.

Constitutional jurisdiction of superior courts, generally, may be stated as intermediate between supreme court and courts of justices of the peace: Mott v. Comrs., 126-866. Code of Civil Procedure does not take away from superior courts jurisdiction heretofore exercised by courts of equity: Barcello v. Hapgood, 118-712; Wilson v. Bynum, 92-717. Courts of state have jurisdiction only of criminal offenses committed within its territorial boundaries: State v. Mitchell, 83-674—though if committed in another state, that is matter of defense under plea of not guilty, Ibid. Court must have jurisdiction of subject before can adjudge anything, and therefore has no jurisdiction over lands in another state: Davenport v. Gannon, 123-362.

Consent of parties can not give jurisdiction generally where same does not attach under constitution and laws: Cary v. Allegood, 121-54; State v. Miller, 100-543; Planing Mills v. McNinch, 99-517; Hawkins v. Hughes, 87-115; Leach v. R. R., 65-486; Branch v. Houston, 44-87—yet when complaint does not show jurisdiction as to parties and subject matter, parties can consent to amendment whereby such jurisdiction appears, Planing Mills v. McNinch, 99-517—and it seems that court has power to allow such amendment without consent of defendants, Ibid.

Superior court has exclusive original jurisdiction in all cases when same not given to some other court: State v. Waldrop, 63-508; Wilmington v. Davis, 63-582.

It is the amount demanded in good faith, along with the other facts which reasonably tend to support it, that fixes the jurisdiction: Thompson v. Express Co., 144-389; Watson v. Farmer, 141-452; Shankle v. Ingram, 133-254; Boyd v. Lumber Co., 132-184; Sloan v. R. R., 126-487; Cromer v. Marsha, 122-563; Martin v. Goode, 111-288; Brantley v. Finch, 97-91; Moore v. Nowell, 94-265; Morris v. O'Briant, 94-72; Wiseman v. Witherow, 90-140. As to what is the real amount demanded that determines jurisdiction, see Brantley v. Finch, 97-91; Coggins v. Harrell, 86-317; Morris v. Saunders, 85-140; Brickell v. Bell, 84-85; Dalton v. Webster, 82-283; Bryan v. Rousseau, 71-194; Froelich v. Express Co., 67-3; Fell v. Porter, 69-142; Hedgecock v. Davis, 64-651.

Where total want of jurisdiction apparent upon face of proceedings, court will of its own motion stay, quash or dismiss suit: Short v. Gill,

126-803; State v. Miller, 100-543; Hannah v. R. R., 87-351; McMinn v. Hamilton, 77-300; Israel v. Ivey, 61-551; Branch v. Houston, 44-85—but where such not the case, objection must in apt time be brought forward by plea to jurisdiction, otherwise there is no implied waiver of objection, Short v. Gill, 126-803; McMinn v. Hamilton, 77-300; Branch v. Houston, 44-88.

Where complaint in action of which court would have no jurisdiction, if same on contract, states facts upon which action, either in tort or contract, could be based, courts will so treat action as to sustain jurisdiction: White v. Eley, 145-36; Parker v. Express Co., 132-130; Sams v. Price, 119-572; Brittain v. Payne, 118-989; Schulhofer v. R. R., 118-1096; Bowers v. R. R., 107-721; Stokes v. Taylor, 104-394. Though judgments are not treated as contracts for all purposes, they are so treated for purpose of distinguishing therefrom causes of action ex delicto: Moore v. Nowell, 94-265. The legal existence of a court can not be drawn in question by a plea to the jurisdiction, for such a plea presupposes that the court was regularly called and organized, as jurisdiction means the right to hear and determine causes between litigants, which nothing but a court can do: State v. Hall, 142-710.

JURISDICTION, CIVIL ACTIONS ARISING EX CONTRACTU. Where sum demanded in good faith in action on contract exceeds $200 the superior court has jurisdiction: Carter v. R. R., 126-437; Horner School v. Wescott, 124-519; Burrell v. Hughes, 116-431; Martin v. Goode, 111-288; McPhail v. Johnson, 109-571; Maggett v. Roberts, 108-174; Kearns v. Heitman, 104-332; Moore v. Nowell, 94-265; Usry v. Suit, 91-406; Coggins v. Harrell, 86-317; Morris v. Saunders, 85-138; Brickell v. Bell, 84-82; Dalton v. Webster, 82-279; Walton v. Walton, 80-26; Bryan v. Rousseau, 71-194; Fell v. Porter, 69-140. Though there may be several causes of action, each of which is for less than $200, if aggregate demand is for more than $200, superior court has jurisdiction, whenever causes of action are such as can be joined in one action: Boyd v. R. R., 132-184; Sloan v. R. R., 126-487; Carter v. R. R., 126-437; Burrell v. Hughes, 116-430; Martin v. Goode, 111-289; Maggett v. Roberts, 108-174; Moore v. Nowell, 94-265—but should demand be reduced under $200 by failure of proof or by sustaining a demurrer to any part thereof or to some of the causes of action, jurisdiction would not thereby be ousted, Brown v. Southerland, 142-227; Boyd v R. R., 132-187; Shankle v. Ingram, 133-259; Martin v. Goode, 111-289; Usry v. Suit, 91-406; Brickell v. Bell, 84-82—except when sum demanded is so palpably in bad faith as to amount to a fraud on jurisdiction: Martin v. Goode, 111-289; Wiseman v. Witherow, 90-140—or where there is misjoinder of parties, Martin v. Goode, 111-289; Mitchell v. Mitchell, 96-14.

The superior court having jurisdiction in actions whereof justices have not exclusive original jurisdiction, it has jurisdiction of actions on contract for $200 and less where title to land in controversy: Brown v. Southerland, 142-225; Smith v. Garris, 131-36; Alexander v. Gibbon, 118-805; Wright v. Harris, 116-460; Boone v. Drake, 109-83; Edwards v. Cowper, 99-421; Forsythe v. Bullock, 74-135; Credle v. Gibbs, 65-192—and the controversy referred to must be between the parties, Davis v. Davis, 83-71; Evans v. Williamson, 79-86. Mere allegation of defendant in action on

contract for $200 or less that title is in controversy will not give jurisdiction to superior court: Brown v. Southerland, 142-225; Pasterfield v. Sawyer, 132-258; McDonald v. Ingram, 124-272; Alexander v. Gibbon, 118-805; Paine v. Cureton, 114-608; Hahn v. Guilford, 87-172. Defendant, by moving to dismiss on pleadings, can not oust jurisdiction of superior court, provided complaint sets forth facts which present case in which title to real estate is in controversy: Brown v. Southerland, 142-225.

Party suing for several penalties against same defendant may unite several such causes of action in same complaint and, if aggregate exceeds $200, superior court will have jurisdiction: Burrell v. Hughes, 116-430; Maggett v. Roberts, 108-174.

In action for forcible entry and detainer superior court and not justice has jurisdiction: Perry v. Shepherd, 78-83; State v. Yarborough, 70-250; Railroad v. Sharpe, 70-509. Superior court and not justice has jurisdiction of action of vendor against vendee for possession: Johnson v. Hauser, 82-375—and where vendor brought summary ejectment against vendee, claiming that vendee had abandoned his rights and sustained the relation of tenant, justice had no jurisdiction if evidence of abandonment insufficient, Boone v. Drake, 109-79.

Superior court has jurisdiction of action upon several judgments rendered by justice of peace, each for less sum than $200, but aggregating more than that sum: Moore v. Nowell, 94-265. Where items of account are incurred under different contracts but plaintiff renders a statement to defendant for entire amount due and defendant accepts it or does not dissent, plaintiff is bound by it as a new contract to pay the amount stated, and if it is for over $200 superior court has jurisdiction and plaintiff can not split it up: Copland v. Tel. Co., 136-11; Simpson v. Elwood, 114-528—but if defendant objects to the consolidated account he is not bound as to jurisdiction, Copland v. Tel. Co., 136-11. Upon a contract to purchase entire output of mill, plaintiff can sue as each delivery is made, but, if he waits till output delivered, he can not split up account and superior court has jurisdiction: McPhail v. Johnson, 109-571. An account for a bill of goods purchased on one day is taken as one entire transaction, unless otherwise appears: Magruder v. Randolph, 77-79.

Where dealings were continuous and nothing appears indicating that either party intended that each item should constitute separate transaction, it can not be split: Ibid. Where, on appeal of several actions brought on split-up accounts, all due under single contract cognizable in superior court, the actions were consolidated, held that superior court did not thereby gain jurisdiction, its appellate jurisdiction being derived solely from the rightful one assumed by court below: Jarrett v. Self, 90-478. Superior court has no jurisdiction of action ex contractu where sum sought to be recovered is $200 or less: Howard v. Ins. Co., 125-49; Gillam v. Ins. Co., 121-369; Powell v. Allen, 103-46; Burbank v. Comrs., 92-257; Hannah v. R. R., 87-351; McDonald v. Cannon, 82-245; Foster v. Penny, 76-131; Pullen v. Green, 75-217; Latham v. Rollins, 72-454; Templeton v. Summers, 71-269; Froelich v. Express Co., 67-1; Winslow v. Weith, 66-432—no jurisdiction where account sued on was for $312 and payments thereon reduced it to less than $200, Wiseman v. Witherow, 90-140.

In action on penal bond, where penalty of bond does not exceed $200, a justice of the peace and not the superior court has jurisdiction, same being an action ex contractu: Railroad v. Hardware Co., 135-73; Darden v. Blount, 126-251; Joyner v. Roberts, 112-114; Coggins v. Harrell, 86-317; Bryan v. Rousseau, 71-194; Fell v. Porter, 69-140—likewise in action for the recovery of a penalty given by statute not over $200, Carter v. R. R., 126-437; Henderson v. Davis, 106-88; Doughty v. R. R., 78-22; Maggett v. Roberts, 108-174; Katzenstein v. R. R., 84-688—and in action on penal bond greater than $200, plaintiff can not make remittance to bring it down to justice's jurisdiction, Coggins v. Harrell, 86-317; Morris v. Saunders, 85-140. Where several counterclaims pleaded, the aggregate sum will be taken as jurisdictional amount: Electric Co. v. Williams, 123-51.

Superior court has no jurisdiction in actions where tort waived and sum received for property wrongly sold sought to be recovered, if amount demanded does not exceed $200: Winslow v. Weith, 66-432. Superior court has no jurisdiction of action upon note for $275 on which balance was less than $200: Harvey v. Johnson, 133-352. Judgment by confession without action, founded on contract in superior court for sum not in excess of 200, is void for want of jurisdiction: Slocumb v. Shingle Co., 110-24.

JURISDICTION, CIVIL ACTIONS ARISING EX DELICTO. In all actions ex delicto, where the value of the property in controversy does not exceed $50, the superior court and the court of a justice of the peace have concurrent jurisdiction: Duckworth v. Mull, 143-461; Watson v. Farmer, 141-452; Thomas v. Cooksey, 130-148; Kiser v. Blanton, 123-400; Malloy v. Fayetteville, 122-480; Johnson v. Williams, 115-33; Crinkley v. Egerton, 113-142; Harvey v. Hambright, 98-446; Montague v. Mial, 89-137; Noville v. Dew, 94-43; Ashe v. Gray, 90-137—but where value exceeds $50 superior court has exclusive original jurisdiction: McDonald v. Cannon, 82-247; Crinkley v. Egerton, 113-142; Spencer v. Bell, 109-39; Bowers v. Railroad, 107-722; Asher v. Reizenstein, 105-213; Long v. Fields, 104-221; Edwards v. Cowper, 99-421; Noville v. Dew, 94-43; Barneycastle v. Walker, 92-198; Womble v. Leach, 83-84.

The jurisdiction is determined by the damages claimed or the value of the property involved, being the amount demanded in good faith: Thompson v. Express Co., 144-389; Watson v. Farmer, 141-452; Noville v. Dew, 94-45; see also Knight v. Taylor, 131-84; Sloan v. R. R., 126-487, and cases cited on page 490; Cromer v. Marsha, 122-563; Martin v. Goode, 111-288; Brantley v. Finch, 97-91; Morris v. O'Briant, 94-72; Moore v. Nowell, 94-265; Wiseman v. Witherow, 90-140.

The words "property in controversy" mean the value of the injury complained of and involved in the litigation: Duckworth v. Mull, 143-461; Malloy v. Fayetteville, 122-480; but see Noville v. Dew, 94-43; Pippin v. Ellison, 34-61; Smith v. Campbell, 10-590.

Mere demand of judgment for amount of damages greater than alleged in complaint will not give superior court jurisdiction: Bowers v. R. R., 107-721.

Where action, brought for tort in justice's court, goes up to superior court on appeal, the jurisdiction being concurrent, that court will take

cognizance however irregular the proceedings in the justice's court may have been: Boing v. R. R., 87-364.

In action by landlord against tenant to recover crop or value thereof, it appeared that tenant's contract was to pay him one-fourth of crop or $200, the superior court has jurisdiction, since action not on contract, but for possession of crop: McGehee v. Breedlove, 122-277.

Where complaint alleges two causes of action, one for deceit in sale of horse, and other for breach of warranty, in each damages claimed less than $150, and verdict against plaintiff on first, but for him in sum of $65 on second, superior court has jurisdiction: Long v. Fields, 104-221; see Harvey v. Hambright, 98-446; Ashe v. Gray, 90-137; Bullinger v. Marshall, 70-520.

JURISDICTION IN EQUITY AND PROBATE MATTERS. The Code of Civil Procedure does not take away from superior courts jurisdiction heretofore exercised by courts of equity: Barcello v. Hapgood, 118-712; Wilson v. Bynum, 92-717. Superior court possesses same equitable powers and jurisdiction, when not limited by statute, formerly exercised by courts of equity: Settle v. Settle, 141-553.

Justice's courts have no jurisdiction to enforce an equity, such jurisdiction being lodged in the superior court: Weathers v. Borders, 124-612; Smaw v. Cohen, 95-85; Levin v. Gladstein, 142-482; Markham v. McCown, 124-163; Kiser v. Blanton, 123-400; Holden v. Warren, 118-326; Cotton Mills v. Cotton Mills, 116-649, and cases cited: Bell v. Howerton, 111-69; Hunter v. Yarborough, 92-68; Dougherty v. Sprinkle, 88-300; Lutz v. Thompson, 87-337; McAdoo v. Callum, 86-419; Fisher v. Webb, 84-50.

Superior court has jurisdiction of action on county treasurer's bond: Wright v. Kinney, 123-618—of application for mandamus against treasurer, Ibid; Robinson v. Howard, 84-151—of action to foreclose mortgage, although debt secured less than $200, Murphy v. McNeill, 82-221—of counterclaim consisting of alleged indebtedness arising out of unadjusted partnership dealings, Love v. Rhyne, 86-576—of creditor's bill, Wadsworth v. Davis, 63-251; Mebane v. Layton, 86-572—of actions to set up lost bonds and deeds, McCormick v. Jernigan, 110-406—of action by creditor to subject property fraudulently conveyed by debtor to payment of debt, Mebane v. Layton, 86-572; Greer v. Cagle, 84-385—of action for specific performance, Keener v. Den, 73-132—to declare trust in real estate and have title executed to plaintiff, and also to impeach a sale of the land under decree of probate court had in special proceeding then ended, Gulley v. Macy, 81-356—to enjoin sale of land subject to dower, which was estimated by taking into consideration decedent's interest in the realty of an insolvent firm to adjust the rights of widow and firm creditors, Sparger v. Moore, 117-449—to issue writs of mandamus, Tate v. Comrs., 122-661—of action by assignee of dower right to enforce allotment of same, Parton v. Allison, 109-674—of action to charge separate property of married woman with payment of debts, Planing Mills v. McNinch, 99-518; Moore v. Wolfe, 122-711; Patterson v. Gooch, 108-503; Berry v. Henderson, 102-525; Smaw v. Cohen, 95-85; Dougherty v. Sprinkle, 88-300; Neville v. Pope, 95-346—of action against married woman where debt less than $200 and it is sought to establish an equitable lien, Weathers v. Borders, 124-612,

citing Dougherty v. Sprinkle, 88-300—of action on claim for contribution by one defendant against another where amount exceeds $200, except in cases of contribution between persons claiming as devisees under will or as heirs at law of testator to whom undevised land has descended, Wharton v. Wilkerson, 92-407—of action instituted by creditor of lunatic for recovery of debt contracted prior to lunacy, Blake v. Respass, 77-193—of action to foreclose mortgage where mortgaged property allotted to bankrupt by court of bankruptcy as homestead, Brown v. Hoover, 77-40—of action to recover legacy where executor has assented to it or it is sought to be enforced as a trust, Hendrick v. Mayfield, 74-626; McFarland v. McKay, 74-258; Hodge v. Hodge, 72-616; Miller v. Barnes, 65-67—of action by administrator against widow, heirs and all other interested parties, for account and restraining order where ground for equitable relief alleged, Kirkman v. Phipps, 86-428—of action to enforce express trust created by contract and also constructive trust arising ex delicto, Oliver v. Wiley, 75-320—of action by creditor against administrator for breach of contract made by intestate, Shields v. Payne, 80-291—of action to have defendant declared a trustee in which statement of his account as executor demanded as necessary incident to determination of same, Cain v. Nicholson, 77-411—of action to surcharge and falsify an account, Houston v. Dalton, 70-662—of action for cancellation of fraudulent releases obtained from plaintiffs, and account and settlement of estate of decedent, Netherton v. Candler, 78-88.

Superior court has jurisdiction concurrent with probate court of actions to compel administrator to account and other actions of like nature: Pegram v. Armstrong, 82-326; Fisher v. Trust Co., 138-90; Godwin v. Watford, 107-168; Bratton v. Davidson, 79-423; see also section 129—of actions to enforce settlement of estates and their subjection to payment of debts, Shober v. Wheeler, 144-403; Shields v. Payne, 80-293; Haywood v. Haywood, 79-42.

Where complaint in action in superior court alleges debt for less than $200, and lien in connection therewith, but afterwards, by consent, alleged that debt chargeable upon separate estate of wife, and judgment demanded that debt be enforced by sale of her real estate, superior court has jurisdiction; though would not without amendment, Planing Mills v. McNinch, 99-517.

Superior court has no jurisdiction of original motion to set aside execution and order of sale granted by justice of peace: Hamer v. McCall, 121-197—to direct disposition of money paid into office of clerk by executors, administrators and collectors under sections 145 and 146: Cassidey, ex parte, 95-225—to issue writ of prohibition, Perry v. Shepherd, 78-83.

Quere: Whether superior court has original jurisdiction of proceedings for removal of executors and administrators: Edwards v. Cobb, 95-4.

JURISDICTION IN CRIMINAL ACTIONS. Superior court has exclusive original jurisdiction of all criminal actions whereof original jurisdiction not conferred upon inferior courts: State v. Waldrop, 63-508—and has concurrent jurisdiction of all offenses with justices of which they have jurisdiction where indictment made after six months [now twelve] from date of crime and no justice has taken cognizance of same, State v. Dalton,

101-682; State v. Roberts, 98-756; State v. Cunningham, 94-824; State v. Reaves, 85-553; State v. Watts, 85-519; State v. Berry, 83-604; State v. Moore, 82-659; State v. Hooper, 82-663.

Superior court has exclusive original jurisdiction of assaults with deadly weapons: State v. Roseman, 108-766; State v. Phillips, 104-786; State v. Murphy, 101-701; State v. Cunningham, 94-824; State v. Taylor, 84-774; State v. Moore, 82-659—of assaults where serious damage done,, State v. Shelly, 98-673; State v. Huntley, 91-617; State v. Cunningham, 94-824; State v. Taylor, 84-773; State v. Moore, 82-659—of assaults with intent to commit rape, State v. Taylor, 84-773; State v. Moore, 82-659—of assaults with intent to kill, Ibid—of offenses punishable within court's discretion, State v. Cherry, 72-124; State v. Perry, 71-523; State v. Heidelburg, 70-496—of misdemeanor punishable by fine of not less than ten dollars nor more than fifty or by imprisonment of not less than ten days, State v. Hampton, 77-526—of misdemeanors where punishment is by a fine exceeding fifty dollars or imprisonment exceeding thirty days, Washington v. Hammond, 76-33—of offense of retailing spirituous liquors without license, State v. Edwards, 113-653; State v. Deaton, 101-728; State v. Cooper, 101-684—of allowing stock to run at large where statute prescribes fine of $10 for each hog permitted to run at large, and warrant charges running at large of ten hogs, State v. Wiseman, 131-795.

Superior court has jurisdiction concurrent with justice's court of affrays committed within one mile of place of the sitting of court: State v. Bowers, 94-910—and has jurisdiction as to both offenders where in an affray a deadly weapon is used, State v. Coppersmith, 88-614.

A deadly weapon is not one that must or may kill, but one which would likely produce death by manner of its use by defendant: State v. Sinclair, 120-603; State v. Archbell, 139-537; State v. Norwood, 115-789—is an instrument capable of producing death, State v. Huntley, 91-167—some weapons being deadly per se, others owing to manner of their use become deadly, State v. Archbell, 139-537; State v. Huntley, 91-617—but a club is ex vi termini a deadly weapon, State v. Phillips, 104-786; State v. Porter, 101-713—as is also an axe, State v. Shields, 110-497—and court will take judicial notice that a pistol is also a deadly weapon, State v. Swann, 65-330.

Whether weapon used is a deadly weapon is a question of law for the court where there is no dispute about the facts concerning its character, size, etc.: State v. Sinclair, 120-603; State v. Norwood, 115-789; State v. Phillips, 104-786; State v. Speaks, 94-865; State v. West, 51-505; State v. Huntley, 91-617; State v. Collins, 30-407; State v. Craton, 28-164—and in determining the question, the size, nature and manner of use of weapon, and size and strength of assailant, and person upon whom it is used, should be considered, State v. Sinclair, 120-603—as a gun or a penknife, under certain circumstances, may both be deadly weapons, Ibid—for even a pin is a deadly weapon where it is pushed down the throat of an infant, producing death, State v. Norwood, 115-789. Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to

submit the matter to jury with proper instructions: State v. Archbell, 139-537, citing State v. Huntley, 91-621.

As to "serious damage done" it is necessary to describe the damage done, its character and extent, so that court can see from face of indictment that the damage was serious: State v. Battle, 130-657; State v. Stafford, 113-635; State v. Phillips, 104-786; State v. Porter, 101-713; State v. Shelly, 98-673; State v. Earnest, 98-740; State v. Russell, 91-624; State v. Moore, 82-659. "Serious damage" must be such physical injury as gives rise to great bodily pain: State v. Nash, 109-824—or must be such as is damaging to the peace, good order, decencies and proprieties of society, State v. Huntley, 91-620.

Affray is the fighting together of two or more persons in a public place to the terror of the citizens: State v. Allen, 11-356; State v. Woody, 47-335; State v. Perry, 50-9—or the using of abusive language in a public place thereby bringing on a fight, State v. Perry, 50-9; State v. Robbins, 78-431.

Where indictment charges assault with deadly weapon, or other offense of which superior court has jurisdiction, and proof shows simple assault or other lesser degree of offense, jurisdiction of superior court not ousted: State v. Fritz, 133-725; State v. Price, 111-705; State v. Roseman, 108-765; State v. Fesperman, 108-770; State v. Porter, 101-715; State v. Earnest, 98-740; State v. Johnson, 94-863; State v. Cunningham, 94-824; State v. Russell, 91-624; State v. Speller, 91-528; State v. Ray, 89-587; State v. Reaves, 85-553. Charge of simple assault in indictment gives superior court prima facie jurisdiction and puts burden on defendant to show twelve months had not elapsed since commission of offense and before superior court took jurisdiction: State v. Shelly, 98-673; State v. Fesperman, 108-771; State v. Porter, 101-714; State v. Earnest, 98-743; State v. Moore, 82-662.

Section does not render it necessary that bill found by grand jury for assault and battery should aver that deadly weapon was used: State v. Taylor, 83-801—that any serious damage done, Ibid—that six [now twelve] months had elapsed before finding of bill, and no justice had taken jurisdiction, Ibid; State v. Moore, 82-659—or that offense was committed within one mile of court during session thereof, State v. Taylor, 83-601—but where jury by special verdict finds that assault was committed within six [now twelve] months next before finding of indictment, jurisdiction of superior court ousted, State v. Berry, 83-601.

Objection to jurisdiction is matter of defense and may be taken advantage of under plea of not guilty: State v. Reaves, 85-553; State v. Berry, 83-604; State v. Taylor, 83-601; State v. Moore, 82-659; State v. Hooper, 82-663.

1501. In vacation or at term. In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Code, c. 10, s. 230; 1871-2, c. 3. Judge has no power to decide any mat-

ter out of courthouse except "chambers business" without consent: Delafield v. Construction Co., 115-22.

Judge has no power to render judgment after expiration of term of court without consent of parties, except in cases where law clothes him with jurisdiction at chambers: Hardin v. Ray, 89-364—has no right to amend a judgment, Hinton v. Ind. Co., 116-22—nor to make order in bastardy prejudicial to mother, State v. Parsons, 115-730.

Consent order that judgment of confirmation of judicial sale may be entered up in vacation is valid: Crabtree v. Scheelky, 119-56.

By consent a cause can be heard and judgment signed outside of district: Hawkins v. Cedar Works, 122-87.

By consent a judgment or order can be signed in vacation: Hawkins v. Cedar Works, 122-87; Bank v. Gilmer, 118-668; Fertilizer Co. v. Taylor, 112-141; Brooks v. Stephens, 100-297; Anthony v. Estes, 99-598; Bynum v. Powe, 97-374; Coates v. Wilkes, 94-174; Branch v. Walkér, 92-87; McDowell v. McDowell, 92-227; Shackleford v. Miller, 91-181; Hardin v. Ray, 89-364; Badger v. Daniel, 82-468; Molyneaux v. Huey, 81-106; Harrell v. Peebles, 79-26; Hervey v. Edmunds, 68-243.

Trial judge may, by consent, determine a case after adjournment of court, although his riding of district be finished before his decision is rendered: Benbow v. Moore, 114-263. As to hearing causes, making orders and signing judgments outside of county by consent, see Hawkins v. Cedar Works, 122-87; Henry v. Hilliard, 120-479; Crabtree v. Scheelky, 119-56; Bank v. Gilmer, 118-668; Brooks v. Stephens, 100-297.

It seems that superior court has power to make amendment to interlocutory order in ancillary proceeding out of term. If appellant does not except at the time, he will be taken to have assented to it: Coates v. Wilkes, 94-174.

As to hearing motions out of county during vacation, see Ledbetter v. Pinner, 120-457; Skinner v. Terry, 107-103; McNeill v. Hodges, 99-248; Gatewood v. Leak, 99-363; Bynum v. Powe, 97-374; Coates v. Wilkes, 94-174.

Where judgment rendered in vacation by consent, but not entered of record before judge went out of office, a motion at subsequent term to enter the judgment nunc pro tunc will be allowed: McDowell v. McDowell, 92-227.

Resident judge of district has no other powers within such district in vacation than any other judge of superior court: State v. Ray, 97-510.

Quare: Whether judge can grant judgment taxing county with payment of costs at chambers and in vacation: Ibid.

1502. Appellate. The superior court shall have appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided by law.

Const., Art. IV, ss. 12, 27; Code, s. 923. For appeals from clerk to superior court, see sections 610-614—from justice of the peace, see section 1489—from corporation commissioners see sections 1074-1076—from county commissioners, as to establishment of roads, see sections 2683, 2690.

Jurisdiction of superior court on appeal is entirely derivative, and if lower court had no jurisdiction, superior court has none: State v. Wiseman, 131-797; Ijames v. McClamrock, 92-362; Raisin v. Thomas, 88-150; Boing v. R. R., 87-364; Boyett v. Vaughan, 85-365—**however, this does not apply to cases which are appealed from the clerk,** In re Anderson, 132-243.

1503. Equity cases transferred to. All suits, petitions and other proceedings pending in the late courts of equity, and in the late courts of pleas and quarter sessions, and not determined by final judgment or decree, and all such cases wherein any act was decreed to be done or deed to be executed, and said act was not done or deed executed, may be transferred to the superior court of the county in which they were pending, at the instance of any person interested. And the superior court shall have power to make all orders, judgments and decrees that shall be necessary for finally adjudicating and settling the same.

Code, s. 944; 1871-2, c. 161; 1873-4, c. 183; 1874-5, c. 81; 1876-7, c. 9.

Section gives any party interested right to have proceedings, lately pending in courts of equity and pleas and quarter sessions, transferred to superior court: Herman v. Watts, 107-646.

Courts which existed under former system continued to act and were recognized as courts until adoption of code of civil procedure: Lash v. Thomas, 86-313.

Action not transferred to docket of superior court according to law is subsisting one until disposed of by judgment: Murrill v. Humphrey, 88-138.

Section merely referred to in Adams v. Howard, 110-18; Runnion v. Ramsay, 93-410; Curtis' Heirs, 82-438.

1504. Surveys in disputed boundaries. Whenever in any suit pending in the superior court, the bounds of lands shall be drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the bounds and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit.

Code, s. 939; R. C., c. 31, s. 119; 1779, c. 157; 1786, c. 252.

146-495 **1505. Contiguous lands held under one survey, how.** Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the

outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner.

Code, s. 1277; 1869-70, c. 34, ss. 1, 2. **By recording and registering survey of outer lines of several contiguous tracts, so as to exhibit outer boundaries, as if whole territory had been covered by one tract, possession at any point on either of separate tracts will amount to possession of whole and every part:** McNamee v. Alexander, 109-244.

III. Terms of Court.

1506. When held. A superior court shall be held by a judge thereof at the courthouse in each county. The state shall be divided into sixteen judicial districts, and the superior courts in the several counties shall be opened and held at the times hereinafter set forth, and each court shall continue in session one week, except as hereinafter provided, unless the business thereof shall be sooner disposed of, namely:

Where term of court set by statute to begin on a certain Monday, and to last for "one week" or two or three weeks, it embraces Sunday of each week, unless sooner adjourned: Taylor v. Ervin, 119-274—**and term expires by limitation at midnight of that day,** Ibid—**therefore verdict rendered or entered on Sunday of week set for duration of court, in absence of earlier adjournment, is legal,** Ibid; State v. Penley, 107-808; State v. Ricketts, 74-187.

In special cases ex necessitate, court may sit on Sunday: Taylor v. Ervin, 119-274; State v. McGimsey, 80-377; State v. Howard, 82-626.

Statute (sections 2836 and 2838) declaring certain days public holidays does not prohibit courts from exercising functions on those days: State v. Moore, 104-743.

Term of superior court does not extend to end of period allotted to it by law, but only until the business is disposed of: Delafield v. Construction Co., 115-21.

There can be no session of court without a judge: Ibid—**hence where judge leaves bench for term, although no notice given of final adjournment, or it is ordered to expire by limitation, the term ends,** Ibid; Hinton v. Ind. Co., 116-22; Boyd v. Teague, 111-246—**and judge can not hear matters out of courthouse, except by consent, unless same could be heard in chambers,** Delafield v. Construction Co., 115-21.

Where there are several statutes regulating terms of superior courts, they will be so interpreted, if possible, so as to secure harmony in their operations and effectuate general purpose of legislation: Wortham v. Basket, 99-70.

An act creating a judge without a district is void: State v. Shuford, 128-593. **A division of terms of court into civil and criminal is valid:** State v. Lew, 133-666.

FIRST DISTRICT.

The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Beaufort County—Third Monday before the first Monday in March, to continue two weeks; seventh Monday after the first Monday in March, to continue one week, for civil cases only; eleventh Monday after the first Monday in March, to continue three weeks, the first two weeks for civil cases and the last for criminal cases; seventh Monday after the first Monday in September, to continue two weeks; thirteenth Monday after the first Monday in September, to continue for three weeks, the first two for civil cases and the last for criminal cases only. That the commissioners of Beaufort County shall draw a jury for each of said weeks.

Currituck County—First Monday before the first Monday in March; first Monday in September.

Camden County—First Monday in March; first Monday after the first Monday in September.

Pasquotank County—First Monday after first Monday in January, to continue two weeks, for civil business only; first Monday after the first Monday in March, to continue two weeks, for criminal and civil business; second Monday after first Monday in September, for one week, for criminal and civil business; eleventh Monday after the first Monday in September, for one week, for civil business only.

Perquimans County—Third Monday after the first Monday in March and September.

Chowan County—Fourth Monday after the first Monday in March and September.

Gates County—Fifth Monday after the first Monday in March and September.

Washington County—Third Monday after the first Monday in January, for one week, for civil cases only; sixth Monday after first Monday in March; sixth Monday after first Monday in September.

Tyrrell County—Eighth Monday after the first Monday in March; ninth Monday after the first Monday in September.

Hyde County—Tenth Monday after the first Monday in March; twelfth Monday after the first Monday in September.

Dare County—Ninth Tuesday after the first Monday in March; tenth Tuesday after the first Monday in September.

1901, cc. 28, 29, s. 2; 1903, c. 685; 1905, c. 514; 1907, cc. 265, 534.

SECOND DISTRICT.

The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Halifax County—Fifth Monday before the first Monday in March, to be for the trial of criminal cases exclusively, and to continue for one week; first Monday in March; the thirteenth Monday after the first Monday in March; the second Monday before the first Monday in September; twelfth Monday after the first Monday in September. The four terms last mentioned each to continue for two weeks.

Northampton County—Sixth Monday before the first Monday in March, to be for the trial of civil actions exclusively, except jail cases on the criminal docket, and to continue one week; third Monday after the first Monday in March, to continue two weeks; first Monday in August, to be for the trial of civil cases exclusively, except jail cases on the criminal docket, to continue one week; the eighth Monday after the first Monday in September, to continue two weeks.

Warren County—Third Monday before the first Monday in March, to continue one week; fifteenth Monday after the first Monday in March, to continue two weeks, and the second Monday after the first Monday in September, to continue two weeks.

Bertie County—Second Monday before the first Monday in March, and the first Monday after the first Monday in September; eighth Monday after the first Monday in March, to continue for two weeks; tenth Monday after the first Monday in September, to continue for two weeks. Each term to be for the trial of criminal and civil cases jointly.

Hertford County—Seventh Monday after the first Monday in March; sixth Monday after the first Monday in September, to continue for two weeks, unless sooner adjourned by the court; third Monday before the first Monday in September, which shall be for the trial of criminal cases exclusively; first Monday before the first Monday in March. All civil causes and actions not requiring a jury trial may be heard and determined at the August term, just as at any other regular term of said court, and jury cases on the civil docket of said court may be tried by consent of all parties at said August terms. No criminal action requiring a jury trial shall be tried at the spring and fall terms of the superior court of Hertford county, unless the defendant is confined in the common jail of the county at the time the court is in session. But all such actions

requiring a jury trial shall be tried at either the August or February terms of said court.

1901, c. 28, s. 1; 1901, c. 29, s. 3; 1903, c. 15, s. 2; 1903, c. 24, s. 1; 1903, c. 701, ss. 1, 2; 1905, cc. 76, 202; 1907, c. 49, 151.

THIRD DISTRICT.

The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt County—Seventh Monday before the first Monday in March; seventh Monday after the first Monday in March, each to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; eleventh Monday after the first Monday in March, for the trial of civil causes only; second Monday after the first Monday in September and the ninth Monday after the first Monday in September, each for two weeks, and the last named term to be for the trial of civil cases only; fourteenth Monday after first Monday in September and second Monday before the first Monday in September, each for two weeks for the trial of civil causes exclusively.

Craven County—Fourth Monday before the first Monday in March, for the trial of criminal cases exclusively; third Monday before the first Monday in March, for the trial of civil cases exclusively; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; fifth Monday after the first Monday in March, for the trial of civil cases exclusively; fourth Monday after the first Monday in September, and the second Monday in June, each for the trial of criminal cases only; the eleventh Monday after the first Monday in September, to continue for two weeks, and fifth Monday after the first Monday in September, each for the trial of civil cases only.

Greene County—First Monday before the first Monday in March; first Monday in September; thirteenth Monday after the first Monday in September, the first named term to continue for two weeks; fourth Monday in May, to continue for two weeks, for the trial of civil cases only.

Carteret County—First Monday after the first Monday in March, and sixth Monday after the first Monday in September.

Jones County—Fourth Monday after the first Monday in March, and eighth Monday after the first Monday in September.

Pamlico County—Sixth Monday after the first Monday in March, seventh Monday after the first Monday in September.

1901, c. 28, s. 1; 1903, c. 294; 1905, cc. 341, 428, 452; 1907, cc. 1, 645; 1908, c. 100.

FOURTH DISTRICT.

The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Franklin County—Sixth Monday before the first Monday in March, sixth Monday after the first Monday in March, each to continue for two weeks; second Monday before the first Monday in September, for the trial of criminal cases exclusively; sixth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively.

Wilson County—Fourth Monday before the first Monday in March, to continue for two weeks, the second week for the trial of civil cases exclusively; tenth Monday after the first Monday in March; first Monday in September; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively; the fifteenth Monday after the first Monday in September, for trial of criminal cases exclusively.

Vance County—Eleventh Monday after the first Monday in March, to continue two weeks; fourth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in March, to continue for two weeks.

Edgecombe County—First Monday in March, and first Monday after the first Monday in September; fourth Monday after the first Monday in March and eighth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; thirteenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases and the trial of such civil actions and matters as shall by consent of counsel be brought to the attention of the court.

Martin County—Second Monday after the first Monday in March, second Monday after the first Monday in June, second Monday after the first Monday in September, and fourteenth Monday after the first Monday in September.

Nash County—Eighth Monday after the first Monday in March and twelfth Monday after the first Monday in September, each to continue for two weeks, the first week of each of said terms to be devoted to the criminal, and the second week to the civil docket; first Monday after the first Monday in March and third Monday after the first Monday in March, each to continue for one week, and to be devoted exclusively to the civil docket, and the Monday next before the first Monday in September, to continue for one week, and to be devoted exclusively to the criminal docket. Civil actions may be brought to any of these terms of

court, and, by consent of parties, any civil action may be tried at any time during either week of any two weeks' term.

1901, cc. 28, 29, ss. 5, 6; 1903, cc. 6, 636, 736; 1905, cc. 17, 298, 349, 423, 535; 1907, c. 668.

FIFTH DISTRICT.

The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

New Hanover County—Sixth Monday before the first Monday in March, to continue two weeks; fourth Monday after the first Monday in March, to continue one week; sixth Monday before the first Monday in September, to continue two weeks; third Monday after the first Monday in September, to continue one week—each for the trial of criminal cases exclusively; fifth Monday after the first Monday in March, to continue two weeks; twelfth Monday after the first Monday in March, to continue two weeks; fourth Monday after the first Monday in September, to continue two weeks; thirteenth Monday after the first Monday in September, to continue one week—each for the trial of civil cases exclusively.

Pender County—Seventh Monday before the first Monday in March, to continue one week; third Monday after the first Monday in March, to continue one week; first Monday after the first Monday in September, to continue two weeks.

Duplin County—Second Monday before the first Monday in March; first Monday before the first Monday in September; eleventh Monday after the first Monday in September—each to continue two weeks.

1909 945 1409 1024

Sampson County—Fourth Monday before the first Monday in March; eighth Monday after the first Monday in March; fourth Monday before the first Monday in September; seventh Monday after the first Monday in September—each to continue two weeks.

Lenoir County—Eighth Monday before the first Monday in March, to continue one week; first Monday after the first Monday in March, to continue one week; eleventh Monday after the first Monday in March, to continue one week; fourteenth Monday after the first Monday in March, to continue one week; ninth Monday after the first Monday in September, to continue two weeks, each for the trial of civil cases exclusively. Second Monday after the first Monday in March, to continue one week; fifteenth Monday after the first Monday in March, to continue one week; second Monday before the first Monday in September, to continue one week; fourteenth Monday after the first Monday in September, to continue two weeks, each for the trial of criminal cases. Civil process may

be returnable to and pleadings filed at all courts herein designated. Civil trials, which do not require a jury, motions and divorce cases, may be heard at such criminal terms, and any other civil actions may be heard by consent at such terms.

Onslow County—The first Monday in March; seventh Monday after the first Monday in March; seventh Monday before the first Monday in September; sixth Monday after the first Monday in September—each to continue one week.

1903, c. 533, s. 1; 1901, c. 28, s. 1; 1905, c. 373; 1907, cc. 31, 290; 1908, c. 20.

SIXTH DISTRICT.

The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Harnett County—Fourth Monday before the first Monday in March, two weeks; eleventh Monday after the first Monday in March, one week; first Monday in September, one week; tenth Monday after the first Monday in September, two weeks, which shall be for the trial of civil cases only.

Johnston County—First Monday in March, two weeks; first Monday after the first Monday in September, two weeks; fourteenth Monday after the first Monday in September, two weeks.

Wake County—Eighth Monday before the first Monday in March, two weeks; third Monday after the first Monday in March, two weeks; eighth Monday before the first Monday in September, two weeks; and the third Monday after the first Monday in September, two weeks—all for the trial of criminal cases exclusively; second Monday before the first Monday in March, two weeks; seventh Monday after the first Monday in March, three weeks; and seventh Monday after the first Monday in September, three weeks—all for the trial of civil cases exclusively. The four terms of January, March, July and September of each year, held for the trial of criminal actions exclusively, shall also be for the trial of civil actions, and all civil and final process may be returnable thereto, but there shall be no jury trial of civil actions, except by consent of the parties plaintiff and defendant thereto, or where the defendant fails to appear in person or by attorney to oppose the action. It shall be the duty of the presiding judge to dispose of the criminal docket during the term, and with this object in view, all civil business of which the court is given jurisdiction at the four terms of January, March, July and September aforesaid may be disposed of at any time during the term.

Wayne County—Sixth Monday before the first Monday in March, two weeks; fifth Monday after the first Monday in March, two

weeks; second Monday after the first Monday in September, two weeks; second Monday before the first Monday in September, two weeks. No civil action shall be tried in the county of Wayne during the first week of any of said terms except by consent.

1901, c. 28; 1903, c. 534; 1905, c. 328; 1907, c. 549.

SEVENTH DISTRICT.

The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Columbus County—First Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, to continue two weeks; first Monday in September; twelfth Monday after the first Monday in September.

Cumberland County—Seventh Monday before the first Monday in March, the twelfth Monday after the first Monday in March, the first Monday before the first Monday in September, the eleventh Monday after the first Monday in September, each for the trial of criminal cases exclusively; the third Monday after the first Monday in March, for the trial of civil cases, except jail cases on the criminal docket; the eighth Monday after the first Monday in March, the seventh Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; the second Monday before the first Monday in March for the trial of civil cases exclusively.

Robeson County—The fourth Monday before the first Monday in March, to continue for two weeks for the trial of criminal cases exclusively; the ninth Monday before the first Monday in September, to continue for one week for the trial of criminal cases exclusively; the ninth Monday after the first Monday in September, to continue for two weeks for the trial of criminal cases exclusively; the fourth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases exclusively; the eleventh Monday after the first Monday in March and the fifteenth Monday after the first Monday in March, each to continue for one week, for the trial of civil cases exclusively; the thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases exclusively.

Bladen County—First Monday after the first Monday in March, and sixth Monday after the first Monday in September, each to continue one week for the trial of both civil and criminal causes; and the fifth Monday before the first Monday in September, to continue one week for the trial of civil cases exclusively.

Brunswick County—Third Tuesday after the first Monday in

March; fourth Monday before the first Monday in September, for the trial of civil cases exclusively, and fourth Tuesday after the first Monday in September.

1901, c. 28, s. 1; 1903, c. 572, c. 607; 1905, cc. 98, 365, 453; 1907, cc. 287, 341, 119, 516.

EIGHTH DISTRICT.

The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Anson County—Third Monday before the first Monday in February, for the trial of criminal cases exclusively; first Monday after the first Monday in February, for trial of civil cases exclusively; fourth Monday after the first Monday in February, for the trial of civil cases exclusively; tenth Monday after the first Monday in February, for trial of criminal cases exclusively; fourteenth Monday after the first Monday in February, for the trial of civil cases exclusively; eigtheenth Monday after the first Monday in February, for the trial of civil cases exclusively; second Monday after the last Monday in August, for the trial of criminal cases exclusively; sixth Monday after the last Monday in August, for the trial of civil cases exclusively; fourteenth Monday after the last Monday in August, for the trial of civil cases exclusively.

Chatham County—First Monday in February; thirteenth Monday after the first Monday in February; third Monday before the last Monday in August, for the trial of civil cases exclusively; eleventh Monday after the last Monday in August.

Lee County—[This county was placed in this district but no courts yet provided.]

Moore County—Second Monday before the first Monday in February, for the trial of civil cases exclusively; seventh Monday after the first Monday in February, for the trial of civil cases exclusively; eleventh Monday after the first Monday in February, for the trial of criminal cases exclusively; fifteenth Monday after the first Monday in February, to continue for two weeks, for the trial of civil cases exclusively; second Monday before the last Monday in August, for the trial of criminal cases exclusively; third Monday after the last Monday in August, for the trial of civil cases exclusively; twelfth Monday after the last Monday in August, for the trial of criminal cases exclusively; fifteenth Monday after the last Monday in August, for the trial of civil cases exclusively.

Richmond County—Fourth Monday before the first Monday in February, for the trial of criminal cases exclusively; eighth Monday after the first Monday in February, to continue for two weeks, for the trial of civil or criminal cases; first Monday after the last

Monday in August, for the trial of criminal cases exclusively; fourth Monday after the last Monday in August, to continue for two weeks, for the trial of civil cases exclusively.

Scotland County—Fifth Monday after the first Monday in February, for the trial of civil cases exclusively; twelfth Monday after the first Monday in February, for the trial of criminal cases exclusively; seventeenth Monday after the first Monday in February; eighth Monday after the last Monday in August, for the trial of civil cases exclusively; third Monday after the last Monday in August, for the trial of criminal cases exclusively.

Union County—First Monday before the first Monday in February, for the trial of criminal cases exclusively; second Monday after the first Monday in February, to continue for two weeks, for the trial of civil cases exclusively; sixth Monday after the first Monday in February, for the trial of criminal cases exclusively; fourth Monday before the last Monday in August, for the trial of criminal cases exclusively; first Monday before the last Monday in August, to continue two weeks, for the trial of civil cases exclusively; ninth Monday after the last Monday in August, to continue two weeks, for the trial of criminal cases exclusively.

1905, c. 359; 1908, c. 176; 1908, c. 51.

NINTH DISTRICT.

The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Durham County—Eighth Monday before the first Monday in March; tenth Monday after the first Monday in March; the first Monday before the first Monday in September, and the thirteenth Monday after the first Monday in September, each for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; fourth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively.

Guilford County—Ninth Monday before the first Monday in March, to continue one week; the seventh Monday before the first Monday in March, to continue one week; the third Monday before the first Monday in March, to continue two weeks; the sixth Monday after the first Monday in March, to continue two weeks; the thirteenth Monday after the first Monday in March, to continue two weeks; the second Monday before the first Monday in September, to continue one week; the seventh Monday after the first Monday in September, to continue two weeks; all of said terms of court being for the trial of civil cases only. The first Monday before the

first Monday in March, to continue for one week; the fourth Monday after the first Monday in March, to continue for one week; the fifteenth Monday after the first Monday in March, to continue one week; the second Monday after the first Monday in September, to continue one week; the fourteenth Monday after the first Monday in September, to continue one week, all of said last-named five terms of courts to be for criminal cases only.

Granville County—Fourth Monday before the first Monday in March, to continue one week; eighth Monday after the first Monday in March, to continue for two weeks; fifth Monday before the first Monday in September, to continue one week; eleventh Monday after the first Monday in September, to continue for two weeks.

Alamance County—First Monday in March; twelfth Monday after the first Monday in March, for the trial of civil cases exclusively; first Monday in September, to continue for two weeks, the first week for the trial of criminal cases; ninth Monday after the first Monday in September, for the trial of criminal cases exclusively.

Orange County—First Monday after the first Monday in March; fourth Monday before the first Monday in September, and sixth Monday after the first Monday in September; eleventh Monday after the first Monday in March, for the trial of civil cases exclusively.

Person County—Fifth Monday after the first Monday in March; third Monday before the first Monday in September, and tenth Monday after the first Monday in September.

1901, c, 28, s. 1; 1903, c. 198; 1905, cc. 399, 519.

TENTH DISTRICT.

The tenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Montgomery County—Sixth Monday before the first Monday in March, for the trial of criminal cases exclusively; sixth Monday after the first Monday in March, for the trial of civil cases exclusively; second Monday after the first Monday in September, to continue for two weeks.

Iredell County—Fifth Monday before the first Monday in March; eleventh Monday after the first Monday in March; fifth Monday before the first Monday in September; eighth Monday after the first Monday in September, each to continue for two weeks.

Rowan County—Third Monday before the first Monday in March; ninth Monday after the first Monday in March; first Monday before the first Monday in September, and eleventh Monday after the first Monday in September, each to continue for two weeks; the civil docket not to be called at the May and November terms until the second week.

Davidson County—First Monday before the first Monday in March, and the third Monday before the first Monday in September, each to continue for two weeks; seventh Monday after the first Monday in March, and tenth Monday after the first Monday in September, each for the trial of civil cases exclusively.

Stanly County—First Monday after the first Monday in March, and first Monday after the first Monday in September, each for the trial of civil cases exclusively; eighth Monday before the first Monday in September, and seventh Monday before the first Monday in March, each for the trial of criminal cases exclusively.

Randolph County—Second Monday after the first Monday in March; seventh Monday before the first Monday in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks.

Davie County—Fourth Monday after the first Monday in March, and fourth Monday after the first Monday in September, each to continue for two weeks.

Yadkin County—Eighth Monday after the first Monday in March; sixth Monday after the first Monday in September, to continue for two weeks.

1901, c. 28, s. 1; 1903, c. 96, s. 1; 1901, c. 29, s. 10; 1905, cc. 188, 396, 454, 600.

ELEVENTH DISTRICT.

The eleventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Ashe County—The fourth Monday after the first Monday in March; eighth Monday before the first Monday in September; seventh Monday after the first Monday in September, each continuing for two weeks for the trial of both criminal and civil causes.

(1904 432)

Forsyth County—Third Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases exclusively; sixth Monday before the first Monday in September, and fifth Monday after the first Monday in September, each for the trial of criminal cases exclusively; eleventh Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in March; first Monday after the first Monday in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively.

Rockingham County—The first Monday before the first Monday in March, to continue two weeks, for the trial of both criminal and civil cases; the fourteenth Monday after the first Monday in

March, to continue two weeks, for the trial of civil cases exclusively; the fifth Monday before the first Monday in September, to continue one week, for the trial of criminal cases exclusively; the ninth Monday after the first Monday in September, to continue two weeks, for the trial of both civil and criminal cases.

Alleghany County—Third Monday after the first Monday in March, and second Monday before the first Monday in September.

Caswell County—Sixth Monday after the first Monday in March and September.

Surry County—Fourth Monday before the first Monday in March; seventh Monday after the first Monday in March, and continue two weeks; first Monday before the first Monday in September, for the trial of civil cases only, and to continue for two weeks; eleventh Monday after the first Monday in September, to continue for two weeks.

Stokes County—Ninth Monday after the first Monday in March, and third Monday after the first Monday in September, each to continue for two weeks.

1901, c. 28, s. 1; 1903, c. 313, s. 1; 1903, c. 464; 1903, c. 656; 1905, cc. 250, 326, 337, 418, 521; 1907, cc. 4, 545, 775; 1908, c. 11.

TWELFTH DISTRICT.

The twelfth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Mecklenburg County—On the third Monday before the first Monday in March, and on the third Monday before the first Monday in September, each of said terms to continue for two weeks; also on the seventh Monday after the first Monday in March, on the thirteenth Monday after the first Monday in March, on the third Monday after the first Monday in September, and on the thirteenth Monday after the first Monday in September, each of said terms to continue for one week, which shall be for the trial of criminal actions only. For the trial of civil actions only, on the seventh Monday before the first Monday in March, on the first Monday after the first Monday in March, on the seventh Monday before the first Monday in September, each of said terms to continue for two weeks; also on the eighth Monday after the first Monday in March, on the fourteenth Monday after the first Monday in March, on the twelfth Monday after the first Monday in September, each of said terms to continue for one week; also, on the fourth Monday after the first Monday in September, to continue for three weeks. No process nor other writ of any kind, pertaining to civil actions, shall be made returnable to any of the criminal terms, and no business pertaining to

civil actions shall be transacted at the criminal terms for Mecklenburg county. At the first fall and spring terms of the criminal courts held for each year grand juries shall be drawn, and the presiding judge shall charge them as provided by law, and such grand juries shall serve during the remaining fall and spring terms respectively.

Cleveland County—Third Monday after the first Monday in March; fifth Monday before the first Monday in September and ninth Monday after the first Monday in September, each to continue for two weeks.

Gaston County—First Monday before the first Monday in March, and first Monday after the first Monday in September, each to continue for two weeks; eleventh Monday after the first Monday in March, to continue for two weeks, and eleventh Monday after the first Monday in September. There shall be drawn and charged a grand jury at the first term held in the spring and fall respectively, which shall serve at the succeeding spring and fall terms.

Lincoln County—Fifth Monday after the first Monday in March, first Monday in September, and fourteenth Monday after the first Monday in September.

Cabarrus County—Fifth Monday before the first Monday in March; ninth Monday after the first Monday in March, and seventh Monday after the first Monday in September, each to continue for two weeks; first Monday before the first Monday in September.

1901, c. 28, s. 1; 1903, c. 177, ss. 1, 4; 1903, c. 469; 1905, c. 75.

THIRTEENTH DISTRICT.

The thirteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wilkes County—Sixth Monday before the first Monday in March and continuing two weeks, for the trial of civil cases only; the first Monday after the first Monday in March, to continue for two weeks, for the trial of both civil and criminal causes; the fourth Monday before the first Monday in September, and continue for two weeks, for the trial of both civil and criminal cases; fifth Monday after the first Monday in September and continuing for two weeks, for the trial of civil cases only.

Catawba County—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; eighth Monday after the

first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases.

Alexander County—Second Monday before the first Monday in March, and continue for one week, and third Monday after the first Monday in September, and continue for two weeks, each term for trial of both civil and criminal cases.

Caldwell County—First Monday before the first Monday in March, to continue for two weeks for the trial of civil and criminal cases; thirteenth Monday after the first Monday in March, for the trial of civil cases only, to continue two weeks; first Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; twelfth Monday after the first Monday in September, for the trial of civil cases only, to continue for two weeks.

Mitchell County—The fifth Monday after the first Monday in March and continue for two weeeks, for the trial of criminal and civil cases; the sixth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only; the tenth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal and civil cases.

Watauga County—Third Monday after the first Monday in March, and first Monday after the first Monday in September, each to continue for two weeks, for the trial of both criminal and civil cases.

1901, c. 28, s. 1; 1901, c. 29, ss. 11, 15; 1903, cc. 231, 282, 629; 1901, c. 29, ss. 13, 14; 1905, cc. 521, 528; 1907, c. 400; 1908, c. 42.

FOURTEENTH DISTRICT.

The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Yancey County—Third Monday after the first Monday in March, and first Monday in September, each to continue for two weeks; fifteenth Monday after the first Monday in March, to continue for one week, for the trial of civil causes only.

McDowell County—Second Monday before the first Monday in March; sixth Monday before the first Monday in September, and second Monday after the first Monday in September, each to continue for two weeks; the sixth Monday before the first Monday in March, to continue two weeks, for the trial of civil causes only.

Henderson County—First Monday in March, for trial of criminal cases exclusively, one week; tenth Monday after the first Monday in March, and tenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively, except jail cases on the criminal docket; fourth Monday after the first

Monday in September, to continue for two weeks, for the trial of criminal cases exclusively. The board of county commissioners of said county is hereby authorized, when they shall deem it for the best interests of the county, to decline to draw a grand jury for any civil term of the superior court in Henderson county, and when they shall fail to do so, then no criminal cases shall be tried at that civil term of said court except those in which a bill has been found by a previous grand jury.

Rutherford County—Fourth Monday before the first Monday in March, and second Monday before the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; fifth Monday after the first Monday in March, and eighth Monday after the first Monday in September, each to continue two weeks, for the trial of criminal and civil causes.

Polk County—Seventh Monday after the first Monday in March, and sixth Monday after the first Monday in September, each to continue for two weeks.

Burke County—First Monday after the first Monday in March, and fourth Monday before the first Monday in September, each to continue for two weeks, for the trial of both criminal and civil causes; thirteenth Monday after the first Monday in March, and thirteenth Monday after the first Monday in March, and thirteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil causes exclusively.

1901, c. 28, s. 1; 1903, cc. 588, 722; 1901, c. 29, s. 19; 1905, cc. 318, 416.

FIFTEENTH DISTRICT.

The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombe County—Fourth Monday before the first Monday in March, to continue for three weeks; seventh Monday after the first Monday in March, fifth Monday before the first Monday in September, and tenth Monday after the first Monday in September, each to continue for two weeks; first Monday after the first Monday in March, to continue for four weeks, for the trial of civil cases exclusively; twelfth Monday after the first Monday in March, to continue for four weeks, for the trial of civil cases exclusively; first Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases exclusively; fourth Monday after the first Monday in September to continue for three weeks, for the trial of civil cases exclusively; thirteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively. The terms to be held on the fourth Monday before the

first Monday in March, the seventh Monday after the first Monday in March, the fifth Monday before the first Monday in September, and the tenth Monday after the first Monday in September shall be for the trial of criminal as well as for the trial of civil cases; and the first week thereof, or such part of said term as may be necessary, shall be for the trial of criminal cases.

Madison County—On the sixth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively. On the first Monday before the first Monday in March, to continue for two weeks, for the trial of both civil and criminal cases. On the ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; on the third Monday before the first Monday in September, to continue for two weeks, for the trial of both civil and criminal cases; and on the eighth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively.

Transylvania County—Fifth Monday after the first Monday in March, and the first Monday before the first Monday in September, each to continue for two weeks; twelfth Monday after the first Monday in September.

1901, c. 28, s. 1; 1903, cc. 84, 495; 1901, c. 29, s. 16; 1905, c. 419; 1907, cc. 141, 547.

SIXTEENTH DISTRICT.

The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Haywood County—Fifth Monday before the first Monday in March, to continue for three weeks; eighth Monday before the first Monday in September, and third Monday after the first Monday in September, each to continue for two weeks: Provided, that the board of commissioners of Haywood county may, when public interest requires it, decline to draw a grand jury for the aforesaid July term of court.

Jackson County—Second Monday before the first Monday in March, eleventh Monday after the first Monday in March, and the fifth Monday after the first Monday in September of each year, each to continue for two weeks. The term beginning on the eleventh Monday after the first Monday in March shall be exclusively for the trial of civil causes, and the terms beginning on the second Monday before the first Monday in March and on the fifth Monday after the first Monday in September shall be for the trial of both civil and criminal causes.

Swain County—First Monday in March, sixth Monday before the first Monday in September, and seventh Monday after the first

Monday in September, each to continue for two weeks: Provided, that the board of county commissioners of Swain county may, when the public interest requires it, decline to draw a grand jury for the July term.

Graham County—Second Monday after the first Monday in March, and the first Monday in September, each to continue for two weeks.

Cherokee County—Fourth Monday after the first Monday in March; fourth Monday before the first Monday in September, each to continue for two weeks.

Clay County—Sixth Monday after the first Monday in March and second Monday after the first Monday in September.

Macon County—Seventh Monday after the first Monday in March, and eleventh Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this chapter.

1901, c. 28, s. 1; 1901, c. 29, ss. 17, 18; 1903, cc. 92, 293, 635; 1905, cc. 154, 536; 1907, c. 702.

1507. Civil process and motions at criminal terms. Civil process shall be returnable to, and pleadings filed at, all of the courts designated by law as exclusively criminal; motions in civil actions may be heard upon due notice at such criminal terms; and trial in civil actions which do not require a jury may be heard at such criminal terms, by consent.

1901, c. 28, s. 2. **Word "return" defined:** Watson v. Mitchell, 108-364.

1508. No grand jury drawn nor criminal process returnable to or solicitors attend, civil terms. No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend nor be entitled to their certificates for attendance upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated in this chapter for the trial of civil actions alone: Provided, this section shall not apply to Mecklenburg county.

1901, c. 28, ss. 3, 7.

1509. Rotation of judges. The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judge of each judicial district shall hold the courts of the fall circuit for the year one thousand nine hundred and one in the district of which he is the

judge, and successively thereafter he shall hold the courts of the several judicial districts in the order of their numbers, district number one following district number sixteen. The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit shall hold all the courts which fall between July and December, both inclusive.

Code, s. 911; 1901, c. 28, ss. 4, 9; R. C., c. 31, s. 20; 1876-7, c. 27; 1879, c. 11; 1885, c. 180; Const., Art. IV, s. 11. **Judge assigned to district is judge thereof for six months, beginning either January or July 1st:** Hamilton v. Icard, 112-589—**and where restraining order made returnable before such judge at place outside of district, and after courts were over, but before end of term of assignment to district, such judge has jurisdiction to hear application and grant injunction to hearing,** Ibid.

Before act of 1879 assigning judges to the different districts, an exchange of circuits, with consent of governor, under act of 1877 was not in violation of section 2, article 4 of the amended constitution: State v. McGimsey, 80-377.

1510. Court adjourned by sheriff when judge not present. If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, he may order the sheriff to adjourn said court to any day certain during said term, and on failure to hear from said judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge can not hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term.

Code, s. 926; 1901, c. 269; 1887, c. 13. **For term expiring pending trial, see section 3266. If judge not present to hold court at time fixed by law, duty of sheriff to adjourn from day to day until sunset on fourth day:** State v. McGimsey, 80-377.

Section by operation of law carries all matters over to next term in same plight and condition: State v. Horton, 123-695.

Where record recited that regular term of superior court was opened and held Wednesday instead of Monday of week fixed by statute, presumption is that sheriff duly opened court and adjourned same from day to day as provided by section: State v. Weaver, 104-758.

Where sheriff does not adjourn court on fourth day thereof hereunder, the acts of the term are not avoided by such failure so to do when judge afterwards appeared and held court: Norwood v. Thorp, 64-682.

IV. Special Terms.

1511. What judge holds; exchange of courts. The governor shall have power to appoint any judge to hold special terms of the supe-

rior court in any county, and, by consent of the governor, the judges may exchange the courts of a particular county or counties; but no judge shall be assigned to hold the courts of any district oftener than once in four years; and whenever a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor.

Code, s. 913; R. C., c. 31, s. 20; 1879, c. 11; Const., Art. IV, s. 11. **Consult generally,** State v. Lewis, 107-967.

Power of governor to order a special term is not restricted to instances where there is an accumulation of business: State v. Register, 133-749—nor, when such fact is recited in commission as reason for special term, is the power of the court restricted to trial of indictments found before that term, Ibid. **The governor need not assign the reason for calling the special** term, State v. Watson, 75-139.

Special terms have all the necessary jurisdiction and powers to dispose of such business as may be authorized to be heard under the commission constituting the court: State v. Ketchey, 70-623. **Judge specially commissioned to hold court in county outside of his district has same jurisdiction of matters transferred to that court by consent from another county** as judge of district comprising both counties: Henry v. Hilliard, 120-479.

Upon the death of one of the judges of the superior court, governor may appoint and require one of the other judges to hold one or more specified terms of court in district assigned to deceased judge: State v. Lewis, 107-967.

Where governor issues commission to judge of superior court authorizing him to hold certain terms of court and the judge undertakes to discharge such duties, he is a de facto judge as far as the public and third persons are concerned, although the commission issued without authority of law: State v. Lewis, 107-967; State v. Turner, 119-841; State v. Speaks, 95-689—**but, after he makes known that he is not a de jure judge, he can not, as a de facto judge, arrest judgment where verdict already rendered and entered,** Ibid.

The inhibition that ''no judge shall be assigned to hold the courts of any district oftener than once in four years'' does not apply to the holding by any judge of one or more regular terms by exchange with another judge with the sanction of the governor, nor to the holding of special terms under this section: State v. Turner, 119-841; State v. Lewis, 107-976—**does not apply to the several terms of the court in any one county embraced in a ''circuit'' or ''riding,'' but only to the series of courts held in the various counties constituting such ''circuit'' or ''riding'' as a whole,** State v. Speaks, 95-689; State v. Monroe, 80-373—**nor does it apply where a new apportionment of districts has been made and judge has been assigned to new district containing counties of district he has just been serving,** State v. Bowman, 80-438; State v. McGimsey, 80-383—**nor does it prohibit legislature from creating extra term of superior court of county and designating resident judge to hold same,** State v. Monroe, 80-373.

Partial exchange of circuits between two judges of superior court, with approval of governor, is legal: State v. Graham, 75-256. **Governor can re-**

quire judge of superior court to hold term of court in county not within his district: State v. Watson, 75-136—and where governor "authorizes and empowers" judge to hold such court, also stating that same done with his consent, and judge so holds court, the consent and authority of governor is equivalent to a command, Ibid.

1512. How ordered. Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district, in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district and hold for such time as he may designate, unless the business be earlier disposed of. The judge shall attend and hold such court, without extra compensation, except his actual expenses to be paid by the county in which the special term is held.

Code, s. 914; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44.

The plea of defendant that special term of court unlawfully called and organized because governor was absent from state when he attempted to order the holding of court was properly overruled: State v. Hall, 142-710. A plea denying the existence of the court is unheard of: Ibid.

The power of governor to order special term is not restricted to instances where there is accumulation of business: State v. Register, 133-749—and the fact that the governor recites that as the reason in the commission does not restrict the power of the judge to trial of indictments pending, Ibid—and it is not necessary that prisoner be arraigned and plead at preceding regular term to special term at which tried, State v. Ketchey, 70-621.

Governor is sole judge of sufficiency of evidence to satisfy him that business of court is such as to require the holding of special term: State v. Lewis, 107-977.

Where governor is empowered to require judge to hold court in district other than the one to which he is assigned, upon certain conditions, and governor issued commission, supreme court will assume that emergency had arisen which would sanction issuing of commission, and same will be recognized as valid if governor could have lawfully issued it: Ibid, 107-967.

This section is not unconstitutional: State v. Ketchey, 70-621.

In appointing special terms of court, governor is not bound by certificate of judge, so far as to confine such terms to trial of a particular class of cases: State v. Ketchey, 70-621.

When it appears from record that cause was tried at special term of superior court, it is prima facie presumed that order for holding same was duly made and that court duly held: Sparkman v. Daughtry, 35-168.

1513. Notice of. Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise said term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement.

Code, s. 915; 1868-9, c. 273. **The notice provided for herein does not constitute part of the record of the term:** State v. Lewis, 107-975.

1514. Certificate of attendance; compensation. The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive his actual expenses from the commissioners of the county in which the court is held.

Code, s. 918; 1901, c. 167; 1868-9, c. 273.

1515. Grand juries for. There shall be no grand jury at any special term, unless the same shall be ordered by the governor.

Code, s. 921; 1868-9, c. 273. **Section merely referred to** in State v. Lew, 133-665.

1516. Jurisdiction. The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have.

Code, s. 916; 1868-9, c. 273. **Special terms have all necessary jurisdiction and powers to dispose of such business as may be authorized to be heard under the commission constituting the court:** State v. Ketchey, 70-623.

Judge specially commissioned to hold court in county outside his district has same jurisdiction of matters transferred to that court, by consent, from another county, as judge of district comprising both counties: Henry v. Hilliard, 120-479.

Superior courts at special term have same power to remove cause to another county that courts have at regular terms: Sparkman v. Daughtry, 35-168.

1517. All persons must attend; process not returnable to. All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. But no process shall be made returnable thereto except subpœnas, or other process for the attendance of witnesses.

Code, s. 919; R. C., c. 31, s. 23; 1844, c. 10; 1848, c. 29. **Defendant bound over to answer criminal charge at regular term of superior court, which**

term not held in consequence of absence of judge, required by section to attend at intervening special term subsequently appointed and held: State v. Horton, 123-695. Word "return" defined: Watson v. Mitchell, 108-364.

1518. Subpœnas returnable to. Subpœnas may issue returnable on any day of any special term.

Code, s. 920; 1868-9, c. 273.

V. Practice.

1519. Minutes read each morning. Every morning during the term the judge presiding shall order the reading of the minutes of said court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of said term.

Code, s. 925; 1861, c. 3.

1520. Nonsuit not allowed after verdict. In actions where a verdict shall pass against the plaintiff, judgment shall be entered against him.

Code, s. 936; R. C., c. 31, s. 110; 2 Hen. IV, c. 7. For nonsuit under Hinsdale act, see section 539.

Plaintiff will not be allowed to take nonsuit after verdict: Strause v. Sawyer, 133-64—or after judgment, Mauney v. Long, 91-170; Mfg. Co. v. Buxton, 105-74—and the court's refusal to grant a nonsuit after verdict and judgment is not reviewable, Brown v. King, 107-313. Where jury, after rendering verdict, returned to jury room to correct mere formal defect in same, plaintiff moved a nonsuit, and was refused, held no error: Strause v. Sawyer, 133-64.

Plaintiff may elect to be nonsuited in every case where no judgment, other than for costs, can be recovered against him: McKesson v. Mendenhall, 64-502.

Where defendant sets up counterclaim for substantive relief arising under subsection one of section 481, plaintiff is not entitled to take nonsuit: Wilkins v. Suttles, 114-550; Pass v. Pass, 109-484; Brown v. King, 107-315; McNeill v. Lawton, 97-16; Bynum v. Powe, 97-374; Whedbee v. Leggett, 92-469; Purnell v. Vaughan, 80-46; Francis v. Edwards, 77-271; Tate v. Phillips, 77-126; McKesson v. Mendenhall, 64-502—but when no such counterclaim pleaded, plaintiff has right to take nonsuit at any time before verdict, Strause v. Sawyer, 133-64; Mfg. Co. v. Buxton, 105-74; Gatewood v. Leak, 99-363; McNeill v. Lawton, 97-16; Peoples Bank v. Stewart, 93-402; Tate v. Phillips, 77-126; Graham v. Tate, 77-120—unless in action of equitable nature the adverse party has acquired some right which he is entitled to have determined, Gatewood v. Leak, 99-363; Bynum v. Powe, 97-374. Interlocutory judgment does not deprive plaintiff of right to take nonsuit: Mfg. Co. v. Buxton, 105-74.

If defendant has pleaded counterclaim arising under subsection 2 of section 481, plaintiff may be permitted to suffer nonsuit as to his cause

of action, but defendant will, nevertheless, be entitled to prosecute his counterclaim: Gatewood v. Leak, 99-363; McNeill v. Lawton, 97-16; Whedbee v. Leggett, 92-469.

Plaintiff may take nonsuit while case pending before referee, if case is one in which he is entitled to do so: McNeill v. Lawton, 97-16.

Plaintiff can not take nonsuit and so deprive defendant of writ of restitution and inquisition of damages, where defendant wrongfully dispossessed of land by legal process: Lane v. Morton, 81-38.

Where parties in particeps criminis, there is no valid counterclaim set up which the law will recognize, and plaintiff may take nonsuit: Pass v. Pass, 109-484.

On issue of devisavit vel non no nonsuit can be taken: Collins v. Collins, 125-104; Young's Will, 123-358; Hutson v. Sawyer, 104-1; Syme v. Broughton, 85-369; Whitfield v. Hurst, 31-170; St. John's Lodge v. Callender, 26-335.

1521. Suit for penalty, plaintiff may reply fraud to plea of release. If an action be brought in good faith by any person to recover a penalty under a law of this state, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual.

Code, s. 932; R. C., c. 31, s. 100; 4 Hen. VII, c. 20.

1522. Suit on bonds; defendant may plead satisfaction. When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or de-

feasance of such bond, though such payment were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded.

Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII, c. 20.

1523. Sum due with interest and costs, discharges penalty of bonds. If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also all such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly.

Code, s. 934; R. C., c. 31, s. 102; 4 Anne, c. 16. **Judgments upon bonds of executors, administrators, etc., should be for penalty of bond, to be discharged upon payment of amount of damages assessed with interest, when allowed, from first day of term at which judgment rendered:** Anthony v. Estes, 101-541.

In penal bonds, only sum due, interest and costs, can be recovered: Moore v. Cameron, 93-58.

As bearing upon section, see Governor v. Sutton, 20-622; Thoroughgood v. Walker, 47-18; Sewing Machine Co. Seago, 128-158.

1524. Proceeds of judicial sales collected on motion. The supreme and other courts ordering a judicial sale, or having possession of the bonds which may have been taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money may become due against the debtors or any of them, unless for good cause shown the court shall direct some other mode of collection.

Code, s. 941; R. C., c. 31, s. 129. **Independent action upon obligation to secure payment of money given upon purchase under judicial sale will not be entertained if objection made in apt time:** Lackey v. Pearson, 101-651—**proper course being to enforce contract by motion in cause in which sale decreed,** Ibid; Hudson v. Coble, 97-262—**but if objection not made at proper time court may proceed with action,** Lackey v. Pearson, 101-651—**and such objection will not be entertained when made for first time in supreme court,** Ibid.

Where commissioner appointed to conduct judicial sale is directed to sell for cash, and did so, except that one of purchasers did not immediately pay his bid, commissioner may maintain independent action in own name to recover amount of bid, Ibid.

As to different courses which may be pursued by court where purchaser refuses to comply with bid, see Hudson v. Coble, 97-260. Court ordering judicial sale has power to make decree for money, after ten days' notice thereof: Cotten ex parte, 62-79; Mauney v. Pemberton, 75-219.

Section is constitutional: Cotten ex parte, 62-79—and, as regards courts of equity, merely substitutes notice and execution for original power of proceeding by attachment, Ibid.

Sale of land for assets, made by administrator, pursuant to judgment in probate court, in proceeding instituted for that purpose, is judicial sale: Mauney v. Pemberton, 75-219—and summary judgment may be rendered against purchaser and his sureties, under section, Ibid; Chambers v. Penland, 78-53—but such judgment can only be rendered by court ordering sale, Mauney v. Pemberton, 75-219.

Semble, that no other way of holding commissioner appointed to make judicial sale pecuniarily responsible for money collected by him, except by action instituted by parties entitled: Smith v. Moore, 79-82.

1525. Judicial sale confirmed, purchaser deemed owner. Any person let into possession under any judicial sale confirmed, where the title may be retained as a security for the price, shall be deemed the legal owner of the premises for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession taken or continued, in the same manner as if the title had been conveyed to him on the day of sale, unless restrained by some order of the court directing the sale; and the suit so brought shall be under the control of the court ordering the sale.

Code, s. 942; 1858-9, c. 50.

1526. Procedure after appeal. In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if said judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause shall stand in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court.

1887, c. 192, s. 2. **See section 1542.**

When new trial awarded by supreme court on appeal, case goes back to superior court for new trial on whole merits: McMillan v. Baker, 92-110—and court below ought to proceed with trial as if no former trial had taken place, Ibid.

1527. Officer attending juries sworn. When any officer (except such as are appointed to attend the grand jury shall be appointed or summoned to attend any superior court, the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend

the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury, that he may be called to attend during that term.

Code, s. 927; R. C., c. 31, s. 36; 1801, c. 592.

1528. Quakers may wear hats in court. The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect.

Code, s. 943; R. C., c. 31, s. 131; 1784, c. 209.

VI. Process.

1529. Return on notice, evidence. When a notice shall issue to the sheriff, his return thereon that the same has been executed shall be deemed sufficient evidence of the service thereof.

Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537.

Presumption that the return states the truth: Strayhorn v. Blalock, 92-292; Miller v. Powers, 117-218; Isley v. Boon, 113-249; Chadbourn v. Johnston, 119-282.

Official returns of sheriff are acted upon without proof of his signature in court in which he is officer: McDonald v. Carson, 94-497.

Return by sheriff on notice to produce paper, "executed by delivering a copy," implies delivery of copy to each person to whom notice addressed, and is sufficient: McDonald v. Carson, 94-497.

Return of sheriff is prima facie service of process: Williamson v. Cocke, 124-585—**subject to be overcome by proof of facts,** Ibid.

1530. When directed to officer of adjoining county. If at any time there should not be in the county a proper officer to whom precepts of process, original, mesne or final, of a court of record, shall or ought to be directed, who can lawfully execute the same; or if there be such officer who shall refuse or neglect to execute such precept or process, then the clerk of the court from which the same hath issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such precept or process to the sheriff of any adjoining county, who shall have power to execute, and shall execute the same, in like manner as if he were sheriff of the county.

Code, s. 929; R. C., c. 31, s. 55; 1779, c. 156; 1821, c. 1080; 1822, c. 1132; 1846, c. 61. **Section merely referred to** in Collais v. McLeod, 30-224.

1531. Sheriff interested and no coroner, issues to officer of adjoining county. In all cases where the sheriff of any county shall be

interested, if there is no coroner in said county, process may be issued to and shall be executed by the sheriff of any adjoining county.

Code, s. 930; 1869-70, c. 175. **Where there is no coroner in county execution against sheriff will issue to sheriff of adjoining county:** Anonymous, 2-422; Witkousky v. Wasson, 69-38. **Section merely referred** to in Evans v. Etheridge, 96-45.

CHAPTER 29.

COURTS—SUPREME.

I. How and When Held.

1532 How constituted. The supreme court shall consist of a chief justice and four associate justices.

Const., Art. IV, s. 6.

1533. Justices to take oath of office. The justices, before they act as such, shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept.

Code, s. 955; R. C., c. 33, s. 3; 1818, c. 963.

1534. Quorum. Three justices shall constitute a quorum for the transaction of the business of the court.

Code, s. 956; 1889, c. 230. **The "court" means the three (now five) justices sitting together, consulting and advising one with the others, upon questions before them for judicial decision:** State v. Lane, 26-435. **The distinction between the three (now five) judges and the "court" pointed out:** Ibid.

Upon the death of a member, the two surviving judges have full power and authority to hold court and exercise its functions: Ibid, page 434.

1535. Convenes, when. There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the last Monday in August.

Code, s. 953; 1901, c. 660; 1887, c. 49; 1881, c. 178.

1536. Sits until business is dispatched; name of court; adjourned if no justice present first week. The court shall sit at each term until all the business on the docket shall be determined or continued

on good cause shown. The court shall bear the name and style of "The Supreme Court of North Carolina," and shall be a court of record; and the papers and records belonging to the clerk's office thereof shall be constantly kept within the city of Raleigh: Provided, that in case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued.

Code, s. 954; R. C., c. 33, s. 2; 1804, c. 660; 1805, c. 674; 1818, c. 962; 1828, c. 13; 1842, c. 15; 1846, cc. 28, 29.

II. Practice in.

1537. Original jurisdiction, claims against state. The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action.

Const., Art. IV, s. 9. **Jurisdiction conferred upon supreme court by this section to hear claims against state is confined to examination of, and adjudication of legal validity of, such claims:** Baltzer v. The State, 104-265—**the jurisdiction only attaching when questions of law are involved,** Miller v. State, 134-270; Reeves v. The State, 93-257; Horne v. The State, 82-384; Clodfelter v. State, 86-51; Bledsoe v. The State, 64-392; Reynolds v. The State, 64-460—**and this jurisdiction will not be exercised where the matter is small and there is no doubt about the law.** Horne v. The State, 82-384; Sinclair v. State, 69-47—**nor where facts pertaining to alleged claim against state are well known, or readily ascertainable, and are no "grave questions of law" to be decided,** Cowles v. State, 115-173.

Section is relaxation of rule that state can not be sued, and enables citizen to obtain opinion of supreme court as recommendation to legislature and no more: Blount v. Simmons, 119-51.

Original jurisdiction conferred by section is for benefit only of such plaintiffs, and to be used only in such cases as can not otherwise obtain footing in court by reason of state being a party: Bain v. State, 86-49.

Supreme court has not original jurisdiction of action against state by clerk of superior court for fees in action instituted by state and for which it has been adjudged liable: Miller v. State, 134-270; Blount v. Simmons, 119-52.

Jurisdiction conferred by section confined to such claims as are legal: Clodfelter v. State, 86-51—**and, as against any other defendant, could be reduced to judgment and enforced by execution,** Ibid; Bain v. State, 86-49. **Jurisdiction to hear claim against state wherein plaintiff demands return of bonds alleged to have been exchanged for other bonds in 1862, is exclusively in supreme court:** Martin v. Worth, 91-45—**as is also jurisdiction to pass upon validity of coupons as claims against state,** Horne v. The State, 82-382.

Costs adjudged against state upon failure of litigation are not claims against state hereunder: Blount v. Simmons, 119-52; Miller v. State, 134-270.

Quaere: Whether claim for damages against state, arising out of failure and refusal of public officer to perform statutory duty imposed on him, can be filed in this court: Stewart v. State, 118-624.

Where the legislature by act or resolution directs treasurer of state to pay claims against state, then supreme court has jurisdiction of such claims: Horne v. The State, 84-364—**but where legislature is prohibited by constitution from exercise of such power, and can only order payment after obtaining assent of people by popular vote, then supreme court has no jurisdiction,** Ibid. **State may plead bar of statute of limitations to prevent recommendatory decision:** Cowles v. State, 115-173.

As to pleading as set-off a claim against state in an action by state against private party, see Battle v. Thompson, 65-406.

Amendment incorporated into Art. 1, section 6, of constitution takes away jurisdiction of court to hear claims against state founded upon obligations alleged to have been incurred by state by virtue of ordinances and statutes passed within a prescribed period: Baltzer v. The State, 104-265; Horne v. State, 84-362—**and such deprivation of jurisdiction after suit brought not inhibited by federal constitution as impairing obligation of contracts,** Horne v. State, 84-362.

If case only involves questions of fact, legislature is proper place to obtain redress: Reeves v. State, 93-257; Sinclair v. State, 69-47—**jurisdiction not extending to settlement of disputed questions of fact,** Reynolds v. State, 64-460.

The supreme court's decision is "merely recommendatory" to legislature: Garner v. Worth, 122-252; Baltzer v. The State, 104-265; Battle v. Thompson, 65-408—**which may provide for its payment if it sees proper to do so,** Baltzer v. The State, 104-265—**the courts being forbidden to issue any process upon their decision,** Garner v. Worth, 122-252; Baltzer v. The State, 104-265. **Upon decision of court in favor of plaintiff upon claim preferred against state, proper course is for clerk to transmit proceedings in cause, together with judgment of court, to governor to be communicated by him to general assemly:** Clements v. The State, 77-142; Bledsoe v. The State, 64-397.

Where a matter has become a quasi-public question, and one of much concern to the several departments of the state government, this court will entertain petition for the construction of a statute, and a contract made thereunder by state officials: Stewart v. State, 118-624; see also Farthington v. Carrington, 116-315.

Section merely referred to in Rand v. The State, 65-194; Boner v. Adms., 65-644; Bayne v. Jenkins, 66-356.

1538. Manner of prosecuting claims against the state. Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein reqest him to appear on

behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term.

Code, s. 948. **As supporting section,** see Horne v. The State, 82-384. **In proceedings under section for adjudication of alleged claims against state, state has right to plead bar of statute of limitations to prevent recommendatory decision:** Cowles v. The State, 115-173.

As to pleading set-off in action by the state against private party, see Battle v. Thompson, 65-406.

Section authorizes no judgment: Garner v. Worth, 122-257.

State, not public treasurer, is proper party defendant in action wherein plaintiff demands return of bonds alleged to have been exchanged for other bonds in 1862: Martin v. Worth, 91-45.

Upon decision of court in favor of plaintiff upon claim preferred against state, proper course is for clerk to transmit proceedings in cause, together with judgment of court, to governor to be communicated by him to general assembly: Clements v. The State, 77-142; Bledsoe v. The State, 64-397.

Practice is to ascertain facts by reference to clerk of court or to have issues for jury: Clements v. State, 76-201; Bledsoe v. State, 64-394.

As to what claims deemed to fall within section, see cases under section 1537.

As bearing upon section, see Henry v. State, 68-465.

1539. Jurisdiction as court of review. The supreme court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" shall be the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

Const., Art. IV, s. 8. **As to what matters are, and are not, reviewable in**

supreme court, see cases cited under section 587 as to what matters appealable and not appealable.

For appeals in criminal actions, see sections 3276, 3277 et seq. For certiorari as substitute for appeal, see section 584. For time and manner of making exceptions in lower court and for motion for new trial, see section 554.

What is meant hereunder by jurisdiction to "review upon appeal" discussed in Rush v. Steamboat Co., 68-72.

The supreme court, except as to claims against the state, derives its jurisdiction solely by an appeal from a court having jurisdiction: James v. R. R., 123-299; Gordon v. Sanderson, 83-1—such lower court being constituted and organized according to law or recognized as having essential attributes of properly constituted tribunal and competent to exercise jurisdiction of controversies between litigants: State v. Hall, 142-710—and no appeal from such lower court will be entertained unless transcript sent up shows possession of that jurisdiction and that cause was properly constituted there, Gordon v. Sanderson, 83-1.

The jurisdiction of supreme court is limited to correction of errors in rulings below: Tyson v. Tyson, 100-360; Scroggs v. Stevenson, 100-354—hence where there has been no ruling on question presented by record, supreme court can not pass upon it, Ibid. In criminal cases appellate jurisdiction of court is confined to review and correction of errors in law committed in trial below: State v. Rowe, 98-630; State v. Starnes, 94-973; State v. Jones, 69-16—and a new trial for newly discovered evidence will not be granted: State v. Lilliston, 141-867.

Court will not ex mero motu review former decision upon second appeal in same case: Best v. Mortgage Co., 131-70—but it is not precluded under doctrine of law of case from passing on question not determined on first appeal, Vann v. Edwards, 135-661.

Court will not review its own ruling or a ruling of court below, which does not injuriously affect complaining party, even if ruling erroneous: Balk v. Harris, 132-16; Nissen v. Gold Mining Co., 104-309; Butts v. Screws, 95-215; Lutz v. Cline, 89-186.

When supreme court has decided a case and term is ended its jurisdiction is at an end: State v. Marsh, 134-197—so also when opinion certified to lower court for judgment there, James v. R. R., 123-299.

Supreme court has no power to change, alter or modify its judgment rendered at a former term, except when issued by mistake or inadvertance, in which case it may be altered so as to speak the truth: James v. R. R., 123-299.

The jurisdiction of supreme court to review decisions on matters of law or legal inference is not impaired by act of legislature postponing right of appeal to final determination of cause: Railroad v. Warren, 92-620.

Agreement that other pending causes shall abide the determination of particular case does not authorize supreme court to assume jurisdiction in cases not before it: Belden v. Snead, 84-243.

Appeals from pro forma judgments will not be considered: Hines v. Hines, 84-122.

In our practice, both before and after establishment of constitution of

1868, supreme court has had all powers of court of errors at common law: Rush v. Steamboat Co., 68-72.

The power of courts to declare statutes unconstitutional is a high prerogative and ought to be exercised with great caution and they should not declare statute void unless its nullity and invalidity are placed in their judgment beyond reasonable doubt, and a reasonable doubt must be solved in favor of legislative action: King v. R. R., 66-283; State v. Baskerville, 141-811; Railroad v. Alamance, 82-264; Stanmire v. Taylor, 48-210; State v. Moss, 47-67.

Writ of habeas corpus can never be made to perform the office of a writ of error or appeal: Ex parte McCown, 139-95; In re Schenck, 74-607.

As to power of supreme court to issue writ of prohibition as a remedial writ to supervise and control the inferior courts, see State v. Whitaker, 114-818; Perry v. Shepherd, 78-83; Railroad v. Newton, 133-136. As to power to issue writ of certiorari, see section 584.

Superior court in granting a new trial on appeal in a criminal case should decide upon the legal merits of the case, if it appears that state can not ultimately succeed in prosecution: State v. Robinson, 143-620.

JURISDICTION TO REVIEW ISSUES OF FACT AND QUESTIONS OF FACT. An "issue of fact" is where a matter is alleged on one side and denied on the other, the decision of which would be final and conclude the parties as to the matter in controversy: Kirk v. R. R., 97-82; Wright v. Cotten, 140-1; Crawford v. Masters, 140-205; Tucker v. Satterthwaite, 120-118; Patton v. R. R., 96-455; McAdoo v. R. R., 105-140; Armfield v. Brown, 70-27; Heilig v. Stokes, 63-612; Klutts v. McKenzie, 65-102—distinguished from question of fact in Goode v. Rogers, 126-62; Keener v. Finger, 70-35; Beavans v. Goodrich, 98-217; Foushee v. Pattershall, 67-453. As to what findings of fact are reviewable in cases of reference, see section 525—in application for injunctive relief, see section 806—in proceedings to set aside judgment for mistake, inadvertance, surprise or excusable neglect, see section 513.

As to the amendment restoring to supreme court jurisdiction over issues of fact and questions of fact as it was exercised before adoption of constitution of 1868, see Jones v. Boyd, 80-260.

Jurisdiction of supreme court over "issues of fact" is restricted to interlocutory and final judgments which are exclusively equitable in their nature: Young v. Rollins, 90-125—which a court of equity, as a distinct and separate tribunal, could alone render under former system, Ibid—and does not extend to cases which under former practice would have been action at law, and in which only errors of law could have been corrected on appeal, Greensboro v. Scott, 84-184; Jones v. Boyd, 80-260.

Supreme court has jurisdiction, in actions purely equitable, to review evidence and findings of fact in court below where entire testimony, as it was offered and received on trial, is transmitted: Gatewood v. Burns, 99-357; Coates v. Wilkes, 92-376; Worthy v. Shields, 90-192—but will not exercise this jurisdiction upon fragmentary or summary statement of evidence, Gatewood v. Burns, 99-357; Runnion v. Ramsey, 93-410.

In appeals from superior courts of law, purely discretionary powers of such courts were never reviewed by supreme court. Otherwise in appeals

from courts of equity, in which every order and decree of such court, affecting rights of parties, were proper subject of review: Long v. Holt, 68-53; see Long v. Gooch, 86-710; Graham v. Skinner, 57-94.

Proceedings for partition are not such equity proceedings as are within the jurisdiction of supreme court under the amendment restoring the same jurisdiction over issues of fact and questions of fact which supreme court, prior to 1868, possessed: Simmons v. Foscue, 81-86.

On appeal from order granting or refusing injunction, court has power to review questions of fact upon which propriety of order depends: Jones v. Boyd, 80-258; Burns v. McFarland, 146- ; Hooker v. Greenville, 130-472; Mayo v. Comrs., 122-5; Roberts v. Lewald, 107-305; Evans v. R. R., 96-47—and will do so whenever the evidence is sent up, Roberts v. Lewald, 107-305—and also may review the facts upon which injunction continued to the hearing, Evans v. R. R., 96-45.

As to waiver of right to have findings of fact reviewed by supreme court, in cases where same may be reviewed, see Runnion v. Ramsay, 93-410.

Quaere: Whether action of covenant, to which equitable defense was made, falls within provisions of this section so that findings of jury may be reviewed: Gragg v. Wagner, 77-246.

1540. How cases taken to. Cases shall be taken to the supreme court by appeal, as provided by law.

Code, s. 946. As to who can appeal, see section 585—and in what cases appeal can be taken, see section 587. For appeals from judge in special proceedings, see section 588. For motion for new trial and exceptions, see section 554. For preparation of case on appeal, see section 591. For certiorari as substitute for appeal, see section 584.

1541. May make rules of court. The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for said court, to be entered on records thereof in each county.

Code, s. 961; R. C., c. 33, s. 13; 1818, c. 963. Supreme court has exclusive power to prescribe rules for the conduct of cases therein: Calvert v. Carstarphen, 133-27; Horton v. Green, 104-400; Herndon v. Ins. Co., 111-384—and is not subject to legislative control, Calvert v. Carstarphen, 133-27; Herndon v. Ins. Co., 111-384; State v. Edwards, 110-511; Rencher v. Anderson, 93-105.

Legislature may prescribe rules for the courts inferior to supreme court: Calvert v. Carstarphen, 133-27; State v. Edwards, 110-511; Cheek v. Watson, 90-307—and if it fails to provide rules of practice in every particular, supreme court may do so, it having been given this power by statute, Calvert v. Carstarphen, 133-27; Barnes v. Easton, 98-116; Cheek v. Watson, 90-302; Johnson v. Sedberry, 65-5.

Rules of supreme court are mandatory, not directory: Calvert v. Carstarphen, 133-27; Wiseman v. Comrs., 104-330; Walker v. Scott, 102-487;

Edwards v. Henderson, 109-84—**and are sole code of practice for supreme court, and are to be observed as strictly as are legislative provisions as to practice in lower courts,** Calvert v. Carstarphen, 133-28.

Discussion of practice in supreme court and its powers under old and new constitution in Herndon v. Ins. Co., 111-384.

For last rules of practice in superior court, see 140-678—**in supreme court,** see 140-653.

Section merely referred to in State v. Lane, 26-435.

1542. Judgment on record; execution, where returnable. In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court, or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided, further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state.

Code, s. 957; R. C., c. 33, s. 6; 1799, c. 520; 1818, c. 963; 1830, c. 2; 1868-9, c. 962. **See section 605. Provisions of section, authorizing court to give such judgment as shall appear "on inspection of whole record" ought to be rendered, refers to such matters only as are necessarily of record, as pleadings, verdict and judgment:** State v. Ashford, 120-588; Wills v. Fisher, 112-540; McKinnon v. Morrison, 104-354; Thornton v. Brady, 100-38. **Supreme court will take notice of errors on face of record proper without any assignment of error:** Wilson v. Lumber Co., 131-163; Appomattox Co. v. Buffaloe, 121-37; Rogers v. Bank, 108-578; Robeson v. Hodges, 105-52; Hutson v. Sawyer, 104-1; Thornton v. Brady, 100-38. **Court will render such judgment as shall appear to be proper from inspection of whole record:** Mfg. Co. v. Hobbs, 128-46; Rogers v. Bank, 108-578; Hutson v. Sawyer, 104-1; Morrison v. Watson, 95-479; Bush v. Hall, 95-82—**shall render such judgment as should have been rendered in superior court, whenever the record presents fully the merits of whole case,** Duvall v Rollins, 71-218; Robison v. Robison, 123-137; Long v. Swindell, 77-176; Perry v. Tupper, 71-380; Rush v. Steamboat Co., 68-72; Isler v. Brown, 67-175. **If no error appears on face of record proper, there being no valid case on appeal, judgment below will be affirmed:** Cressler v. Asheville, 138-482; Hicks v. Westbrook, 121-131; Barnes v. R. R., 121-504; Roberts v. Partridge, 118-355; Dela-

148-57
150-312

field v. Construction Co., 115-21; Fertilizer Co. v. Black, 114-591; Maggett v. Roberts, 114-227; Forte v. Boone, 114-176; Rosenthal v. Roberson, 114-594; Cummings v. Hoffman, 113-267; Lovic v. Ins. Co., 109-302; Howell v. Jones, 109-102; Mitchell v. Tedder, 108-266; Simmons v. Andrews, 106-201; Mfg. Co. v. Simmons, 97-89; Rencher v. Andrews, 95-208; McCoy v. Lassiter, 94-131; State v. Freeman, 93-558; Mott v. Ramsay, 90-29; Neal v. Mace, 89-171; State v. Fox, 81-578; Turner v. Foard, 83-683; State v. Hooks, 82-696; Paschall v. Bullock, 80-; State v. Murray, 80-364; State v. Orrell, 44-217; State v. Ray, 32-29—**also where no error assigned by defendant and none appears upon record, judgment below will be affirmed,** Holmes v. Brewer, 117-347; State v. Whitmire, 112-895; Marshall v. Stine, 112-697; Simmons v. Andrews, 106-201; Taylor v. Plummer, 105-56; Walker v. Scott, 102-487; Anthony v. Estes, 99-598; Wilson v. Shepherd, 98-154; Carroll v. Barden, 97-191; Mfg. Co. v. Simmons, 97-89; Justice v. R. R., 96-412; Williams v. Johnston, 94-633; Howell v. Ferguson, 87-115; State v. Hovis, 76-117; Swepson v. Summey, 74-551; Stephenson v. Jones. 12-15. **If inspection of record proper discloses error in judgment below it will not be affirmed,** although no exception entered thereto or particular assignment of errors therein: Huntsman v. Lumber Co., 122-583. **Supreme court renders judgment upon inspection of whole record and must therefore be satisfied of** sufficiency of such record: State v. Daniel, 121-574. **When no error apparent upon record court will not interefere with judgment upon speculative** reasoning as to how jury arrived at verdict: Williams v. Johnson, 94-633.

Court bound to correct errors which appear on face of record whether same excepted to below or not: Appomattox Co. v. Buffaloe, 121-37. **Appeal will be dismissed where transcript fails to show judgment of record from** which same was taken: Logan v. Harris, 90-7. **Where, but for errors** alleged, record would sustain judgment given in court below, same must be sustained by supreme court unless errors are shown: Collins v. Gilbert, 65-135—but otherwise where nothing in record to sustain judgment of court below, Ibid. **Where no statement of case accompanies record, judgment** will be affirmed: Green v. Dawson, 92-61—unless upon looking into record it is found that there is want of jurisdiction, or apparent from whole case that plaintiff entitled to no relief, Ibid. **Where in attachment proceedings it appears from whole record that statute substantially complied with,** action will not be dismissed nor attachment dissolved: Best v. British and American Co., 128-351. **Irrespective of reasons of trial court, its judgments will be affirmed where supreme court finds sufficient reasons in record to sustain judgment:** Burns v. McFarland, 146- . **Where facts appear only from statement of case, there being no transcript of record, and it does not appear that court held at time and place appointed by law, appeal dismissed:** Sneeden v. Harris, 107-311. **Where on appeal by state from order arresting judgment, transcript of record erroneously showing judgment below to be ''new trial'' instead of ''arrest of judgment,'' appeal dismissed:** State v. Keeter, 82-547. **If there is irreconcilable conflict in findings of jury upon issues submitted, or between verdict and judgment, new trial will be awarded:** Morrison v. Watson, 95-479. **Where it appears from record that no cause of action exists, supreme court will ex mero motu dismiss appeal:** Peacock v. Scott, 104-154; Norris v. McLam, 104-159.

Appeal will not be dismissed where there is no statement of case on appeal, because there may be error apparent on face of record: McCoy v. Lassiter, 94-131. Where upon inspection of whole record, it appears that judgment unwarranted upon facts, this will, ex mero motu reverse it: Everett v. Raby, 104-479. Where appellant does not show error affirmatively and record insufficient to determine whether or not error committed by trial judge, judgment affirmed: McCrimmen v. Parish, 116-614. If errors appear in record proper new trial will be granted: McDaniel v. Scurlock, 115-295. Upon objection that judgment erroneous upon record proper, court will construe judgment with reference to pleadings, evidence and charge and not with regard to issues alone: Sutton v. Walters, 118-495. Errors not excepted to on trial below will not be considered in supreme court unless apparent upon record: Cunningham v. Cunningham, 121-413.

Settled rule of supreme court to affirm every judgment not appearing to be erroneous: Thomas v. Alexander, 19-385. Judgment of court below will be affirmed where no case on appeal, and nothing in record to show exception taken: Mott v. Ramsay, 90-29—where no statement of case, assignment of error nor any error apparent in record, State v. Whitmire, 112-895—where only exception in case on appeal is exception to whole of charge, and it not affirmatively appearing that not more than one proposition of law laid down therein, no error appearing on face of record proper, Hemphill v. Morrison, 112-756.

Insufficiency of verdict to support judgment is a defect on face of record proper: Strauss v. Wilmington, 129-99. Where it appears from record that question of law was reserved by court below, to which verdict subject, and that question was decided in favor of appellee, verdict set aside and nonsuit ordered, but judge fails to state what question was, there must be venire de novo: Brown v. Kyle, 47-442. Where court unable to ascertain from record and statement of trial judge sufficient facts to determine case, new trial will be ordered: Sprinkle v. Wellborn, 132-468. Where record or case clearly discloses ground of appeal, same will not be dismissed for absence of formal exceptions or assignment of error: Allen v. Griffin, 98-120. Supreme court not bound to look to sufficiency of whole record and pronounce judgment upon it where same might be perfected by amendment before judgment necessary: Caroon v. Rogers, 51-240. When pleadings are so confused and vague as to leave it in doubt what parties are contending over, supreme court will not take cognizance of cause on appeal: Woodlief v. Merritt, 96-226. Appeal will be dismissed where it does not appear in record that appeal taken, Mfg. Co. v. Simmons, 97-89. Appeals will be dismissed where no index is sent up in record and printed, and no marginal references prepared: Sigman v. R. R., 135-181.

Where record proper differs from statement of case on appeal, former must control: Ladd v. Teague, 126-544; Sutton v. Phillips, 117-230; Threadgill v. Comrs., 116-616; McDaniel v. Scurlock, 115-295; State v. Ramsour, 113-642; State v. Carlton, 107-956; McCanless v. Flinchum, 98-358; McNeill v. Lawton, 97-16; State v. Keeter, 80-472, 82-547; Cansler v. Cobb, 77-30; Farmer v. Willard, 75-401—but where verdict in record ambiguous and case on appeal explanatory thereof, case will govern, Sutton v. Phil-

lips, 117-228—and where matters stated in case in regard to which record silent, they will be accepted as facts, McNeill v. Lawton, 97-16.

When final judgment rendered in supreme court upon appeal from final judgment in superior court, latter court has power to issue no other process in case than execution for its own costs: Grissett v. Smith, 61-297. Judgment for costs in supreme court is rendered in that court: Johnston v. R. R., 109-504.

In action in nature of quo warranto, to try title to public office to which relator appointed and qualified, judgment of supreme court in his favor immediately upon being filed, and ex proprio vigore, placed relator in possession of office, and no process of court necessary for that purpose, and though execution from supreme court unnecessary to give effect to judgment by placing relator in possession of office, it will not be recalled on motion of defendant: Caldwell v. Wilson, 121-480.

Section merely referred to in Printing Co. v. Herbert, 137-319; Pender v. Mallett, 123-61; Kruger v. Bank, 123-18; Caldwell v. Wilson, 121-473; Bradsher v. Cheek, 112-839; Allen v. R. R., 106-518; Walker v. Scott, 106-61; Phipps v. Pierce, 94-516; Greenlee v. Sudderth, 65-470; Bible Society v. Hollister, 54-12; Cates v. Whitfield, 53-267; Jones v. McLaurine, 52-393.

1543. Appeals dismissed, when. Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it.

Code, s. 967; R. C., c. 33, s. 20; 1848, c. 28; Supm. Ct. Rules, 15, et seq. For dismissal of appeal for failure to file undertaking, see sections 593, 596.

Appeal is not properly pending in supreme court until same has been docketed: Avery v. Pritchard, 93-267; Cross v. Williams, 91-497—and this provides only for dismissing appeal regularly brought up and docketed, Cross v. Williams, 91-497. Ordinarily, hereafter, motions to dismiss appeals will be allowed, upon a failure to comply with the rules of this court, without discussing the merits of the case: Davis v. Wall, 142-450.

DISMISSAL FOR FAILURE TO PROSECUTE. It is the duty of appellant to prosecute his appeal according to rules of court, which are not merely directory: Wiseman v. Comrs., 104-330. Appeal not prosecuted for two terms of supreme court will be dismissed when reached in regular order, unless good cause be shown for a continuance: Brantly v. Jordan, 92-291; Wiseman v. Comrs., 104-330. Where appellant, pending appeal from his conviction of crime, breaks jail, and is beyond process of court at time case called, appeal will be dismissed: State v. Keebler, 145-560.

DISMISSAL FOR FAILURE TO PERFECT APPEAL. Appeal will be dismissed, on motion of appellee, where requirements of statute for

perfecting it are not complied with: Hutchison v. Rumfelt, 82-425; Sever v. McLaughlin, 82-332; Walton v. Pearson, 82-464—except where record shows written agreement waiving lapse of time, or where alleged agreement is oral and disputed and such waiver can be shown by affidavit of appellee, rejecting that of appellant, Ibid. Compliance with the statutory regulations as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential; hence, it is no defense to say that negligence was the negligence of counsel and not negligence of the party: Cozart v. Assurance Co., 142-522. Appeal will not be dismissed upon ground that no notice of appeal given, where record shows that appeal bond filed and approved by court: Capehart v. Biggs, 90-373. Where delayed mail caused transcript not be docketed in time, appeal will not be dismissed: Walker v. Scott, 104-481. Appeal will be dismissed for failure of appellant to file printed record or brief in time prescribed, unless, for good cause shown, time extended: Stroud v. Tel. Co., 133-253; Calvert v. Carstarphen, 133-25. The attention of the profession is specially directed to the rules of this court, and to the decision in Davis v. Wall, 142-450, as being very proper for their careful consideration when preparing cases on appeal: Marable v. Railroad, 142-557. If appeal bond is not filed within ten days after rendition of judgment, unless waived by agreement of counsel of record, appeal will be dismissed: State v. Hamby, 126-1069; Harmon v. Herndon, 99-477; Boyden v. Williams, 92-546; Applewhite v. Forte, 85-596; Smith v. Reeves, 85-594; Brown v. Williams, 83-684; Sever v. McLaughlin, 82-332; State v. Walker, 82-696; State v. Donaldson, 83-683; State v. Spurtin, 80-362; State v. Patrick, 72-217; Taylor v. Brower, 78-8; Wade v. Newbern, 72-498; State v. Hawkins, 72-180; Bryan v. Hubbs, 69-423; see also Walker v. Scott, 104-481; Worthy v. Brady, 91-265; Chamblee v. Baker, 95-98; Turrentine v. R. R., 92-642—but not so, if filed before the transcript is sent up, or later, where good excuse shown for delay, Jones v. Asheville, 114-620; Graves v. Hines, 106-323; Howerton v. Sexton, 104-75; Harrison v. Hoff, 102-25; Jones v. Wilson, 103-13. Where case remanded that a lost record might be supplied by court below, but, though several terms of such court have passed, nothing has been done and no excuse offered by appellant, appeal will be dismissed: Cox v. Jones, 113-276. Where appeal reinstated, failure to print within time prescribed will not be deemed sufficient ground for dismissal: Briggs v. Jervis, 98-454. Sickness of attorney is sufficient excuse for want of diligence in perfecting appeal: Mott v. Ramsay, 90-372.

PROCEDURE BY APPELLEE TO DISMISS. Where appellant has failed to prosecute, appellee can have transcript sent up, or a certificate of clerk that appeal was taken, and case docketed and dismissed, Cross v. Williams, 91-496; Avery v. Pritchard, 93-266. The motion to dismiss must be made in writing: Brafford v. Reed, 124-346. The privilege to have case dismissed belongs to the appellee, not appellant: Davenport v. Grissom, 113-38. Motion to dismiss because appellant has failed to perfect appeal must be made at or before entering upon the hearing: Hutchison v. Rumfelt, 82-425; Chastain v. Chastain, 87-283—and comes too late after argument, Yancey v. Greenlee, 90-317.

Notice of motion to dismiss need not be given when made on ground

that no appeal bond has been filed: Jones v. Asheville, 114-620; Harmon v. Herndon, 99-477; Bowen v. Fox, 98-396—but where motion made on ground that appeal bond is irregular, or sureties have failed to justify, then notice of motion to dismiss must be given, McGee v. Fox, 107-766; Lackey v. Pearson, 101-651; Allison v. Whittier, 101-490; Harmon v. Herndon, 99-477; Bowen v. Fox, 98-396; Jones v. Slaughter, 96-541. No notice required when motion made to dismiss for failure to comply with rules as to transmission, docketing and printing record: Johnston v. Whitehead, 109-207.

Upon motion to dismiss for failure to docket appeal, appellant should then render his excuses, for he can not take advantage of them on motion to reinstate: Morgtage Co. v. Long, 116-77. Though a cause is docketed too late to be heard on the call of district to which it belongs, this court will enter a motion to dismiss after due notice to appellant, that trial of cause below may not be delayed by an invalid appeal: Dunn v. Marks, 141-232. Where appellee fails to move to dismiss when appellant has not docketed the transcript within time required, he can not so move when appellant has docketed the transcript before ending of the term and before appellee makes motion: Laney v. Mackey, 144-630; Packing Co. v. Williams, 122-406; Craddock v. Barnes, 140-427; Curtis v. R. R., 137-308; Benedict v. Jones, 131-474, and cases cited. Motion by appellee to docket and dismiss, made before docketing transcript, though not at first opportunity, will be allowed, Worth v. Wilmington, 131-532.

The appellee's motion to dismiss the appeal because (1) the exceptions are not "briefly and clearly stated and numbered" as required by the statute, Rev., 591, and Rule 27 of this Court; (2) the exceptions relied on are not grouped and numbered immediately after the end of the case on appeal as required by rules 19 (2) and 21; (3) the index is not placed at the front of the record as required by rule 19 (3), is allowed under rule 20, in the expectation that appellants hereafter will conform to these requirements: Davis v. Wall, 142-450.

REINSTATEMENT OF DISMISSED APPEAL. Motion to reinstate dismissed appeal may be heard not later than next term: Wiseman v. Comrs., 104-330. Motion to reinstate appeal dismissed for failure to print must be made at the same term and will only then be allowed for good cause shown: Pipkin v. Green, 112-355. Motion to reinstate must show no laches on the part of appellant: Ibid. Motion to reinstate will not be allowed on an excuse which should have been sent up in answer to the motion to dismiss: Paine v. Cureton, 114-606. Motion to reinstate on appellant's affidavit that his attorney was sick, it not appearing that appellant made any inquiries of his attorney regarding appeal, or sought to get other counsel to prosecute, was refused: Martin v. Chambers, 116-673—allowed, however, when appellant shows no laches, Mott v. Ramsay, 90-372. It is not duty of counsel to file appeal bond: Churchill v. Life Ins. Co., 92-485; Winborn v. Byrd, 92-7—nor his duty to have record printed, Griffin v. Nelson, 106-238—and where appellant does not show due diligence as to both he can not have his appeal reinstated, Ibid; Bowen v. Fox, 99-127.

Excuses for failure to docket must be rendered in reply to motion to dismiss and not upon motion to reinstate appeal: Mortgage Co. v. Long, 116-

77. **Failure of counsel to answer motion to dismiss regularly made can not be excused because he did not think motion would be considered at once:** Parker v. R. R., 121-501. **That clerk failed to send up transcript in time for docketing will not excuse laches of appellant in failing to have transcript sent up within time required:** Fain v. Rwy. Co., 130-29.

1544. No judgment on interlocutory order; opinion certified below. When an appeal shall be taken to the supreme court from any interlocutory judgment, the supreme court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions.

Code, s. 962. **No appeal should be taken from an interlocutory judgment or order:** Rogerson v. Lumber Co., 136-266; Navigation Co. v. Worrell, 133-93; Brown v. Nimocks, 126-808; Benton v. Collins, 121-66; Harding v. Hart, 118-839; Bruce v. Crabtree, 116-528; Brendle v. Reese, 115-552; Sinclair v. R. R., 111-507; Sprague v. Bond, 111-425; Hilliard v. Oran, 106 467; Warren v. Stancil, 117-112; Clement v. Foster, 99-255; Blackwell v. McCaine, 105-460; Arrington v. Arrington, 91-301; Hailey v. Gray, 93-195; Welch v. Kinsland, 93-281; Loftin v. Rouse, 94-508; Sneeden v. Harris, 107-311; Williams v. Walker, 107-334; Railroad v. Warren, 92-620; Leak v. Covington, 87-501; Comrs. v. Cook, 86-18; Hines v. Hines, 84-122; Tel. Co. v. R. R., 83-420; Hailey v. Gray, 93-195; State v. Pollard, 83-597—**unless it affects the substantial rights of appellant,** Martin v. Flippin, 101-452; Lane v. Richardson, 101-181; Merrill v. Merrill, 92-657; Davis v. Ely, 100-283; Clement v. Foster, 99-255; Leak v. Covington, 95-193; Hailey v. Gray, 93-195; Spencer ex parte, 95-271. **No appeal will be entertained from order appointing commissioners to assess damages until after final judgment in action:** Hendrick v. R. R., 98-431; Railroad v. Warren, 92-620; Telegraph Co. v. R. R., 83-420—**nor from interlocutory order making additional parties,** Lane v. Richardson, 101-181—**nor from order made to ascertain controverted facts and without prejudice to parties,** Sutton v. Schonwald, 80-20—**nor from an order of reference,** Shankle v. Whitley, 131-168; Jones v. Wooten, 137-421—**nor from order setting aside arbitrator's award and directing other proceedings,** Warren v. Stancill, 117-112—**nor from order of examination of person in supplementary proceeding,** Bruce v. Crabtree, 116-528—**nor from order assessing defendant's damages on dissolution of attachment,** Brown v. Nimocks, 126-808—**nor from order of state court to certify record for removal to federal court,** Mayo v. Dockery, 127-1—**nor from order remanding condemnation proceedings to clerk, though plea in bar filed by defendant,** Railroad v. Newton, 133-132.

In criminal cases, appeal lies only from final judgment, and never from interlocutory ruling: State v. Nash, 97-514; State v. Hazell, 95-623; State v. Polk, 91-652; State v. Saunders, 90-651; State v. Twiggs, 90-685; State

v. McDowell, 84-798; State v. Pollard, 83-597; State v. Hinson, 82-540; State v. Keeter, 80-472; State v. Wiseman, 68-203; State v. Jefferson, 66-309; State v. Bailey, 65-426.

Appeals from interclocutory orders, judgments and decrees, carried up for review only on rulings of court upon that specific point: Green v. Griffin, 95-50; Perry v. Tupper, 71-380—**but order or judgment appealed from not vacated, though further proceedings under same suspended until validity there determined,** Green v. Griffin, 95-50—**and until decision certified to superior court to the end that cause may be proceeded with,** Perry v. Tupper, 71-380.

Interlocutory judgments, as to which no assignment of errors is set out or appears on record, will not be considered: Shields v. McNeill, 118-590.

When supreme court passes upon interloctuory order and decides no error, court below can not modify it in any respect: Murrill v. Murrill, 90-120; Dobson v. Simonton, 100-56—**its power being confined to incidental matters of detail necessary to carry decree into effect, not inconsistent therewith,** Murrill v. Murrill, 90-120.

If supreme court commits error in ordering superior court to issue certain process, only remedy is by petition to rehear: Perry v. Tupper, 71-380.

See Grissett v. Smith, 61-299, where section quoted at length.

As to premature appeals, see State v. Dewey, 139-556; Rogerson v. Lumber Co., 136-266; Navigation Co. v. Worrell, 133-93; Ayers v. Makely, 131-60; Shankle v. Whitley, 131-168; Hughes v. Pritchard, 129-42; Connor v. Dillard, 129-50; Jones v. R. R., 127-188; Best v. Dunn, 126-560; Goode v. Rogers, 126-62; Gammon v. Johnson, 126-64; Railroad v. King, 125-454; Benton v. Collins, 121-66; Harding v. Hart, 118-839; Bennett v. Shelton, 117-103; Vann v. Lawrence, 111-32; Milling Co. v. Finlay, 110-411; Guilford County v. Georgia Co., 109-310; Turner v. Holden, 109-182; Bain v. Bain, 106-241; Hilliard v. Oram, 106-467; Blackwell v. McCaine, 105-460; Bazemore v. Bridgers, 105-191; Mfg. Co. v. Buxton, 105-74; Wallace v. Douglas, 105-42; Thornton v. Lambeth, 103-86; Martin v. Flippin, 101-452; Lane v. Richardson, 101-181; Hendrick v. R. R., 98-431; University v. State National Bank, 92-651; Jones v. Call, 89-188.

1545. Power over amendments; further testimony, when. The supreme court shall have power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment. Also to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And also, whenever it shall appear necessary for the purpose of justice, to allow and direct the taking of further testimony in any case which may be pending in said court under such rules as may be prescribed, or the court may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below.

Code, s. 965; R. C., c. 33, s. 17; 1777, c. 115, s. 75; 1785, c. 233; 1792, c. 360; 1831, c. 46. See annotations under section 507.

POWER TO AMEND. Supreme court may amend only to same extent and in such cases as could superior court: Robeson v. Hodges, 105-50; see section 507. Where objection for defect of parties made below and overruled, supreme court will not exercise discretionary power of amendment to destroy exception duly taken below: West v. R. R., 140-620; Grant v. Rogers, 94-755; see Justices v. Simmons, 48-188. Supreme court will not allow amendment where it would perhaps present case substantially different from one tried below, and raise question of law not presented in present appeal: Bonner v. Stotesbury, 139-3.

Supreme court has power to allow pleadings to be amended in that court: Allen v. Sallinger, 108-160; Fleming v. Murph, 59-61. Amendment to answer by striking out $2,337 and substituting $3,500 therefor asked by petitioner under section can not be allowed: Mfg. Co. v. Gray, 126-108. Supreme court may permit pleadings to be filed in that court nunc pro tunc: McLean v. Breece, 113-393.

Where it appeared during trial that evidence sustained issues embodying averment of payment of purchase money by plaintiff, amendment of pleadings to that effect will be permitted in supreme court: Leatherwood v. Fulbright, 109-683. Where agreed in court below the complaint may be amended so as to supply necessary averments, but it is not done, supreme court will allow amendment to be filed in that court: Freight Discrimination cases, 95-434.

Where superior court ordered nol pros as to certain defendants who appealed and moved in supreme court to make other persons parties, whose presence only necessary if nol pros erroneously entered, such motion will not be considered until question raised by nol pros disposed of: Lee v. Eure, 92-283. Where action on administration bond brought in name of administrator de bonis non, instead of state on his relation, amendment making proper plaintiff will be allowed in supreme court, without terms: Grant v. Rogers, 94-755—but such amendment will not be allowed when it would destroy just legal ground for appeal which existed when same taken, Ibid. When assignment of judgment made during pendency of appeal, and it appeared that judgment bought for another person, real purchaser and not nominal assignee should be substituted as plaintiff under section: Field v. Wheeler, 120-264. Amendment of process by insertion of words "State on relation of" may be allowed in supreme court: Forte v. Boone, 114-176. While amendment substituting parties can be allowed in supreme court, it will not be permitted when it will put opposite party at disadvantage: Hodge v. R. R., 108-24; Kent v. Bottoms, 56-69. Supreme court will not grant order to make parties unless it appears probable that proposed parties are in some way necessary to proper and complete determination of action: Lee v. Eure, 92-283. Amendment not allowed to introduce party plaintiff who could maintain action, while party to record when appeal taken could not do so, and objection made for that cause: Grant v. Rogers, 94-755.

Failure of receivers, suing as such, to produce certified copy of order of dissolution of bank and of their appointment as receivers, such allegation

not being admitted in answer, is defect of proof which can not be supplied, after appeal, by amendment under this section: Person v. Leary, 126-504. While it may be that supreme court has power to direct or allow amendment to record below of cause while appeal pending, it is clear that it has no such power after final judgment rendered therein: Walton v. McKesson, 101-428. Amendment will be refused where effect of same would be to reverse judgment below, which was rightly given and to enter judgment here for different party plaintiff: Justices v. Simmons, 48-188.

CASE REMANDED TO SUPERIOR COURT FOR FURTHER ACTION. Where plaintiff becomes insane pending appeal by defendant from judgment awarding plaintiff custody of her minor children, case will be remanded to superior court for proper action: Jones v. Cotten, 108-457. Supreme court may remand case so that amendments may be made in court below: Robeson v. Hodges, 105-50. In certain cases supreme court may direct further testimony to be taken: Gatewood v. Burns, 99-357—or direct issue of fact to be framed and remanded for trial by jury, Ibid. Supreme court has power in proper cases to remand causes to the end that proper mandments may be made or further proceedings taken in court below: Holley v. Holley, 96-229. Where judge below, to whose decision both law and facts referred under section 540, fails to find facts fully and distinctly, so that his conclusions of law can not be reviewed, case will be remanded for fuller finding of facts: Straus v. Beardsley, 79-59. Where jury leave, as open question, whether debt secured by mortgage has not been paid in part, mortgagor has right to have such facts found by a jury, and cause will be remanded so that issue may be made up and responded to by jury below: Barnes v. Brown, 69-439.

Where judgment below rendered against three defendants, only one of whom appealed, supreme court upon affirming judgment, will remand case so that judgment may be enforced against all of defendants: Baxter v. Wilson, 95-137. When demurrer filed for want of proper party, from facts presented by pleadings, and matter left in doubt, court must remand case: Bunting v. Foy, 66-193. Where no facts found and pleadings and affidavits conflicting, case will be remanded that facts may be found by court below, or by jury upon proper issues: Kitchen v. Troy, 72-50. Where judge below does not find facts upon which he overruled defendant's exceptions, court will remand case that such facts may be found: Froneberger v. Lewis, 70-456. Where transcript fails to set out facts necessary for determination of case on appeal, it will be remanded to the end that same may be supplied or found by court below: Bank v. Blossom, 89-341. When it appears that other parties necessary to final determination of action, court will remand cause that such interested parties may be brought in: Kornegay v. Morris, 123-128; Meadows v. Marsh, 123-189; Brooks v. Headen, 80-11. Where demurrer overruled in court below, with leave to defendant to answer over and to plaintiff to amend complaint, cause will be remanded for further proceedings in court below: Morris v. Gentry, 89-248. Cause will not be remanded for purpose of making case substantially different from one tried in court below: Whitehead v. Spivey, 103-66. Upon allegation of inadvertance in including supersedeas bond in appeal bond, issue therein may be sent down to superior court to be tried by jury;

Burnett v. Nicholson, 86-728. **Where issues submitted do not cover the whole merits of case, supreme court will retain cause and frame other issues to be passed upon by jury in court below:** Allen v. Baker, 86-92. **Where answer insufficient to defeat plaintiff's recovery, and court below held same to be sufficient, case will be remanded to give defendant opportunity to move for such amendment as he may be advised:** Foy v. Haughton, 83-467. **Where no judgment entered in court below, record will be remanded so that judgment may be entered:** Baum v. Shooting Club, 94-217. **Where, in superior court, additional findings necessary in order to do justice between parties, case may be sent back for trial of additional issues:** McDonald v. Carson, 95-377. **Where judgment below reversed, cause in certain cases should be remanded to be proceeded with as if no erroneous ruling had been made:** Scott v. Queen, 95-340. **Where case left by consent to be tried both as to facts and law by judge and he fails to find some material fact, it will be remanded that such fact may be found:** Knott v. Taylot, 96-553.

As bearing upon section, see Crenshaw v. Street R. R. Co., 140-192.

For cases under old practice, see Hart v. Roper, 41-349; Mallory v. Mallory, 45-80; Williams v. Chambers, 45-75.

Section merely referred to in Hollomon v. Hollomon, 125-33; Wilkinson v. Brinn, 124-725; Monger v. Kelly, 115-295; Boyer v. Teague, 106-573; Wilson v. Pearson, 102-290; Grant v. Edwards, 88-250.

1546. Petition to rehear may be filed when; execution restrained. A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or either of the associate justices, may, upon such term as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

Code, s. 966; R. C., c. 33, s. 18; Supm. Ct. Rules, 52, 53, 54. **Proper and only way to review decision of supreme court is by petition to rehear:** Holland v. R. R., 143-437; Holley v. Smith, 132-36; Jones v. R. R., 131-133; Setzer v. Setzer, 129-297; Kramer v. R. R., 128-270; Hendon v. R. R., 127-112—**for it is not permissible by second appeal to review former decree of supreme court,** Green v. Green, 143-406; Holley v. Smith, 132-36; Best v. Mortgage Co., 131-70; Jones v. R. R., 131-133; State Hospital v. Fountain, 129-90; Setzer v. Setzer, 129-296; Perry v. R. R., 129-334; Kramer v. R. R., 128-269; Wright v. R. R., 128-77; Hendon v. R. R., 127-110; Shoaf v. Frost, 127-307; Pretzfelder v. Ins. Co., 123-164. **Second rehearing is permissible only when in first rehearing court has reversed or materially changed opinion sought to be reheard:** Nelson v. Hunter, 145-334. **Unnecessary to consider assignment of error in petition to rehear, "for that, granting correctness of every legal proposition laid down by court and that findings of fact supported by record, yet conclusion erroneous:"** Bunn v. Braswell, 142-113. **Where new trial without passing upon certain**

exceptions and upon rehearing of exceptions upon which new trial granted, is reversed, supreme court, personnel of same having been partially changed, orders a reargument of exceptions not passed upon, without petition for same being filed: Fleming v. R. R., 132-714. Motion for new trial upon newly discovered evidence is not properly before court upon petition to rehear: Flemming v. Borden, 127-214. Word "filed," as used in section, defined: Bird v. Gilliam, 123-63. On petition to rehear case formerly decided, supreme court will not consider matters not contained in transcript of record: Presnell v. Garrison, 122-595. Petition to rehear must be upon record as it was at former hearing: Ibid. Rehearings granted only in exceptional cases and, when granted, every presumption is in favor of judgment already rendered: Weisel v. Cobb, 122-67. Section can not be allowed to give losing party absolute right to rehearing, and to have his petition considered by whole court contrary to its rule governing practice in such cases: Herndon v. Ins. Co., 111-384, wherein section generally discussed. This section and section 1549 are in pari materia, and must be construed together: Emery v. R. R., 102-234. Semble, that proper way to obtain relief against judgment of supreme court dismissing appeal on point of law is by petition to rehear, and not motion to reinstate: Bowen v. Fox, 99-127. Court will not, on petition to rehear, reexamine same authorities and same course of reasoning in order to reverse judgment: Dupree v. Ins. Co., 93-237.

Where grounds of error assigned in petition to rehear substantially same as those argued and passed upon in former hearing, court will not disturb judgment: Ruffin v. Harrison, 91-76—nor in such case will order restraining collection of execution upon judgment be granted: Ibid.

Applications for rehearing are based only upon alleged errors in law and newly discovered evidence: Wilson v. Lineberger, 90-180—therefore such proceedings not proper mode of asserting claim to uncollected assets not included in former account of party to be charged, Ibid.

Supreme court has no power to entertain petition to rehear criminal actions: State v. Council, 129-511; State v. Jones, 69-16; State v. Starnes, 94-981.

Rehearing will not be granted after time limited: Strickland v. Draughan, 91-103; Young v. Greenlee, 85-593. When rehearing has been ordered and a manifest error is made to appear, court will correct it: Hodgin v. Bank, 125-503; The burden of showing error is on the petitioner: Webb v. Hicks, 125-201; Weisel v. Cobb, 122-67. Where first decision reversed on rehearing, purchasers of land, before time for rehearing expired, not protected: Bird v. Gilliam, 125-76. Effect of reversal upon a new trial already had under first decision, see Hodgin v. Bank, 125-503. Point heard, considered and decided on former hearing will not be considered on rehearing where no new authority presented and nothing overlooked: Moore v. Beaman, 112-558. No rehearing granted on summary motion to modify final judgment of supreme court: Ruffin v. Harrison, 91-398. Case where rehearing granted, before opinion certified down, without formal petition: Robinson v. McDowell, 125-343. Court will not consider point not certified as erroneous by counsel making certificate: Kerr v. Hicks, 133-175. Case where former opinion modified but petition dismissed: Coble v. Huffines, 133-426.

GROUNDS FOR REHEARING. In order to obtain a rehearing it must appear either that decision handed down was clearly erroneous: School Directors v. Asheville, 137-503; In re Drury, 136-81; Capehart v. Burrus, 124-48; Hudson v. Jordan, 110-250; Emry v. R. R., 105-45; Weathersbee v. Farrar, 98-255; Barcroft v. Roberts, 92-249; Wilson v. Lineberger, 90-180; University v. Harrison, 93-84; Devereux v. Devereux, 81-12; Perry v. Tupper, 71-380—that some fact found and relied upon by court was incorrectly found, Webb v. Hicks, 125-200; Mullen v. Canal Co., 115-15—that decision was hastily made, Mullen v. Canal Co., 115-15; Hudson v. Jordan, 110-250; Haywood v. Daves, 81-8—that material point of law or fact, or a direct authority overlooked, Mullen v. Canal Co., 115-15; Tucker v. Tucker, 110-333; Hudson v. Jordan, 110-250; Gay v. Grant, 105-478; Weathersbee v. Farrar, 98-255; Fisher v. Mining Co., 97-95; Dupree v. Ins. Co., 93-237; Lockhart v. Bell, 90-501; Mizell v. Simmons, 82-1; Haywood v. Daves, 81-8; Watson v. Dodd, 72-240—that, in its application of law or facts of case, court omitted to consider material fact, Gay v. Grant—that new evidence has been discovered, Barcroft v. Roberts, 92-249; Wilson v. Lineberger, 90-180—that court overlooked material admissions in pleadings of prevailing party, Mason v. Pelletier, 80-66—that court did not consider material defenses, Williams v. Williams, 71-216—or that some weighty consideration requires a rehearing, Emry v. R. R., 105-45; Fisher v. Mining Co., 97-95.

No ground for a rehearing that opinion of court was not put in writing: Parker v. R. R., 133-335.

PRACTICE IN OBTAINING REHEARING. Petition must be filed in accordance with requirements of rule 12 (now rules 52 and 53) and this section: Strickland v. Draughan, 91-103. Petition may be filed at any time before expiration of the first twenty days of the next succeeding term: Bird v. Gilliam, 123-63, 125-79—and may be filed during term at which opinion filed, Emery v. R. R., 102-234. In computing time in which petition must be filed, first day must be excluded: Cook v. Moore, 95-4; Barcroft v. Roberts, 92-249—and last day also when falls on Sunday, Ibid. Petition must contain plain, concise statement of facts or law overlooked or erroneously decided, and not mere argument: Weathers v. Borders, 124-610; White v. Jones, 92-388—and must not assign other grounds for alleged error than those presented at first hearing, McDonald v. Carson, 95-377; Weathersbee v. Farrar, 98-255; but see Hodgin v. Bank, 125-503; also cases cited in paragraph above.

As bearing upon section, see Allen v. R. R., 106-515; Morisey v. Swinson, 106-221; Solomon v. Bates, 118-322.

1547. Exhibits, how proved. Exhibits or other documents relative to cases pending in the supreme court may be proved by the parol testimony of witnesses to be examined in said court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court and suitors in said court may have subpœnas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for travelling, ferriage and attendance

as witnesses in the superior court: Provided, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned.

Code, s. 963; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1. **Though witnesses in some instances may be summoned to supreme court, it has not been the practice:** In re Deaton, 105-63.

1548. Opinions and judgments to be in writing. The justices shall deliver their opinions and judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary.

Code, s. 964; 1893, c. 379, s. 5; R. C., c. 33, s. 16; 1810, c. 785. **As to what is meant by "opinions,"** see State v. Lane, 26-435.

Filing of written opinion discretionary with supreme court: Parker v. R. R., 133-335—**the legislature not having the power to compel it,** State v. Council, 129-515, and cases cited.

Justices not required to write their opinions in full: State v. Council, 129-511—**nor to state the reasons for opinion, but can simply announce decision,** Bradsher v. Cheek, 112-838.

No provision of law requiring clerk supreme court to certify to court below opinion as distinguished from decision of case: State v. Ketchey, 71-147.

1549. Certificates transmitted, when; execution for costs; penalty. The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from said court, which shall have been on file ten days; and thereupon the said clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the said certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars.

Code, s. 968; 1887, c. 41; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1, s. 3. **As to costs on appeal, see sections 1279, 1280.**

Opinions should be certified down on first Monday in each month, provided they have been on file for ten days: State v. Council, 129-514. Certificate from supreme court announcing no error in judgment appealed from, precludes court below from all right or power to modify that judgment in any respect: Merrimon v. Lyman, 126-541; Banking Co. v. Morehead, 126-279; Dobson v. Simonton, 100-56; Murrill v. Murrill, 99-120—or to take any action in case, McCall v. Webb, 126-760. When supreme court has certified decision to court below for judgment there, this court has no further jurisdiction of case: James v. R. R., 123-299.

Judgment for costs in supreme court is rendered in that court: Johnston v. R. R., 109-504—and superior court has no jurisdiction in matter: Ibid.

Practice in entering judgment on certificate from supreme court discussed in Johnston v. R. R., 109-504.

This section and section 1546 are in pari materia and must be construed together: Emery v. R. R., 102-234.

Section requires decisions of supreme court to be certified to lower courts during the term, thus placing them beyond control of court in term time: Ibid.

No provision of law requiring clerk of supreme court to certify to court below opinion as distinguished from decision of case: State v. Ketchy, 71-147.

When final judgment rendered in supreme court upon appeal from final judgment in superior court, latter court has power to issue no other process than execution for its own costs: Grissett v. Smith, 61-297.

The court, in its judgment, may direct an opinion certified down in advance of statutory time: State v. Herndon, 107-934.

DUTY OF SUPERIOR COURT ON APPEAL CERTIFIED. Where on appeal in capital case there is no statement of case, and no error appears in record, it will be certified to court below that there was no error so that it may proceed to judgment: State v. Leitch, 82-539; State v. Murray, 80-364; State v. Edney, 80-360.

Where supreme court decides appeal in favor of state it is duty of judge below to pass sentence at next term of court: State v. McIntire, 46-1.

Where a new trial or venire de novo awarded by supreme court, case goes back for new trial on whole merits, and court below should proceed as though no former trial had taken place, McMillan v. Baker, 92-110, Beville v. Cox, 109-265.

Decision of court in criminal cases not a judgment or sentence, but simply an order to court below to "proceed to judgment and sentence agreeable to the decision and the laws of the state:" State v. Applewhite, 75-229; State v, Jones, 69-16. Where case heard in supreme court and certified to court below to proceed with according to law, no notice necessary of motion for judgment in conformity with certificate: Williams v. Whiting, 94-481.

1550. Records recorded. The court may order the clerk to record such parts of the record of cases as it may deem necessary.

Code, s. 959.

III. Officers of

1551. May appoint acting attorney general. If the attorney general should fail at any term of the supreme court to attend to the business which by law is assigned to him, the court may appoint some counsel learned in the law to discharge his duties during the term.

Code, s. 969; R. C., c. 33, s. 22; 1846, c. 29.

1552. Reporter. The supreme court may employ a reporter of its decisions.

Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 429. **For compensation, see section 2771.**

1553. Clerk. The clerk of the supreme court shall be appointed by the court, and shall hold his office for eight years.

Const., Art. IV, s. 15.

1554. Money in hands of clerk. The clerk of the supreme court shall, at the beginning of each fall term, produce to the court a statement on oath of all moneys remaining in his hands which have been paid into his office three years or more previous thereto, whether received directly from parties or from his predecessor in office, and is not detained in his hands by special order of the court, specifying therein the name of the person to whom the same is payable, and his address, if known; a copy of which report shall be transmitted to the state treasurer and to the auditor.

Code, s. 1864; R. C., c. 73; 1823, c. 1186; 1831, c. 3.

1555. Marshal. The supreme court may appoint an officer to be styled "marshal of the supreme court," removable at will, who shall attend upon the court during its sessions.

Code, s. 950; 1873-4, c. 34; 1881, c. 306.

1555a. Janitor and Assistant Librarian. A janitor of the supreme court shall be appointed by said court. He shall also act as assistant librarian of the supreme court.

1907, c. 732, s. 2.

CHAPTER 30.

DESCENTS.

1556. Rules of. When any person shall die seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules:

Code, s. 1281; R. C., c. 38, s. 1. **Upon death of an intestate, title to**

estate descends and vests at once in his heirs: Harris v. Russell, 124-547. It can not stand in abeyance and vest in future, like an executory devise: Ibid. 150-484

For an interesting case discussing the cannons of descent generally, see Clement v. Cauble, 55-86.

In the descent of acquired estates, the only qualification necessary to a collateral heir is that he be the nearest relation of the person last last seized. In descended estates he must be of the blood of the first purchaser: Bell v. Dozier, 12-333.

RULE 1. *Lineal descent.*

Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided.

Code, s. 1281; R. C., c. 38, Rule 1. Where remainder or reversion, expectant upon freehold estate, comes by descent, and reversioner or remainderman dies during continuance of particular estate, person claiming estate by inheritance must make himself heir to original donor who erected estate: King v. Scoggins, 92-99. Where reversion or remainder comes by descent and is conveyed by deed or devise to stranger before determination of particular estate, donee takes by purchase, and estate will descend to his heirs: Ibid. Where remainder or reversion acquired by purchase, one claiming estate by descent must make himself heir to first purchaser of remainder or reversion at time when it comes into possession, Ibid. Where estate devised to person for life, remainder to another in fee, and remainderman died in lifetime of tenant; held, that estate descended to heirs of remainderman, although he was never actually seized, and not to the heirs of devisor: Ibid—for under the rule neither actual nor legal seizin necessary to make the stock in devolution of estates, Sears v. McBride, 70-152. Where remainderman dies before life tenant, upon death of life tenant remainder descends to heirs at law of original remainderman; Early v. Early, 134-258.

Rule merely referred to in Norton v. McDevit, 122-759.

RULE 2. *Females inherit with males, younger with older children; advancements accounted for.*

Females shall inherit equally with males, and younger with older children: Provided, that whenever a parent shall die intestate, having in his or her lifetime settled upon or advanced to any of his or her children, any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the per-

sonal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced or not equally advanced. And in case any one of the children shall have been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children shall have been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate.

Code, s. 1281; R. C., c. 38, s. 1, Rule 2; 1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2. **For annotations on the subject of "advancements," see under section 133.**

Value of advancements to be estimated as of time same is made. Ward v. Riddick, 57-22; Lamb v. Carroll, 28-4; Stallings v. Stallings, 16-298.

Rule abolishes priority of male over female line and places them on perfect equality both as to collateral and lineal descent: Bell v. Dozier, 12-334.

RULE 3. *Lineal descendant represents ancestor.*

The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living.

Code, s. 1281; R. C., c. 38, Rule 3; 1808, c. 739. **Right of representation under rule is indefinite as well among collateral as lineal kindred:** Johnston v. Chesson, 59-147—**and heirs of deceased collateral relatives represent their ancestors, and take what they, if living, would have taken,** Draper v. Bradley, 126-72.

Under rule grandchildren represent their ancestors and take estate per stirpes and not per capita: Crump v. Faucett, 70-345—**and next collateral relations of person last seized, who are equal degree, take per stirpes, and not per capita,** Cromartie v. Kemp, 66-382; Clement v. Cauble, 55-82; Haynes v. Johnson, 58-124. **Heirs of a naked trustee, who joined in a mortgage, take no interest, legal or equitable:** Fleming v. Barden, 126-455.

RULE 4. *Collateral descent when estate derived from ancestor.*

On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person

thus advanced would in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor subject to the two preceding rules.

Code, s. 1281; R. C., c. 38, Rule 4; 1808, c. 739. **The effect of this section is that purchased estates descend to the nearest relations whether of the paternal or maternal line; and that descended estates and certain purchased estates (which the section puts on same footing with those descended) descend to nearest relations of the blood of ancestor or person from whom estate moved:** Burgwyn v. Devereux, 23-586. **Person dying intestate, without lineal descendants, real estate inherited from father descends to brother, who was next collateral relation capable of inheriting, of blood of father:** Jones v. Hoggard, 108-181.

Where nearest relations of intestate who derived estate through father were paternal aunt, maternal aunts, paternal grandfather, and maternal grandmother, paternal aunt entitled to estate as being of blood of ancestor: Gillespie v. Foy, 40-280.

Where estate vests in surviving father or mother under rule 6, immaterial whether such parent be of blood of purchasing ancestor, McMichal v. Moore, 56-471.

Half brothers and sisters not of blood of purchasing ancestor can not take estate: Little v. Buie, 58-10—**and where person last seized died leaving as nearest relation a half sister not of blood of first purchaser, and remote collaterals of such blood, inheritance will descend to such collaterals,** Dozier v. Grandy, 66-484—**for in descended estates collateral must be of blood of first purchaser,** Bell v. Dozier, 12-333.

Where descended estate inherited by person, through a series of descents and settlements, who dies without issue, land results back to those of collateral relations who would be heirs of ancestor from whom it originally descended: Wilkerson v. Bracken, 24-315; Felton v. Billups, 19-308.

In descent of real estate under rule, next collateral relations of person last seized, who are of equal degree, take per stirpes, and not per capita: Cromartie v. Kemp, 66-382; Haynes v. Johnson, 58-124; Clement v. Cauble, 55-82.

Where devisee could not be heir, or one of heirs of devisor, estate passes to collateral relations upon side of mother as well as those upon side of father: Osborne v. Widenhouse, 56-238; Burgwyn v. Devereux, 23-586. **For general discussion of rule,** see Burgwyn v. Devereux, 23-583.

Cases under old act of 1784, which is now superseded by this rule: Seville v. Whedbee, 12-160; Ham v. Martin, 8-423; Doe v. Sheppard, 7-334.

Rule merely referred to in Weeks v. Quinn, 135-425; Early v. Early, 134-260; Sawyer v. Sawyer, 28-408.

RULE 5. *Collateral descent when estate not derived from ancestor.*

On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an

ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules.

Code, s. 1281; R. C., c. 38, Rule 5; 1808, c. 739. **Where estate had been transmitted by descent, and blood of acquiring ancestor is extinct, upon death of person last seized intestate and without issue, estate descended to his nearest collateral relations:** University v. Brown, 23-387.

In descent of acquired estates the only qualification necessary for collateral heir is that he be nearest relation of person last seized: Bell v. Dozier, 12-333.

For cases under old act of 1784, superseded by this rule, see Ross v. Toms, 9-9; Pritchard v. Turner, 9-435.

RULE 6. *Half blood inherits with whole; parent from child.*

Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided, that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father if living, and if not, then in the mother if living.

153-246
153-26

Code, s. 1281; R. C., c. 38, Rule 6; 1808, c. 739. **Where person last seized survived by child and widow, and child inherits estate from him and dies before widow, heirs of widow and not those of husband inherit estate:** Weeks v. Quinn, 135-425—**and where child died leaving no issue capable of inheriting, nor brother, nor sister, nor issue of such, but leaving father surviving, inheritance vests in him,** Jarvis v. Davis, 99-42; Kincaid v. Beatty, 98-340; McMichal v. Moore, 56-473—**though in such case, where father dead, estate vests in mother,** Early v. Early, 134-266. **Where person died seized of lands descended through mother from her father, and left no issue, nor brother nor sister, except half sister not of mother's blood, the father surviving took inheritance:** Little v. Buie, 58-10—**and where person dies without issue or sisters or brothers or issue of same, the father or mother will take inheritance regardless of whether he or she is of blood of purchasing ancestor,** McMichal v. Moore, 56-471—**and proviso in rule applies to cases where surviving brother or sister can not inherit, as well as to cases where none survive descendents,** Bell v. Dozier, 12-333. **For cases under old act of 1784, superseded by this rule,** see Ross v. Toms, 9-9; Pritchard v. Turner, 9-435; Doe v. Sheppard, 7-334.

For decision prior to amendment of rule 1, and passage of rule 12, which changed law, see Lawrence v. Pitt, 46-344, as explained in Sears v. McBride, 70-152.

As bearing upon rule, see Dozier v. Grandy, 66-484; M'Kay v. Hendon, 7-209.

RULE 7. *Persons unborn take, when.*

No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized.

Code, s. 1281; R. C., c. 38, Rule 7; 1823, c. 1210. **Upon death of father seized of lands, his wife being then enciente, inheritance will immediately vest in child en ventre sa mere:** Deal v. Sexton, 144-157. **Inheritance not divested by birth of child more than ten lumar months after death of person last seized,** Britton v. Miller, 63-270. **Rule only applicable where person last seized has died since enactment of same,** Rutherford v. Green, 37-121.

RULE 8. *When widow takes as heir.*

When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate.

Code, s. 1281; R. C., c. 38, Rule 8; 1801, c. 575, s. 1. **Under rule, widow is heir only where there is no one who can claim as heir of descedant:** Powers v. Kite, 83-156.

RULE 9. *Illegitimate children inherit from mother.*

When there shall be no legitimate issue, every illegitimate child of the mother and the descendant of any such child deceased shall be considered an heir, and as such shall inherit her estate; but such child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral.

Code, s. 1281; R. C., c. 38, Rule 10; 1799, c. 522. **Person, who is legitimate, claiming under collateral kinsman of mother, excluded from any benefit under this rule:** Bettis v. Avery, 140-184—**which has reference only to lineal descendant from mother to illegitimate child, and not to any collateral descendant from her kindred to child as her representative, for rule excludes right to inherit, as representative of illegitimate mother, any part of estate of her kindred, either lineal or collateral, neither can illegitimate child of mother inherit where there are legitimate children:** Flintham v. Holder, 16-347—**and illegitimate children of mother can not inherit from legitimate children,** Ibid.

Rule merely referred to in Norton v. McDevit, 122-759; Tucker v. Tucker, 110-334, 108-235; Ivey v. Granberry, 66-228.

RULE 10. *Who may take from illegitimate children.*

Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock.

And in case of the death of any such child or his issue without leaving issue, his estate shall descend to such person as would inherit, if all such children had been born in wedlock: Provided, that when any illegitimate child shall die without issue, his inheritance shall vest in the mother in the same manner as is provided in rule six of this chapter.

Code, s. 1281; R. C., c. 38, Rule 11. **Upon death of illegitimate child, intestate, unmarried and without issue, leaving brothers and sisters born of same mother, some legitimate and others illegitimate, his real estate descends to brothers and sisters alike, in equal parts:** McBride v. Patterson, 78-412—**and upon death of illegitimate child, intestate and without issue, leaving legitimate sister born of same mother, real estate of such intestate descends to such sister, to exclusion of intestate's widow,** Powers v. Kite, 83-156; Flintham v. Holder, 16-345. **Legitimate person, who does not claim directly from brother or sister, or from issue of heirs of either, but from illegitimate first cousin, comes within neither letter nor reason of rule:** Bettis v. Avery, 140-184.

Illegitimate children may inherit from each other; Flintham v. Holder, 16-345.

Persons born in slavery of slave parents, who were not legitimated by marriage of parents subsequent to war, have rights of illegitimates as between themselves: Tucker v. Tucker, 108-235—**hence where there are two brothers coming under this description, and one dies leaving no issue or brother or sister, other brother inherits,** Ibid.

For cases under rule before amendment, not now the law, see Ehringhaus v. Cartwright, 30-39; Sawyer v. Sawyer, 28-416, (both cases explained in McBride v. Patterson, 78-416).

Rule referred to in Tucker v. Tucker, 110-334; Arrington v. Alston, 6-326.

RULE 11. *Estate for life of another, not devised, an estate of inheritance.*

Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter.

Code, s. 1281; R. C., c. 38, Rule 12. **Rule merely referred to** in Batchelor v. Whitaker, 88-356.

RULE 12. *Seizin defined.*

Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance.

Code, s. 1281; R. C., c. 38, Rule 13. **All that is required by rule for creation of new stock of inheritances is that person from whom descent claimed should have had, at time of descent cast, some right, title or interest in inheritance, whether same vested in possession or not:** Early v. Early, 134-267—**for under rule, neither actual nor legal seizin necessary**

to make the stock in the devolution of estates, Sears v. McBride, 70-152.

Rule merely referred to in Redding v. Vogt, 140-566; Weeks v. Quinn, 135-427; Boyd v. Redd, 118-685.

RULE 13. *Issue of certain colored persons to inherit.*

The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are hereby declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead their issue shall represent them with all the rights of heirs at law and next of kin provided by this section for their deceased parents or either of them if they had been living; and the provision of this section shall apply to the estates of such children as are now deceased or otherwise.

Code, s. 1281; 1897, c. 153; 1879, c. 73. **Rule is valid law as to descents after its passage:** Woodward v. Blue, 103-109—**and renders legitimate the children of all colored parents living together as man and wife born before Jan. 1, 1868,** Ibid. **Children of woman of mixed blood, whose mother was white woman, who lived with slave as wife at time of their birth, are rendered legitimate:** Ibid.

Operation of rule does not extend beyond those persons occupying relation of parent and child: Tucker v. Bellamy, 98-31.

Where former slave died in 1880, seized of lands, without issue, but leaving surviving her children of brother, who died in 1860, a slave, such children incapable of taking lands by descent: Ibid.

Persons born in slavery, of slave parents, who were not legitimized by parents marrying subsequent to war, not legitimized by rule, except to extent of inheriting from parents, Tucker v. Tucker, 108-235.

Rule intended to apply to colored persons cohabiting as man and wife, who occupied such relations to each other exclusively: Branch v. Walker, 102-34—**and not where slave cohabited with several women, also slaves, at same time,** Ibid.

Rule operates only prospectively, and could not divest any estate theretofore acquired: Jones v. Hoggard, 108-178; Tucker v. Bellamy, 98-33. **There are two essential conditions of rule, cohabitation subsisting at birth of child and paternity of party from whom property claimed is derived:** Nelson v. Hunter, 140-598; Woodard v. Blue, 107-411, 103-116.

Rule legitimates child of colored parents born before Jan. 1, 1868, and merely extends child's right of inheritance to estate of father, which, before this enactment, was restricted to estate of mother: Bettis v. Avery, 140-184—**but does not transmit any title to such person claiming land as heir of illegitimate first cousin,** Ibid. **Children of slave parents, born prior to Jan. 1, 1868, whose marriage was duly legitimized as provided by section 2085 are legitimate, and can inherit lands of which father died seized:** Jones v. Hoggard, 108-178—**and are also entitled to inherit lands**

of which mother died seized, to exclusion of children born during cohabitation of mother with another slave, which relation ceased to exist prior to emancipation, Ibid.

The fact of cohabitation furnishes presumptive evidence that child is issue of persons living together as man and wife: Erwin v. Bailey, 123-635; Woodward v. Blue, 107-411, 103-109—yet presumption of legitimacy may be rebutted, Ibid—and to repel inference of paternity, same stringent rules do not apply as in cases of established legal marriage, Woodward v. Blue, 107-411, 103-109.

CHAPTER 31.

DIVORCE AND ALIMONY.

1557. Jurisdiction. The superior court shall have jurisdiction of complaints for divorce and alimony, or either.

Code, s. 1282; 1868-9, c. 93, s. 45. **"Alimony" defined:** Taylor v. Taylor, 93-418. **Superior court in term time alone has jurisdiction of divorce:** Barringer v. Barringer, 69-179. **Action to annul marriage contract on ground of incapacity is proceeding for divorce:** Lea v. Lea, 104-603—**and in action for divorce where neither party has domiciled in state of forum, decree of divorce is void,** Bidwell v. Bidwell, 139-402—**though both parties may have appeared and voluntarily submitted themselves to jurisdiction of court,** Ibid.

As bearing upon section, see Gilmore v. Gilmore, 58-284; Williamson v. Williams, 56-448.

FOREIGN DIVORCES. Where one party to the marital relation is resident here and other party obtains divorce in foreign state of which he is resident, such divorce is invalid here unless personal service within the forum has been made upon defendant resident here: Bidwell v. Bidwell, 139-402; Harris v. Harris, 115-587; Arrington v. Arrington, 102-510; Davidson v. Sharpe, 28-14; Irby v. Wilson, 21-568—**or unless defendant appears and answers,** Bidwell v. Bidwell, 139-402; Arrington v. Arrington, 102-491. **The better doctrine now seems to be that where domicile of plaintiff has been acquired in good faith and not in fraud or in violation of some law of a former domicile, his divorce granted by foreign state, being the state of his domicile, should be recognized as binding even though only constructive service of summons has been made upon defendant here:** Bidwell v. Bidwell, 139-409 (dictum).

Foreign divorce obtained by wife, resident of foreign state, against husband domiciled here, without personal service of summons upon him, is a nullity in this state, both as to relation of parties and as to custody of a child domiciled with its father at time of proceeding: Harris v. Harris, 115-587.

1558. Bond for costs unnecessary. It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover.

Code, s. 1294; 1871-2, c. 193, s. 41. **Section merely referred to** in Broom v. Broom, 130-565.

1559. Venue. In all proceedings for divorce, the summons shall be returnable to the court of the county in which the applicant resides.

Code, s. 1289; 1871-2, c. 193, s. 40.

1560. What marriages may be declared void on application of either party. The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter.

Code, s. 1283; 1871-2, c. 193, s. 33. **Court has power to pronounce marriage void ab initio for want of capacity in one of the parties:** Setzer v. Setzer, 97-252; see also Johnson v. Kincade, 37-470—**but judgment declaring marriage void ab initio will not bastardize issue,** Setzer v. Setzer, 97-252. **Marriage with declared lunatic is void ab initio:** Sims v. Sims, 121-297; Smith v. Morehead, 59-362; Crump v. Morgan, 38-91; Johnson v. Kincade, 37-470; Gathings v. Williams, 27-487.

Where the validity of a divorce has been established by a decree of a competent court, having full jurisdiction, plaintiff is estopped from setting up defenses which have been or could have been passed upon in that cause: Bidwell v. Bidwell, 139-402.

Marriage void on account of lunacy can not be cured by cohabitaton after restoration: Sims v. Sims, 121-297; Crump v. Morgan, 38-91—**being a nullity, such marriage can only be remidied by proceedings to set aside requisition of lunacy or by a new marriage:** Sims v. Sims, 121-297.

Marriages entered into by parties under legal age, being not void but voidable, can be validated by cohabitation after arrival at marriageable age, Sims v. Sims, 121-300, and cases cited.

Impotency in husband does not render a marriage by him void ab initio, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting: Smith v. Morehead, 59-360. **Husband competent witness against wife to prove her impotency:** Barringer v. Barringer, 69-179.

When fact of lunacy established, court is bound to decree marriage void, having no discretion: Crump v. Morgan, 39-91.

Suit for nullity of marriage on ground of insanity may be brought either in name of lunatic, by her guardian, or in name of guardian: Crump v. Morgan, 38-91 (decision prior to enactment of section).

Marriages between persons nearer of kin than first cousins, followed

by cohabitation and birth of issue, shall not be declared void in any proceeding after death of either party thereto. The power of court to declare such marriages void is confined to cases where parties are living: Baity v. Cranfill, 91-293.

Question whether or not marriage was void ab initio must be between the parties, and question can not be raised in action by children of such marriage, claiming as next of kin or heirs at law, in order to bastardize the issue: Setzer v. Setzer, 97-252.

Semble: That facts required to be set forth in affidavit by section 1563 are necessary to give court jurisdiction under this section: Concurring opinion of Clark, J. in Johnson v. Johnson, 141-94. Action to have marriage declared void because of preexisting disqualifications to enter into marriage relation is action for divorce: Lea v. Lea, 104-603.

As to constitutionality of acts as above, see Baity v. Cranfill, 91-293.

1561. Grounds for absolute divorce. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Divorce can only be granted upon application of person injured: House v. House, 131-142; Tew v. Tew, 80-316—and husband not injured where he is cause of wife's misconduct, Ibid.

1. If the husband shall commit fornication and adultery.

In allowing a divorce for "fornication and adultery," legislature intended same construction to be put upon words as when used in criminal statute, which is that the misconduct must be habitual: Prendergrast v. Prendergrast, 146- ; see also section 3350—one act of adultery not being sufficient, Ibid.

Wife who has separated herself from husband can not obtain divorce on ground of adultery committed by husband after separation unless she alleges and proves that compelled to leave husband on account his violent or outrageous conduct: Foy v. Foy, 35-90; Wood v. Wood, 27-674.

Petition for divorce on ground of adultery of defendant need not allege that petitioner has not been guilty of adultery: Steel v. Steel, 104-631; Edwards v. Edwards, 61-534.

2. If the wife shall commit adultery.

Where wife commits adultery and husband afterwards lives with her after learning it, and keeps up connubial relations, divorce will not be granted him: Sparks v. Sparks, 94-257; see Lassiter v. Lassiter, 92-129; Gordon v. Gordon, 88-45. Husband can not obtain divorce from wife on ground of adultery committed by her after separation, if such separation caused by fault or at instigation of husband: Tew v. Tew, 80-316; Moss v. Moss, 24-55. Petition for divorce, because of adultery of defendant, need not allege that petitioner has not been guilty of adultery: Steel v. Steel, 104-631; Edwards v. Edwards, 61-534. Where cruelty of wife compelled husband to abandon her, adultery by him after abandonment is no valid defense to his suit for divorce: Setzer v. Setzer, 128-170, and cases cited therein. When found by jury that both parties guilty of adultery, and no

condonation proved, case properly dismissed: Horne v. Horne, 72-530. **As to what constitutes ground of rescrimination for wife in action by husband,** see House v. House, 131-140. **As to evidence of physical condition of person with whom adultery alleged to have been committed,** see Perkins v. Perkins, 88-41. **Respondent not compelled to answer if he had had intercourse with wife:** Smith v. Smith, 116-386. **Husband and wife both incompetent to prove adultery in action for divorce on that ground:** Perkins v. Perkins, 88-41; see also section 1636—**also their admissions are incompetent,** Steel v. Steel, 104-631; Perkins v. Perkins, 88-41. **In addressing the jury it is incompetent for counsel to exhibit baby of defendant to jury and state that if divorce granted it would disgrace and bastardize it:** Hopkins v. Hopkins, 132-25. **Mere neighborhood rumor of improper relations between defendant and paramour are incompetent:** Ibid. **That alleged adulterous wife offered to pay cost of criminal prosecution of paramour is competent:** Toole v. Toole, 112-152. **Cases merely referring to section:** Prendergrast v. Prendergrast, 146- ; Morris v. Morris, 75-169.

3. If either party at the time of the marriage was and still is naturally impotent.

For case under subsection prior to enactment of section 2083, see Smith v. Morehead, 59-360. **Husband is competent witness to prove impotency of wife:** Barringer v. Barringer, 69-179. **Subsection merely referred to in** Prendergrast v. Prendergrast, 146- ; Morris v. Morris, 75-169.

4. If the wife at the time of the marriage be pregnant, and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage.

Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize decree of divorce under subsection, unless pregnancy resulted: Steel v. Steel, 104-631.

5. If there shall have been a separation of husband and wife, and they shall have lived separate and apart for ten successive years, and they shall have resided in this State for that period, and no children shall have been born of the marriage.

Code, s. 1285; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1871-2, c. 193, s. 35; 1879, c. 132; 1905, c. 499; 1907, c. 89.

1562. From bed and board; grounds for. The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

As to rights of husband in wife's land, where she has obtained divorce a mensa, see Taylor v. Taylor, 112-134, and cases under sections 2102 and 2111.

Condonation is forgiveness upon condition that the party forgiven will abstain from like offense afterwards. If condition is violated original offense is revived: Lassitter v. Lassitter, 92-129; Gordon v. Gordon, 88-45.

1. If either party shall abandon his or her family; or,

Where husband made wife leave him, or so failed to provide for her

that she was compelled to leave, it amounts to abandonment of her: High v. Bailey, 107-70; Setzer v. Setzer, 128-172. As to sufficiency of complaint under subsection, see Griffith v. Griffith, 89-113; Jackson v. Jackson, 105-433. When complaint filed for divorce a mensa et thoro hereunder, but, pending action, new statute passed giving divorce a vinculo for same offense, and plaintiff is allowed to amend complaint so as to get divorce a vinculo, failure to file affidavit with amended complaint renders it inoperative: Holloman v. Holloman, 127-15.

2. Shall maliciously turn the other out of doors; or,

Where no evidence of turning feme plaintiff out of doors at any time more than six months before action, issue as to such fact properly excluded: Jackson v. Jackson, 105-433; O'Connor v. O'Connor, 109-139. As to sufficiency of complaint under subsection, see Jackson v. Jackson, 105-433; Griffith v. Griffith, 89-113; Little v. Little, 63-22.

3. Shall, by cruel or barbarous treatment endanger the life of the other; or,

Divorce will not be granted for cruel and barbarous treatment where appears that acts complained of were committed more than ten years prior to commencement of action, and in meantime parties had continued to live together: O'Connor v. O'Connor, 109-139.

That husband communicated infectious disease to wife is not ground for divorce under subsection: Long v. Long, 9-192—but where drunken husband cursed wife and drove her from house, and by demonstrations of violence caused her to leave bedside of dying child and seek safety at distance of several miles, she is entitled to divorce, Scoggins v. Scoggins, 85-347.

As to contents of complaint under subsection, see Martin v. Martin, 130-27; O'Connor v. O'Connor, 109-139; Jackson v. Jackson, 105-433; Griffith v. Griffith, 89-113.

4. Shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome; or,

To entitle wife to divorce under subsection, indignity offered by husband must be such as may be expected seriously to annoy woman of ordinary good sense and temper, and must be repeated or continued in, so that it may appear to have been done wilfully and intentionally, or at least consciously by husband to annoyance of wife: Miller v. Miller, 78-102, overruling Everton v. Everton, 50-202.

Not necessary that indignities complained of should be striking or even touching body, but foul and injurious accusations, often repeated, with withdrawal of all intercourse, refusing to bed with wife, and denial that she is wife, with threats against her life, are sufficient to entitle her to divorce: Green v. Green, 131-533; Coble v. Coble, 55-392—but husband communicating infectious disease to wife is not ground for divorce under subsection, Long v. Long, 9-192.

Where drunken husband cursed wife and drove her from the house, and by demonstrations of violence caused her to leave bedside of dying child and seek safety at distance of several miles, she is entitled to divorce: Scoggins v. Scoggins, 85-347—also where defendant had repeatedly threat-

ened to chastise feme plaintiff and had boasted of having done so, that he had inflicted bruises upon her person, and that she had offered to return and live with him if he would agree not to whip her, which he refused to do, she is entitled to divorce, Taylor v. Taylor, 76-433.

Quaere: Are not parties to action hereunder competent witnesses and compellable to give evidence for or against each other, except as to adultery: Taylor v. Taylor, 76-433.

Evidence of acts of husband within six months of beginning of action is not competent: Green v. Green, 131-533; O'Connor v. O'Connor, 109-139; Jackson v. Jackson, 105-433.

For definition of condonation, and effect where offense condoned is repeated, see Lassiter v. Lassiter, 92-130; Gordon v. Gordon, 88-45.

Words "indignities to person" defined in Taylor v. Taylor, 76-436; Coble v. Coble, 55-395.

What constitutes such "indignity" hereunder is question of law and not of fact: Harrison v. Harrison, 29-490.

As to sufficiency of complaint under subsection, see Green v. Green, 131-535; O'Connor v. O'Connor, 109-139; Jackson v. Jackson, 105-433; Griffith v. Griffith, 89-113; White v. White, 84-340; Joyner v. Joyner, 59-322; Harrison v. Harrison, 29-485.

Subsection merely referred to in McQueen v. McQueen, 82-471; Erwin v. Erwin, 57-83.

5. Shall become an habitual drunkard.

Subsection merely referred to in Taylor v. Taylor,, 112-135.

Code, s. 1286; 1871-2, c. 193, s. 36.

1563. Affidavit to be filed with complaint; provisos. The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint; and the plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint; and that complainant has been a resident of the state for two years next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove his property and effects from the state, whereby she may be disappointed in her alimony: Provided, if any wife shall file in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which said petition or action will be based for six months, then and in that case it shall be lawful for

such wife to reside separate and apart from her said husband, and to secure for her own use the wages of her own labor during the time she shall so remain separate and apart from her said husband: Provided further, that if such wife shall fail to file her petition or bring her action for divorce within ninety days after the six months shall have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section.

Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184, 1907, c. 1008.

149-321

The purpose of this enactment discussed in Nichols v. Nichols, 128-108; Holloman v. Holloman, 127-16. **The affidavit required is for the purpose of giving jurisdiction and court is powerless to make the decree without it,** Johnson v. Johnson, 142-462; Williams v. Smith, 134-252; Nichols v. Nichols, 128-108—**for the requirement of statute is mandatory,** Williams v. Smith, 134-252; Hopkins v. Hopkins, 132-22; Nichols v. Nichols, 128-108. **Usual verification of complaint in civil actions is insufficient as affidavit such as required by this section:** Hopkins v. Hopkins, 132-22; Martin v. Martin, 130-28. **Whenever alleged that husband is removing or about to remove property from state, section allows wife to file complaint without regard to time when facts alleged as cause of divorce may have occurred:** Scoggins v. Scoggins, 80-319; Gaylord v. Gaylord, 57-74.

Residence required by section must be actual residence: Schonwald v. Schonwald, 62-221, 55-367; see, however, Moore v. Moore, 130-335; Harris v. Harris, 115-587; Smith v. Morehead, 59-360—**and it is not divested by wife temporarily leaving state without intention of residing elsewhere,** Moore v. Moore, 130-333. **Where wife sues who is resident of another state, legal maxim that "her domicile is that of her husband" will not avail instead of actual residence:** Schonwald v. Schonwald, 55-367, 62-221; Smith v. Morehead, 59-364.

Where wife alleging sufficient facts for divorce a mensa and to obtain alimony makes necessary affidavit in reference to husband's removal of property from state, not necessary to file another complaint six months after facts alleged to have occurred, Scoggins v. Scoggins, 85-347.

Objection that affidavit is defective may be first taken in supreme court: Nichols v. Nichols, 128-108.

THE AFFIDAVIT ITSELF. Must state that action was not brought within six months from time plaintiff first acquired knowledge of facts therein: Clark v. Clark, 133-28; Dickinson v. Dickinson, 7-327—**except in cases where husband about to dispose of property or remove same from state, when wife need not so aver,** Scoggins v. Scoggins, 80-320; Gaylord v. Gaylord, 57-74. **Affidavit and petition must be verified:** Clark v. Clark, 133-28. **Judge can amend affidavit in his discretion:** Moore v. Moore, 130-333.

As bearing upon section, see McQueen v. McQueen, 82-471. **Section merely referred to** in Cram v. Cram, 116-294.

1564. Material facts found by jury; parties can not testify to adultery. The material facts in every complaint asking for a divorce

shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff on any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact.

Code, s. 1288; 1868-9, c. 93, s. 47. **In action for divorce, verdict by eleven jurors consented to by both parties is valid if for defendant, but invalid for plaintiff:** Hall v. Hall, 131-185.

Provision of section that allegations of complaint are deemed to be denied applies only to trial upon merits, since facts must be found by jury: Zimmerman v. Zimmerman, 113-432.

In trial for divorce on ground of alleged adultery, neither husband nor wife is competent witness to prove same: Toole v. Toole, 112-155; Perkins v. Perkins, 88-41; see section 1636—**nor shall admissions of either party to each other, or in pleadings, be received in evidence to prove fact,** Perkins v. Perkins, 88-41; Steel v. Steel, 104-631—**but declarations of alleged paramour made to or in presence of feme defendant indicating that improper familiarities had been or were about to be indulged in between them, and her reply to such declarations, are competent evidence,** Toole v. Toole, 112-155—**and wife sued for divorce on ground of adultery, competent to deny evidence of witnesses that she was guilty of adultery with them,** Broom v. Broom, 130-562.

Quaere: Whether husband and wife are competent to give evidence for and against each other, except as to adultery: Taylor v. Taylor, 76 433.

For procedure where defendant becomes insane pending action, see Stratford v. Stratford, 92-297.

Section merely referred to in Long v. Long, 77-305; Hansley v. Hansley, 32-510.

1565. Alimony on divorce from bed and board. When any court shall adjudge any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered.

Code, s. 1390; 1871-2, c. 193, s. 37. **For alimony pendente lite,** see section 1566.

Alimony is that part of husband's estate which is allotted to wife for her support during period of judicial separation: Taylor v. Taylor, 93-418. **One-third of husband's estate may be assigned to wife when she obtains divorce a mensa:** Davis v. Davis, 68-180—**and whether wife entitled to it is question of law upon facts found,** Moore v. Moore, 130-333; Morris v. Morris, 89-109; Schonwald v. Schonwald, 62-215.

Where alimony allotted to wife in specific property of husband, title to such property remains in him, and will revert at death of wife, Taylor v. Taylor, 93-418; Rogers v. Vines, 28-293—**or upon reconciliation,** Ibid—**and may be reduced or enlarged at any time in discretion of court,** Ibid—**but where decree in divorce a mensa, obtained by wife, directed that husband pay sum in gross and be discharged from all further support of wife, she is nevertheless entitled to dower in his lands after his death,** Taylor v. Taylor, 93-418.

Judgment for alimony provable against estate of bankrupt, hence discharge of bankrupt constitutes discharge of judgment: Arrington v. Arrington, 131-143.

Where trial judge finds that party in contempt for failure to pay alimony could pay part of amount ordered, error to imprison him until he should pay whole amount: Green v. Green, 130-578.

For contempt proceedings where defendant fails to comply with order of court awarding alimony, see Green v. Green, 143-406; see also section 939.

As bearing incidentally upon section, see Cooper v. Cooper, 127-490; Hodges v. Hodges, 82-124.

1566. Alimony pendente lite. If any married woman shall apply to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and shall set forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it shall appear to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony pendente lite under this or the succeeding section, whether in or out of term, it shall be admissable for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband shall have abandoned his wife and left the state, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary.

Code, s. 1291; 1871-2, c. 193, s. 38; 1883, c. 67. **Case directly supporting section:** Scoggins v. Scoggins, 80-319.

Purpose of this enactment is to afford wife present pecuniary relief pending progress of action: Moore v. Moore, 130-334; Morris v. Morris, 89-111.

Whether wife entitled to alimony is question of law upon facts found: Moore v. Moore, 130-333; Morris v. Morris, 89-109; Schonwald v. Schonwald, 62-215—and, in deciding upon such right, court is confined to consideration of petition in cause, Schonwald v. Schonwald, 62-215; Scoggins v. Scoggins, 80-321.

Application for alimony pendente lite may be made by motion in the cause: Zimmerman v. Zimmerman, 113-432; Reeves v. Reeves, 82-348—and may be heard in or out of term, Moore v. Moore, 130-333.

Wife need not be plaintiff in action; she is entitled to alimony pendente lite if a party to proceeding: Webber v. Webber, 79-572—but, as defendant, she must set up claim for divorce in order to be entitled, Reeves v. Reeves, 82-348; Hodges v. Hodges, 82-122.

Requirement of section that judge shall find such allegations of complaint to be true as will entitle plaintiff to order, applies only where such allegations are controverted: Zimmerman v. Zimmerman, 113-432.

Motion to reduce alimony pendente lite may be made anywhere in district in which action is pending: Moore v. Moore, 131-371, 130-333. Resident judge holding court in another district can not hear motion to reduce alimony pendente lite in suit pending in district in which he resides: Moore v. Moore, 131-371. Where motion to reduce alimony pendente lite disallowed, another motion for same purpose should not be heard unless different state of facts shown and receipt exhibited for reasonable proportion of allowance made at former hearing: Ibid.

Mutual releases between husband and wife of their interests in property of each other do not bar wife from alimony pendente lite and attorney's fee in subsequent suit for divorce: Bailey v. Bailey, 127-474.

Land of husband, who is out of state, may be charged with alimony pendente lite and attorney's fees: Ibid.

Order for alimony pendente lite not necessarily affected by failure of plaintiff to obtain relief prayed for: Wood v. Wood, 61-538.

For contempt proceedings for failure to comply with order of court decreeing alimony pendente lite, see Green v. Green, 130-578; Zimmerman v. Zimmerman, 113-432; Pain v. Pain, 80-322; Wood v. Wood, 61-538; see section 939.

Before passage of section (acts 1852, ch. 53) court could not grant alimony pendente lite: Earp v. Earp, 54-119; Everton v. Everton, 50-206; Wilson v. Wilson, 19-377.

For cases under original section before amendment of same, see Simmons v. Simmons, 62-63; Shearin v. Shearin, 58-233; Gaylord v. Gaylord, 57-74; Earp v. Earp, 54-118; Taylor v. Taylor, 46-528.

AS TO NOTICE TO ADVERSE PARTY. Five days notice of motion must be given adverse party when heard out of term: Moore v. Moore, 130-333; Zimmerman v. Zimmerman, 113-432—but notice of motion not necessary where alleged and court finds as fact that husband has abandoned wife and is out of state, Barker v. Barker, 136-316. Fact that notice of motion for alimony pendente lite duly served upon defendant did not specify time of hearing, will not invalidate the order allowing same, it having been heard at term at which cause stood regularly for trial: Zimmerman v. Zimmerman, 113-432—for application for alimony pendente

lite can be made by motion in cause, Ibid; Reeves v. Reeves, 82-348—and defendant fixed with notice thereof, Zimmerman v. Zimmerman, 113-432—for it is only where motion made out of term that notice necessary, Ibid. Order of court continuing motion for alimony to future term of court, made in presence of counsel for both parties, is sufficient notice of such motion: Lea v. Lea, 104-603.

WHEN AND HOW ALLOWED. Upon married woman making out prima facie case, she is entitled to alimony pendente lite: Sparks v. Sparks, 69-319. Where in action for divorce by husband, defendant files cross bill and moves for alimony pendente lite, it is sufficient for court to find facts as alleged in answer, and affidavits in support thereof: Barker v. Barker, 136-316. If facts, as found by judge, would, if found by jury on final hearing, warrant a divorce a mensa, they per se constitute sufficient ground to award alimony pendente lite: Lassiter v. Lassiter, 92-129—though unnecessary to decide whether complaint warrants divorce a vinculo or only divorce a mensa, Little v. Little, 63-22. Alimony may be granted, upon finding by judge, after considering counter affidavits or answer of defendant, that facts alleged are true and entitle plaintiff to relief demanded: Zimmerman v. Zimmerman, 112-432; Lea, 104-603; Griffith v. Griffith, 89-113; Morris v. Morris, 89-109. Amount of alimony is within court's discretion and his discretion not reviewable unless abused: Barker v. Barker, 136-316; Moore v. Moore, 131-374, 130-333—but appeal lies from order granting or refusing alimony pendente lite, Barker v. Barker, 136-316; Moore v. Moore, 130-333; Morris v. Morris, 89-109; Lynch v. Lynch, 62-46; Schonwald v. Schonwald, 62-215. Alimony pendente lite may be allowed before return term if complaint has been filed: Moore v. Moore, 130-333. Alimony pendente lite not allowed unless plaintiff seeks dissolution of marriage relation or separation from bed and board: Hodges v. Hodges, 82-122. Alimony pendente lite may be allowed in action to have marriage declared void because of preexisting disqualifications to enter into marriage relation: Lea v. Lea, 104-603. Wife entitled to alimony when income from her separate estate not sufficient for her support and to defray necessary expenses in prosecuting suit: Miller v. Miller, 75-70—for she need not resort to corpus or capital of her separate estate before calling on that of husband, Ibid—and where defendant denies having any property, but admits he is an able-bodied man, court may decree alimony pendente lite without inquiring into value of his property, Muse v. Muse, 84-35. Where in petition for divorce from bed and board cruelty was alleged, and also an estimate of value of defendant's estate; held to be sufficient evidence to decree alimony and fix amount: Pain v. Pain, 80-322.

FINDINGS OF FACT UPON MOTION TO ALLOW. On a motion for alimony pendente lite, judge must find the facts: Zimmerman v. Zimmerman, 113-432; Lassiter v. Lassiter, 92-129—but if no answer filed, judge can simply find that as a fact and adjudge that alimony be paid, Zimmerman v. Zimmerman, 113-432. Facts found must be set out in record of case on appeal: Moody v. Moody, 118-927; Lassiter v. Lassiter, 92-129; Griffith v. Griffith, 89-113; Morris v. Morris, 89-109. Need not find as fact that plaintiff was faithful, dutiful and obedient wife: Lassiter v. Lassiter, 92-129. Order is erroneous if made without finding of facts by judge: Moody v. Moody, 118-926.

1567. Alimony without divorce, when. If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the superior court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage from the estate of her husband, and it shall be lawful for such judge to cause the husband to secure so much of his estate as may be proper according to his condition and circumstances, for the benefit of his said wife and children, having regard also to the separate estate of the wife.

Code, s. 1292; 1871-2, c. 193, s. 39. **Wife who has been deserted by husband and left unprovided for may, under this section, sue him for support without asking for divorce:** Cram v. Cram, 116-288.

Fact that summons in proceeding hereunder, of which judge has jurisdiction, was made returnable at term, does not affect jurisdiction of judge to hear and determine matter: Ibid.

Vague and indefinite charges of infidelity of wife made by husband in answer to complaint will not affect question of his liability under section: Ibid.

Where, in agreement for separation of husband and wife, former agreed to pay certain allowance to wife, and after paying several installments discontinued same, he can not set up agreement in bar of her action for support: Ibid—**even though he discontinued payments because wife demanded that allowance be increased,** Ibid.

In action under section the only questions are whether marriage relation existed at time of institution of proceedings: Bidwell v. Bidwell, 139-409; Skittletharpe v. Skittletharpe, 130-72—**and whether husband separated himself from wife,** Skittletharpe v. Skittletharpe, 130-72.

In action by wife against husband for maintenance, husband should be required to secure portion of estate for benefit of wife and children, but not required to make monthly payments, though in such action judgment should not be final: Ibid.

In proceedings under section, it is province and duty of judge to determine what is reasonable subsistence for wife: Cram v. Cram, 116-288—**either by hearing testimony himself, or by reference to referee to ascertain facts as to income of husband, etc.,** Ibid.

Where application for alimony alone, it can not be decreased before final hearing: Hodges v. Hodges, 82-122—**for alimony pendente lite can not be allowed under this section,** Ibid.

Amount or speiific property to be assigned is left to discretion of court, regard being had to husband's condition, and his means, wherever situated, in determining its value: Ibid; Cram v. Cram, 116-295.

In action for support under section judgment of nonsuit proper where court of state having jurisdiction of cause and parties had adjudged that status of parties was not husband and wife: Bidwell v. Bidwell, 139-402.

Section merely referred to in Clark v. Clark, 133-30; Reeves v. Reeves, 82-352; McKinnon v. McDonald, 57-7.

1568. Alimony in real estate, writ of possession issued. In all cases in which the court shall grant alimony by the assignment of real estate, the court shall have power to issue a writ of possession when necessary in the judgment of the court to do so.

Code, s. 1293; 1868-9, c. 123, s. 1. **Where alimony allotted to wife in specific property of husband, title to such property remains in him, and will revert at death of wife or upon reconciliation:** Taylor v. Taylor, 93-418.

1569. Effects of absolute divorce. After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture.

Code, s. 1295; 1871-2, c. 193, s. 43. **Upon granting of absolute divorce, all rights arising out of marriage cease and determine:** Duffy v. Duffy, 120-346—**hence court has no power to allow permanent alimony in such cases,** Ibid.

Judgment for divorce declaring marriage void ab initio will not bastardize issue: Setzer v. Setzer, 97-252.

Where wife, domiciled in another state, obtained decree for divorce a vinculo therein, husband appearing by attorney, he is bound by judgment rendered, and his property rights in her estate here terminated from date thereof: Arrington v. Arrington, 102-491.

For effect of absolute divorce on right to administer, see sections 7, 8, 9—on property rights, see section 2109.

1570. Custody of children in divorce. After the filing of a complaint in any action for divorce, whether from the bonds of matrimony, or from bed and board, both before and after final judgment therein, it shall be lawful for the judge of the court, in which such application is or was pending, to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such

children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Code, ss. 1296, 1570; 1871-2, c. 193, s. 46. **For effect of abandonment on custody of children, see section 180. Right of appeal in habeas corpus as to custody of children, see section 1854. In divorce proceedings, whether to grant custody and tuition of children to father or mother, discretionary with court:** Setzer v. Setzer, 129-296—**and court may, upon notice, change custody before or after judgment,** Ibid.

Court will not award custody of child to nonresident mother if it does not appear that child desires to go with her, or that husband is not proper person to have child, or that child will be benefited by change: Harris v. Harris, 115-587.

CHAPTER 32.

ELECTRIC COMPANIES.

1571. May use public highways. Any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, shall have the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway.

Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; 1874-5, c. 203, s. 2. **Section merely referred to** in Railroad v. Railroad, 83-496.

1572. May acquire easement in right of way. Such telegraph, telephone, or electric power or lighting company shall have power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation: Provided, that this section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation.

Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; 1874-5, c. 203, s. 3. **A railroad company can not grant easement over its right-of-way to telegraph company; this can be done only by owner of soil:** Hodges v. Hodges, 133-237; Narron v. R. R., 122-856.

1573. May exercise right of eminent domain; conditions; repeal of special charter rights. Such telegraph, telephone, electric power

or lighting company shall be entitled to the right of way upon making just compensation therefor, over the lands, privileges and easements of other persons and corporations, and the right to erect poles and to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works or power houses, and the right-of-way through all lands between their reservoirs, ponds, dams, works and power-houses, with the right to divert the water from such ponds or reservoirs and conduct same, by flume, ditch, conduit, water-way or pipe-line, or in any other manner, to the point of use for the generation of power, at said power houses, returning said water to its proper channel after being so used: Provided, that the power given under this section shall not be used to interfere with any mill or power-plant actually in process of construction, or in operation; and provided further, that water-powers, developed or undeveloped, with necessary land adjacent thereto for their development, shall not be taken; and that this section shall not authorize the taking of residence property, or vacant lots adjacent thereto, in towns or cities, or other residence, gardens, orchards, graveyards and cemeteries. Any provisions in any special charters heretofore granted in respect to the exercise of the right of eminent domain which are in conflict herewith, are hereby repealed.

Code, s. 2009; c. 64; 1903, c. 562; 1874-5, c. 203, s. 4; 1907, c. 74. **As to eminent domain granted telegraph companies,** see Hodges v. Tel. Co., 133-225; Phillips v. Tel. Co., 130-513—**electric power and lighting companies,** see Brown v. Power Co., 140-333; Brown v. Electric Co., 138-533—**street railway companies,** Hester v. Traction Co., 138-288; Merrick v. Street Rwy., 118-1081; Railroad v. Street Rwy., 120-520.

1574. Proceedings to condemn land. Whenever such telegraph, telephone, electric power or lighting company shall fail on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it shall be lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way

be made a party defendant: Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends: Provided further, that it shall not be necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors.

Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; 1874-5, c. 203, s. 5. **Private property may not be taken for public use, directly or indirectly, without compensation:** Phillips v. Tel. Co., 130-513; Staton v. R. R., 111-278; see also sections 2575 and annotations thereunder—**therefore permanent damages may be awarded land owner injured by putting telegraph poles on his land,** Phillips v. Tel. Co., 130-513.

The act of congress of July 24, 1860, does not give authority to enter private property without consent of owner, but provides that where consent obtained, no state shall prevent use of such postroads for telegraph purposes by such corporations as avail themselves of its privileges: Ibid.

Telegraph line built along and on the right-of-way of railroad is an additional burden for which land owner entitled to just compensation: Ibid, and cases cited on page 524; Hodges v. Tel. Co., 133-225—**so also where electric lines built along streets or sidewalks abutting owner entitled to compensation,** Brown v. Electric Co., 138-533—**so also where power company built dam and backed water on railroad right-of-way to detriment of land owner,** Brown v. Power Co., 140-347.

Where proceedings to condemn portion of railroad right-of-way for telegraph poles, etc., land owner must be made party: Phillips v. Tel. Co., 130-513.

Land owner is not given the right hereunder to file petition for damage; he must sue in trespass: Ibid.

Purchaser of land subsequent to the taking and erection thereon of a telegraph line, may recover permanent damages, and in suit therefor telegraph company may acquire easement: Ibid.

Electric company can not cut down shade tree along sidewalk in city without abutting owner being justly compensated: Brown v. Electric Co., 138-533—**and where company cut it down in absence of plaintiff and over protest of his wife, plaintiff entitled to punitive damages,** Ibid.

Construction of street-car track does not impose any additional servitude upon property fronting on street so occupied so as to necessitate condemnation proceedings against the owners: Hester v. Traction Co., 138-288; Merrick v. Street Rwy., 118-1081—**provided the railway track is so constructed as not to shut abutter out or off with embankments,** Merrick v. Street Rwy., 118-1081.

The running of street cars over a railroad bridge imposes an additional servitude, for which street car company must render compensation: Railroad v. Street Rwy., 120-520.

1575. Copy of petition to be served. A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court.

Code, s. 2011; 1874-5, c. 203, s. 6; 1899, c. 64, s. 3. **Condemnation proceedings by telegraph company against railroad company to condemn right-of-way, to which landowner not a party gives no rights against landowner:** Phillips v. Tel. Co., 130-513; Narron v. R. R., 122-856.

1576. Proceedings same as for railroads. The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed for condemning lands to the use of railroads.

Code, s. 2012; 1899, c. 64; 1903, c. 562. **For condemnation proceedings by railroads, see sections 2580-2599.**

Section refers to proceedings subsequent to filing of petition and service of required notices: Phillips v. Tel. Co., 130-525—**in other words, refers to proceedings after parties are all before court,** Ibid.

1577. Commissioners to inspect premises. In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory.

Code, s. 2013; 1874-5, c. 203, s. 9.

For certain powers of electric companies, see sections 1132, 1133.

CHAPTER 33.

ESTATES.

1578. Estates in tail converted into fee simple. Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple; and all sales and conveyances, made bona fide and for valuable consideration, since the first day of January, in the year of our Lord one thousand seven hundred and seventy-seven,

by any tenant in tail in actual possession of any real estate where such estate hath been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder, of and from all claim, action and right of entry, whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple.

Code, s. 1325; R. C., c. 43, s. 1; 1784, c. 204, s. 5. **A fee-tail converted into fee-simple by this section:** Sessoms v. Sessoms, 144-121; Marsh v. Griffin, 136-333; Whitfield v. Garris, 134-29, and cases cited; Leathers v. Gray, 101-165, and cases cited; Smith v. Brisson, 90-284; Ward v. Jones, 40-405; Folk v. Whitley, 30-133; Ross v. Toms, 15-376; Sanders v. Hyatt, 8-247—**but section confirmed only such alienations in fee as had been made by tenants in tail in possession since 1777,** Minge v. Gilmour, 2-279; Wells v. Newbolt, 1-538—**and when tenant in tail had sold in fee-simple before enactment of section and purchaser actually in possession of land at time of passage of same, he is entitled to fee-simple,** Ibid; also Moore v. Bradley, 3-142.

This section will bar remainder dependent upon estate tail in possession of tenant in tail at time of passage of section: Lane v. Davis, 2-277.

This act of 1784, which subsequently converted estate tail into fee simple, did not change original form of the acquisition, which still continued to be by purchase: Ballard v. Griffin, 4-237.

Section does not affect principle of law decided in Shelley's Case: Dawson v. Quinnerly, 118-188.

As bearing upon section, see Coon v. Rice, 29-217. **Section merely referred to** in Rogerson v. Lumber Co., 136-267; Hauser v. Craft, 134-328; Millsaps v. Estes, 134-492; Hodges v. Lipscomb, 133-203, 128-63; Starnes v. Hill, 112-1; Mills v. Thorne, 95-362; Patrick v. Morehead, 85-67; Holliday v. McMillan, 79-324; Ward v. Jones, 40-402; Jones v. Spaight, 4-159.

1579. Joint tenancy; survivorship abolished, when. In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns respectively of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted, in pursuit of the said joint business; but as soon as the same shall be effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner, all such part, share, and sums of money as he may be entitled to by

virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

Code, s. 1326; R. C., c. 43, s. 2; 1784, c. 204, s. 6. **Section does not abolish joint tenancies:** Rowland v. Rowland, 93-214, and cases cited—**but only takes away right of survivorship from joint tenancies in fee,** Ibid; Blair v. Osborne, 84-417; Powell v. Morisey, 84-421—**and has no application to joint tenancies for life,** Ibid; Powell v. Allen, 75-450.

Section does not prohibit contracts making rights of parties dependent upon survivorship: Taylor v. Smith, 116-531.

Word ''estates'' as used in section, defined: Bond v. Hilton, 51-180.

TENANCY OF HUSBAND AND WIFE. A conveyance to husband and wife does not create a joint tenancy but an estate by entireties: Spruill v. Mfg. Co., 130-42; Gray v. Bailey, 117-439; Harrison v. Ray, 108-215; Long v. Barnes, 87-329; Woodford v. Higly, 60-234; Todd v. Zachary, 45-286—**therefore this section abolishing survivorship as to joint tenants does not apply to estates held by husband and wife jointly,** West v. R. R., 140-621; Gray v. Bailey, 117-439; Phillips v. Hodges, 109-250; Woodford v. Higly, 60-234—**but, being in law but one person, they have each the whole estate as one person, and on the death of either, the whole estate continues in survivor,** Ray v. Long, 132-891; Phillips v. Hodges, 109-250, quoting from Long v. Barnes, 87-329; Simonton v. Cornelius, 98-433; Harrison v. Ray, 108-216; Motley v. Whitemore, 19-537; Woodford v. Higly, 60-234; Todd v. Zachary, 45-286. **Where father made conveyance of land to son in consideration of comfortable support of himself and wife during their natural lives, in default of which grantee covenanted to reconvey: Held that grantor and wife had right to demand reconveyance, on breach of covenant, in entirety, with right of survivorship:** Stamper v. Stamper, 121-251. **Where lands granted to husband and wife, but intention appearing on face of conveyance that it intended to make them joint tenants or tenants in common, they will so take and hold and not as tenants of entirety:** Stalcup v. Stalcup, 137-305. **Where husband and wife purchase property, each furnishing portion of purchase money, an estate in entirety is created, and they hold per tout et non per my:** Ray v. Long, 132-891. **Constitution did not destroy or change the properties and incidents belonging to estates held by entireties:** West v. R. R., 140-621, citing Long v. Barnes, 87-333. **As to the rights and incidents attaching to estates by entireties,** see Ray v. Long, 132-891; West v. R. R., 140-621, and cases there cited; Gray v. Bailey, 117-439; Johnson v. Edwards, 109-466; Phillips v. Hodges, 109-248; Bruce v. Nicholson, 109-202; Simonton v. Cornelius, 98-433.

TENANCY OF COPARTNERS. Land purchased with partnership funds is held by partners in joint tenancy: Baird v. Baird Heirs, 21-524—**and, if upon death of one partner and the winding up of the partnership, all the proceeds from sale of land is not needed to pay debts, the amount that would have gone to deceased partner descends to heir as real estate,** Summey v. Patton, 60-601; Stroud v. Stroud, 61-526—**and, accordingly, the widow is entitled to dower in such interest of deceased partner in part-**

nership land not needed to pay partnership debts, Patton v. Patton, 60-572; Stroud v. Stroud, 61-526; see Sparger v. Moore, 117-449.

Claims of surviving partner upon proceeds of sale of deceased partner's half of real estate, to reimburse him to amount of one half on expenditures incurred in conduct of firm business and improvements put upon property, constitute incumbrance prior to claims of creditors of deceased partner: Mendenhall v. Benbow, 84-646. **Equitable right of partnership under contract to convey land to firm, upon death of one of partners, vests in surviving partner in order to enable him to wind up partnership and pay its debts:** McCaskill v. Lancashire, 83-396.

Section merely referred to in Brown v. Ward, 103-173; Pitt v. Moore, 99-92; concurring opinion of Pearson J. in Allison v. Andrews, 34-193; Waugh v. Mitchell, 21-522.

1580. Survivorship among trustees. In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cortustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four.

1885, c. 327, s. 1. **Executors and administrators hold as joint tenants, see section 166. Under provision of section that trustees shall hold as joint tenants in all respects as joint tenants held before 1784, where limitation had barred entry of one trustee, entry of cotrustees also barred:** Webb v. Borden, 145-188; Cameron v. Hicks, 141-21.

Trustees are seized as joint tenants and not as tenants in common, Webb v. Borden, 145-188; Cameron v. Hicks, 141-21.

As to survivor of two or more mortgagees or trustees executing the power of sale in mortgage or deed of trust, see section 1033.

1581. How certain contingent limitations construed. Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or descendant or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will

made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight.

Code, s. 1327; R. C., c. 43, s. 3; 1827, c. 7. **Cases directly supporting section:** Sain v. Baker, 128-259; Kornegay v. Morris, 122-202; Smith v. Brisson, 90-284.

152 - 220

The "dying without issue," upon which contingent remainder vests, will be construed as referring to death of devisee of first estate, and not to that of testator: Buchanan v. Buchanan, 99-308—**unless devise be to tenants in common with clause of survivorship,** Ibid—**or apparent from whole will that testator intended to make estate dependent on event of own death,** Ibid.

Section only applicable to instruments executed since Jan. 15, 1828: Sain v. Baker, 128-258; Weeks v. Weeks, 40-111.

Section is rule of construction upholding second and contingent estate upon death of first taker without heirs: Sessoms v. Sessoms, 144-121—**and does not change application of doctrine of shifting uses and executory devises in determining nature and extent of precedent estate,** Ibid. **Section does not interfere with application of rule in Shelley's case in determining nature and extent of precedent estate:** King v. Utley, 85-61.

The will in this case having been executed since enactment of section must be read as if testator had added, immediately preceding limitation, words "living at time of his death, or born to him within ten lunar months thereafter:" Hathaway v. Harris, 84-98.

Original enactment went into effect on Jan. 15, 1828, see Weeks v. Weeks, 40-111.

For limitations held good under section, see Sessoms v. Sessoms, 144-121; Sanderlin v. Deford, 47-75; Garland v. Watt, 26-287; Moore v. Barrow, 24-436; Tillman v. Sinclair, 23-183.

For cases prior to enactment of section, see Gibson v. Gibson, 49-425; Weatherly v. Armfield, 30-25; Hollowell v. Kornegay, 29-261; Brantley v. Whitaker, 27-225; Cox v. Marks, 27-361; State v. Skinner, 26-57; Robards v. Jones, 26-54; Brown v. Brown, 25-134.

Section merely referred to in Lockhart v. Covington, 132-471; Miller v. Churchill, 78-374.

1582. Unborn infant in esse may take by deed. An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born.

Code, s. 1328; R. C., c. 43, s. 4. **Child en ventre sa mere at time of execution of deed to heirs of a living person takes as tenant in common with living children:** Campbell v. Everhart, 139-503; Graves v. Barrett, 126-267—**so also where deed made to a woman "and her children,"** Heath v. Heath, 114-547—**but child born more than a year after execution of instrument will not take,** Ibid.

For interesting case prior to enactment of section, see Dupree v. Dupree, 45-164.

Section merely referred to in Deal v. Sexton, 144-159.

1583. Heirs of living person construed to mean children. Any limitation by deed will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will.

Code, s. 1329; R. C., c. 43, s. 5. **Deed to heirs of living person construed to be limitation to children of such person, and includes afterborn children:** Graves v. Barrett, 126-267; Campbell v. Everhart, 139-503—**but where estate settled on one for life, with power of appointment in fee, by writing to take effect after her death, and in case of a failure to appoint, then to heirs of donee for life, word "heirs" does not come within section so as to be interpreted "children,"** Graves v. Trueblood, 96-495. 149-201

Section only applicable where no precedent estate conveyed to such living person: Jones v. Ragsdale, 141-200; Marsh v. Griffin, 136-334. **Rule in Shelley's case not abolished by section:** Nichols v. Gladden, 117-499; Starnes v. Hill, 112-1; Chamblee v. Broughton, 120-170; but see Howell v. Knight, 100-254; Jenkins v. Jenkins, 96-254.

Words "and lawful heirs of her body" in instrument to be taken as implying children, nothing to contrary appearing: Jarvis v. Davis, 99-40.

Where bequest immediate, not dependent upon preceding limited estate, to heirs of living person, and children of such person are illegitimate, they are entitled to take under section: Howell v. Tyler, 91-207; see Smith v. Brisson, 90-284.

Section merely referred to in Hodges v. Fleetwood, 102-125; King v. Utley, 85-61; Miller v. Churchill, 78-374.

1584. Conveyance to use, possession transferred to use without livery of seizin. By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seize to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenanter shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant.

Code, s. 1330; R. C., c. 43, s. 6; 27 Hen. VIII, c. 10. **Estate of freehold to commence in futuro can be conveyed by deed of bargain and sale operating under section:** Savage v. Lee, 90-320.

The words "for the sole and separate use," or equivalent language, qualifying estate of trustee for a married woman, must be construed as manifesting intent on part of grantor to limit her right of alienation to mode and manner expressly provided in instrument by which estate created: Kirby v. Boyette, 118-244.

Where one devised in 1828 to trustee to use and benefit of a woman for her life, remainder to use of all her children: Held that by force of this section the legal estate for life was executed in woman, and that legal

estate in remainder passed to children she had at time of devise, subject to participation of such as she might thereafter have: Wilder v. Ireland, 53-85.

As to necessity of consideration and effect of lack of consideration in conveyance to use, see Pittman v. Pittman, 107-163; Ivey v. Granberry, 66-227; Springs v. Hawks, 27-30. A fee simple may be limited after a fee simple either by deed or will by operation of statute of uses; if by deed, it is a conditional limitation; if by will it is an executory devise: Smith v. Brisson, 90-284. As to whether a use can be executed upon a use, see Rowland v. Rowland, 93-221.

In cases of bare or naked trusts, the cestui que trust can call for legal title and a court of equity will force trustee to convey it to him: Perkins v. Brinkley, 133-154; McKenzie v. Sumner, 114-425; Jasper v. Maxwell, 16-357; Turnage v. Greene, 53-63; see, however, Wilder v. Ireland, 53-85; Kirby v. Boyette, 118-263.

Where land is conveyed to trustee who is to pay rents to married woman, wife of grantor, the cestui que trust may compel conveyance of legal estate to herself at any time; hence trustee is not liable to rents and profits received by husband of cestui que trust: Perkins v. Brinkley, 133-154, and cases cited—it seeming to the court that the reason for construing a trust in favor of a married woman as an active, rather than passive, trust no longer exists: Ibid, but see Kirby v. Boyette, 118-263, and cases cited.

Devise of real and personal estate to J. in trust for E. (a married woman), with no limitations over and no duties to be performed by trustee, is a dry, naked or passive trust and vests legal title in property in E. under section: McKenzie v. Kirby, 114-425.

Where estate conveyed to trustee to preserve contingent remainders, this section will not execute the use: Cameron v. Hicks, 141-21.

Cases bearing on subject of uses: Hogan v. Strayhorn, 65-279; Bruce v. Faucett, 49-391; Davenport v. Wynne, 28-128; Harrison v. Battle, 21-215.

1585. Rights of grantee of reversion against life tenant. Whenever a conveyance shall be made by any person of any reversion in lands, rents, tenements, or hereditaments, which at the time of such conveyance shall be held by any other person for a term of life or years, such grantee, his heirs, executors, administrators, and assigns shall have the like advantages against the tenant for life, and against the tenant for years, his executors, administrators, and assigns, by entry for nonpayment of rent and for doing of waste, and the same benefit and advantage and remedies by action for the not performing of other conditions, covenants, or agreements, contained and expressed in the indentures or other agreement, by which such tenant for life or years holds the same lands, tenements, rents or hereditaments against said tenant for life or for years, his executors, administrators and assigns, as the grantor or lessor himself or his heirs might have.

Code, s. 1331; R. C., c. 43, s. 7; 32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18.

Rents are incidental to the reversion and, when estate is transferred, go to bargainee, unless they are overdue or secured by note: Wilcoxon v. Donelly, 90-245.

1586. Right of life tenant against grantee of reversion. Lessees and grantees of lands, rents, tenements and hereditaments for term of years or life, their executors, administrators and assigns, shall have like action, advantage and remedy against every person, his heirs and assigns, who shall have any conveyance from any person of the reversion of the same lands, rents, tenements and hereditaments, so let, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indenture of their leases, as the same lessees, or any of them, might and should have had against the said lessor and grantor, and his heirs.

Code, s. 1332; R. C., c. 43, s. 8; 32 Hen. VIII, c. 34, s. 2. **Rents are incidental to the reversion, and, when estate is transferred, go to bargainee, unless they are overdue, or secured by note:** Wilcoxon v. Donelly, 90-245.

1587. Collateral warranties abolished; warranties by life tenant good only as to heir. All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenantor in like manner as other obligations.

Code, s. 1334; R. C., c. 43, s. 10; 4 Anne, c. 16, s. 21; 1852, c. 16. **Case directly supporting section:** Hauser v. Craft, 134-329.

The warranty in this case has the force and effect of a personal covenant: Hauser v. Craft, 134-330—**the difference between which and a warranty, which operates as a bar by way of rebutter, is explained in Wiggins v. Pender, 132-628,** Ibid.

It may be further observed in this case that the position that the warranty in the deed of the life tenant can defeat the remainder of the heirs by way of rebutter, is wholly untenable: Starnes v. Hill, 112-13, citing Moore v. Parker, 34-129.

Where a father, having a life estate only, makes deed in fee for land, with warranty, his heir, with or without assets, is rebutted by warranty, except in cases where rule of common law changed by statute or where the heir can connect himself with outstanding remainder or reversion: Southerland v. Stout, 68-446.

Where tenant by courtesy conveys land belonging to wife, in fee with general warranty, right of heirs of wife to land not rebutted by warranty: Johnson v. Bradley, 31-362.

Where land devised to person for life and at death of life tenant to children thereof such children not estopped by deed with covenant of warranty executed by life tenant: Hauser v. Craft, 134-319; Starnes v.

Hill, 112-13; Brown v. Ward, 103-173; Southerland v. Stout, 68-446; Moore v. Parker, 34-129.

Warranties now treated as personal covenants: Smith v. Ingram, 130-102.

Section merely referred to in Whitesides v. Cooper, 115-577.

1588. Spendthrift trusts authorized. It shall be lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relations, whether the same be contracted or incurred before or after the grant.

Code, s. 1335; 1871-2, c. 204, s. 1. **Provisions of section should be at least substantially complied with to create trust with incidents contemplated by same:** Gray v. Hawkins, 133-6—**and where no declaration of trust in deed, nor any limitation of estate to life of child or grandchild, such deed inoperative under section,** Ibid.

152-31

146-503
147-253

1589. Titles quieted. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claims and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, no such relief shall be granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff can not recover costs. In any case in which judgment has been or shall be docketed, whether such judgments shall be in favor of or against the person bringing such action, or shall be claimed by him or shall affect real estate claimed by him, or whether such judgment shall be in favor of or against the person against whom such action may be brought, or shall be claimed by him, or shall affect real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section.

1893, c. 6; 1903, c. 763; 1907, c. 888. **Action can be maintained to remove cloud from title although plaintiff is not in possession:** Daniels v. Fowler, 120-14; McLean v. Shaw, 125-492—**and plaintiff can maintain such action without showing that defendant is an occupant or any more than claimant of land in controversy,** Burgess v. Burgess, 117-447.

Action to determine conflicting claims to land may be treated as action of ejectment, when complaint alleges ownership in plaintiff and possession in defendant: Hines v. Moye, 125-8; Kerner v. Cottage Co., 123-294.

Where plaintiff is in possession of lands and court finds defendant's claim to be invalid, action should not be dismissed: Rumbo v. Mfg. Co., 129-9—**but decree should be entered removing the cloud from title,** Ibid.

Should purchaser at execution sale delay to commence suit for possession, claimant to title, whether in or out of possession, could proceed under section against such purchaser: McLean v. Shaw, 125-491.

Where taxes, interest and costs, for which land sold, paid by tax debtor within time allowed for redemption, tax deed, valid on face, constitutes cloud on title: Beck v. Meroney, 135-532.

In action to remove tax deed as cloud upon title, plaintiff need not show title out of state: Edwards v. Lyman, 122-741.

In action under section, defense bond not required: Timber Co. v. Butler, 134-50.

For cases prior to enactment of section, see Duncan v. Hall, 117-443; McNamee v. Alexander, 109-242; Peacock v. Stott, 104-154; Murray v. Hazell, 99-168; Byerly v. Humphrey, 95-151; Pearson v. Boyden, 86-585; Busbee v. Lewis, 85-332; Busbee v. Macy, 85-329; Thigpen v. Pitt, 54-49.

For case rendered nugatory by amendment (acts 1903, c. 163), see McLean v. Shaw, 125-491.

In action under section, owner of land entitled to injunction pending action to restrain judgment creditor of his vendor from selling land under judgment asserted to be lien thereon: Mortgage Co. v. Long, 113-123.

Correction of a deed to create fee simple intsead of life estate is within this section: McLamb v. McPhail, 126-218.

As bearing upon section see Edwards v. Lyman, 122-741; Younger v. Ritchie, 116-782.

Section merely referred to in Jones v. Ballou, 139-527; Hill v. Gettys, 135-377; Olmsted v. Smith, 133-585; Treadaway v. Payne, 127-436; Cowles v. McNeill, 125-388.

1590. Contingent remainders may be sold; procedure; proviso. In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the superior court at term time, which proceeding shall be conducted in the manner pointed out in this section: Such proceedings may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land, shall be made parties defendant and served with sum-

mons as in other civil actions, and upon nonresidents or persons whose names and residences are unknown, by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors or persons under other disabilities, or to persons not in being, or whose names and residence are not known, or who may in any contingency become interested in said land, but because of such contingency can not be ascertained, the judge of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem to represent such remaindermen, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees. The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate.

1903, c. 99; 1905, c. 548; 1907, cc. 980, 956. **See also sections 2509, 2516. This section is constitutional; it also applies to estates created prior to its enactment:** Springs v. Scott, 132-548; Anderson v. Wilkins, 142-159.

Purpose of this enactment reviewed in Hodges v. Lipscomb, 133-202; Springs v. Scott, 132-548.

Persons to whom a remainder is limited, subject to death of father before life tenant, are not bound by proceedings for partition to which life tenant and other remaindermen, but not father, were parties: Whitesides v. Cooper, 115-570.

Court has power hereunder where there is a vested interest in real estate and contingent remainder over to persons not in being, or when contingency has not happened which will determine who remaindermen are, to order sale by conforming to procedure prescribed by section: Spring v. Scott, 132—548—**and upon application of all parties in interest, trustee representing contingent remaindermen, court can direct sale of land and can order that sale be made privately where it appears to the interest of parties,** McAfee v. Green, 143-411.

Decree should provide for investment of fund in such way as court may deem best for protection of all persons who have or may have remote or contingent interests: Springs v. Scott, 132-548.

In action for sale of land for reinvestment in which are contingent interests, it is sufficient to make parties those who would, by happening

of contingency, have estate therein at time of commencing action: Hodges v. Lipscomb, 133-199—**and persons not in being, who may have interest in property invested, not necessary parties in action for sale thereof and reinvestment,** Smith v. Gudger, 133-627—**though where remainder may go to minors, or persons not in esse, or unknown, court may appoint guardian ad litem to represent such parties,** Hodges v. Lipscomb, 133-199.

Clerk of court has no jurisdiction of action to sell property for reinvestment, etc., under section: Smith v. Gudger, 133-627—**though where case carried to superior court on appeal same will be retained for hearing,** Ibid.

Contingent remaindermen, not represented either by guardian or attorney, and not named in process, pleadings or decree, not bound by proceedings for partition instituted by other remaindermen and life tenant: Whitesides v. Cooper, 115-570.

As to assignments of contingent remainders, see Kornegay v. Miller, 137-659.

For cases prior to enactment of section, see Hodges v. Lipscomb, 128-57; Marsh v. Dellinger, 127-360; Hutchison v. Hutchison, 126-671; Yancey's Case, 124-151; Smith v. Smith, 118-735; Overman v. Tate, 114-571; Aydlett v. Pendleton, 111-28; Young v. Young, 97-132; Justice v. Guion, 76-442.

1591. Sale of contingent remainders validated. In all cases wherein property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise or other limitation wherein a judgment of a superior court has been rendered authorizing the sale of such property discharged of such contingent remainder, executory devise or other limitation in action or special proceedings wherein all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate.

1905, c. 93. **The enactment of this section was a valid exercise of legislative power:** Anderson v. Wilkins, 142-154.

CHAPTER 34.

EVIDENCE.

I. Statutes.

1592 How proved. All statutes, or joint resolutions, passed by the general assembly may be read in evidence from the printed statute book.

Code, s. 1339; R. C., c. 44, s. 4; 1826, c. 7. **Where act published in printed public laws of state every person has right to read same in evidence as the law in any court of state:** Range Co. v. Carver, 118-337.

Cases referring to section: Wilson v. Markley, 133-622; Durham v. R. R., 108-403.

As to pleading private statutes, see section 500.

1593. Martin's collection; copies certified by secretary of state. Any private act published by Francis X. Martin, in his collection of private acts, or a copy of any act of the general assembly certified by the secretary of state, shall be received in evidence in every court.

Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2.

1594. Laws of other states or foreign countries, how proved. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten, or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a printed volume of the laws of such state, territory or country, on file in the state, or supreme court, library, or in the office of the governor or secretary of state.

Code, s. 1338; R. C., c. 44, s. 3; 1823, c. 1193, ss. 1, 3; C. C. P., s. 360. **See also, section 2503. Courts will not take judicial notice of statutes of another state:** Hall v. R. R., 146 ; Coal and Ice Co. v. R. R., 144-732; Waters v. R. R., 108-349; Hilliard v. Outlaw, 92-266; Hooper v. Moore,

50-130—or of a foreign country, Waters v. R. R., 108-349; Hooper v. Moore, 50-130—but printed copy of statute of another state contained in book purporting to have been published by authority thereof admissible to prove existence of such statute, Copeland v. Collins, 122-619; Balk v. Harris, 122-64.

What is statute law of another state is question of fact to be proved like any other fact: Gooch v. Faucett, 122-270; Hilliard v. Outlaw, 92-266; Hooper v. Moore, 50-130; State v. Jackson, 13-563; Moore v. Gwynn, 27-187. Semble, that unless pleaded and proven presumption is that statutory law of another state same as this state: Lassiter v. R. R., 136-89.

Regulations of U. S. Department of Agriculture made pursuant to statute and intended to control conduct of general public, are not foreign laws within meaning of section when such regulations operate and take effect in this state: State v. R. R., 141-846.

Any person claiming to know common or unwritten laws of another state or foreign country may testify to and explain them before courts and juries: State v. Behrman, 114-797; Temple v. Pasquotank Co., 111-36—and jury should consider, not only veracity of witnesses who give legal opinions, but their reputation, character, learning and legal standing and determine for themselves how much weight they will give opinions, Hancock v. Tel. Co., 142-163.

As to who are competent witnesses to prove the law of another state or country, see State v. Behrman, 114-797; Hancock v. Tel. Co., 142-166.

Transcript of statute, once duly certified by secretary of state according to law, evidence at all times of its being in force in conformity with terms, unless repeal shown: State v. Cheek, 35-114. Certificate of secretary of state as to statutes of another state, given in pursuance of section is evidence in criminal as well as civil cases: State v. Patterson, 24-346. Section substantially complied with by certificate under hand and private seal of secretary of state, accompanied by certificate of governor, under seal of state, as to official character of secretary of state: State v Jackson, 13-563.

Common law of foreign state is presumed to be same as this state: Lassiter v. R. R., 136-89; Hall v. Rwy., 146- ; Brown v. Pratt, 56-202; Griffin v. Carter, 40-413.

When the law of another state or foreign country is proven it is duty of court to instruct jury as to meaning of law, its applicability to case in hand and its effect on the case, and it is error to refer whole question to jury without such instructions: Hooper v. Moore, 50-130; Moore v. Gwynn, 27-187.

Laws of this state at time of cession of Tennessee must be taken to be laws of that state until shown that they have been altered or repealed: State v. Patterson, 24-346.

Where copy of statute of another state has been received in evidence in court below, upon insufficient proof, if it is made to appear to supreme court from official and proper source that copy so received was correct, a venire de novo will not be awarded for that error: McDugald v. Smith, 33-576.

What is the unwritten law of another state is like the law of foreign

countries, a matter of fact to be tried by jury, and can not be determined by court: Moore v. Gwynn, 27-187.

A certificate of an act of South Carolina reciting the title of a prior act, not sufficient as evidence of such prior act: State v. Welsh, 10-404.

As to the law concerning subject matter of this section prior to 1823, see State v. Behrman, 114-804; State v. Twitty, 9-441.

1595. Town ordinances. In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance.

1899, c. 277, s. 2.

II. Grants, Deeds and Wills.

1596. Copies certified by secretary of state. Copies of the plots and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original.

Code, s. 1341; R. C., c. 44, s. 6; 1822, c. 1154. **Abstracts of grants in usual form, duly certified as correct copies by secretary of state, and recorded in office of register of deeds, competent to show title out of state:** Marshall v. Corbett, 137-555; Ray v. Stewart, 105-473; Clarke v. Diggs, 28-159; McLenan v. Chisholm, 64-323; Candler v. Lunsford, 20-142; Osborne v. Ballew, 29-415—**though plats and certificates of survey, not being identified or explained, not competent evidence to show location of land,** Cowles v. Lovin, 135-488.

Clerk of secretary of state has no power to certify and affix great seal of state to copies of grants and other papers from office of secretary of state to be used in evidence: Beam v. Jennings, 96-82 (but see section 1597 validating such acts)—**for section contemplates that secretary of state should do all official acts himself, and does not permit any of them to be done by deputy,** Ibid.

As patents or grants from state are recorded in office of secretary of state, copies of them obtained from that office may be given in evidence without accounting for originals by all persons except patentees or grantees, or those claiming under them who would be entitled to possession of originals: Candler v. Lunsford, 20-142.

1597. Copies of grants certified by clerk of secretary of state validated. All copies of grants heretofore issued from the office of the secretary of state, duly certified under the great seal of the state, and to which the name of the secretary has been written or affixed by the clerk of the said secretary of state, are hereby ratified and approved and declared to be good and valid copies of the origi-

nal grants and admissible in evidence in all courts of this state when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the secretary of state in person and duly registered.

1901, c. 613.

1598. Copies certified by register of deeds, evidence, when. A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Code, s. 1251; 1893, c. 119, s. 2; R. C., c. 37, s. 16; 1846, c. 68, s. 1.

Record of registered deed competent evidence without producing original, where no rule of court for production of original issued: Ratliff v. Ratliff, 131-425—**as is also certified copies of such registered deeds,** Hughes v. Debnam, 53-127—**and duly authenticated copy of record of bond to make title, under which deed made, is within spirit and meaning of section, and admissible without accounting for absence of original,** Bohanan v. Shelton, 46-370—**also, as register required to keep bond of clerk superior court, duly certified copy of record of such bond competent evidence of its provisions,** Battle v. Baird, 118-854; Short v. Currie, 53-42.

Certificate of register of deeds, to the effect that copy of deed, with order of probate and registration, are of record in office, prima facie evidence of its execution and probate: Love v. Harbin, 87-249. **Copy of grant from register's office, which affirmatively shows that same issued under great seal of state, admissible in evidence, though registry does not show impress of seal or scroll to indicate same:** Aycock v. R. R., 89-321. **Copy of abstract of grant dated in 1799 bearing signature of governor and certified by register, admissible in evidence to show land granted:** Strickland v. Draughan, 88-315. **Not proper to correct by parol testimony certified copy of deed, as recorded, by showing that original, which was lost, had different description:** Hopper v. Justice, 111-418.

Party against whom registry of instrument, or copy thereof, introduced in evidence, can not then raise objection that there is variance between such registry, or copy, and original instrument: Devereux v. McMahon, 108-134—**but if he desired to avail himself of the objection, he should**

have required the production of the original in manner provided by section. Ibid; Ratliff v. Ratliff, 131-427.

For case prior to amendment of section, (Acts 1893, c. 119, s. 2) providing seal for register of deeds, see Thompson v. Justice, 88-269.

Section merely referred to in Griffith v. Richmond, 126-378; Ray v. Stewart, 105-474; Howell v. Ray, 92-512; Moore v. Hill, 85-220; Mauney v. Crowell, 84-316; Gudger v. Hensley, 82-486.

1599. Copy certified may be registered in another county and given in evidence. A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without futher proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Code, s. 1253; 1893, c. 119, s. 3; R. C., c. 37, s. 16; 1846, c. 68. **See section 988. For record of surveys as evidence, see section 1723. For registration of certificate of survey as evidence, see section 2663. Party against whom the registry of a deed or other instrument, or copy thereof, has been introduced in evidence, can not then raise objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required production of original in the way provided:** Devereux v. McMahon, 108-134; Ratliff v. Ratliff, 131-427.

1600. Evidence to support title under H. E. McCulloch. In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds, of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers

of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made.

Code, s. 1336; R. C., c. 44, s. 1; 1819, c. 1021.

1601. Grant or copy from proprietor, sufficient evidence of title under him. In all trials where the titles of either plantiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence.

Code, s. 1337; R. C., c. 44, s. 2; 1807, c. 724.

1602. Deeds registered and lost, registry lost, presumed in due form. Whenever it shall be shown in any judicial proceeding, that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof can not be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance; and that it was made upon sufficient consideration.

Code, s. 1348; R. C., c. 44, s. 14; 1854, c. 17. **Probate of a deed in regular form is presumed from the fact of registration:** Cochran v. Imp. Co., 127-386. **Registration of a deed is presumed to be correct:** Ibid.

1603. Copy of will. Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence.

Code, s. 2175; R. C., c. 119, s. 21; 1784, c. 225, s. 6. **See sections 329, 3130. Certified copy of a will competent evidence under section:** Hampton v. Hardin, 88-592; Croom v. Dugg, 110-260, and cases cited.

A copy of will made in another state, with its probate certified by judge of court in which proved, and accompanied by testimonials of governor of that state that person who gave certificate was proper officer to take such probate and certify same, is sufficient authentication to admit it in evidence: Knight v. Wall, 19-125.

1604. Written instruments proved otherwise than by attesting witnesses; not to affect registration. It shall not be necessary to prove by the attesting witness instruments to the validity of which

the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration.

1905, c. 204.

1605. Evidence to fit the land to the description. In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest.

1891, c. 465, s. 1. **For vagueness of description in a deed, see section 948. Cases in which description in instrument held sufficiently definite for land to be identified by parol:** Broadwell v. Morgan, 142-475; Janney v. Robbins, 141-400; Gudger v. White, 141-507; Moore v. Fowle, 139-51; Sherman v. Simpson, 121-129; Wilkins v. Jones, 119-95; Walker v. Moses, 113-527; Perry v. Scott, 109-374 **(overruling** in part Blow v. Vaughan, 105-198; Wilson v. Johnson, 105-211); Allen v. Sallinger, 108-159; Euliss v. McAdams, 108-507; Grubb v. Foust, 99-286; Edwards v. Bowden, 99-80; McGlawhorn v. Worthington, 98-199; Rollins v. Harris, 96-557; Hinton v. Roach, 95-106; Scull v. Pruden, 92-168; Warren v. Makely, 85-12—**held to be too vague to admit parol evidence to identify land:** Harris v. Woodard, 130-581; Holmes v. Sapphire Co., 121-410; Hemphill v. Annis, 119-514; Lowe v. Harris, 112-472; McGlawhorn v. Worthington, 98-199; Harrison v. Hahn, 95-28; Harrell v. Butler, 92-20; Archibald v. Davis, 50-322; Mann v. Taylor, 49-272. **Section does not act retrospectively:** Hemphill v. Annis, 119-514; Lowe v. Harris, 112-472—**but even if it did, word "description" used therein imports such description as can be aided by parol proof,** Harris v. Woodard, 130-581; Holmes v. Sapphire Co., 121-410; Hemphill v. Annis, 119-514; concurring opinion of Shepherd, C. J., in Lowe v. Harris, 112-472.

While parol evidence competent to fit description to land intended to be conveyed by deed, yet it can not add to or enlarge its scope: Holmes v Sapphire Co., 121-410; Harrison v. Hahn, 95-28—**and where descriptive words in deed so indefinite that in order to give it effect something must be added, conveyance inoperative,** Ibid.

If deed, when applied to land, found to be ambiguous, parol evidence of surrounding circumstances and of acts of parties competent to aid in interpretation of deed: Ward v. Gay, 137-397. **As to parol evidence to remove latent ambiguities as to boundaries,** see Ward v. Gay, 137-397; Lewis v. Roper Lumber Co., 113-57; Wynne v. Alexander, 29-237; Bullard v. Barksdale, 33-461; Hurley v. Morgan, 18-425; Reed v. Schenck, 13-415;

Loften v. Heath, 3-347; Bustin v. Christie, 3-99; Archibald v. Davis, 50-322; Waters v. Simmons, 52-54; Slade v. Green, 9-218. **Declarations of deceased persons to locate boundaries,** see Hill v. Dalton, 140-9; Yow v. Hamilton, 136-357; Shaffer v. Gaynor, 117-15; Bethea v. Byrd, 95-311; Smith v. Headrick, 93-210; Mason v. McCormick, 85-226; Huffman v. Walker, 83-411; Caldwell v. Neely, 81-114; Hedrick v. Gabble, 63-48; Toole v. Peterson, 31-180; Dancy v. Sugg, 19-515; Hartzog v. Hubbard, 19-241; Sasser v. Herring, 14-340; Gervin v. Meredith, 4-439; Harris v. Powell, 3-349.

Parol evidence can be introduced to establish lost corners: Holmes v. Sapphire Co., 121-410; Caraway v. Chancy, 51-361; Addington v. Jones, 52-582; Topping v. Sadler, 50-357; Safret v. Hartman, 50-185; McNeill v. Massey, 10-91; Cherry v. Slade, 7-82; Den v. Green, 9-218. **General reputation as evidence** see Echerd v. Johnson, 126-409; Mendenhall v. Cassells, 20-43. **Where one deed refers to another for a description, latter is to be taken as if embodied in deed referring to it:** Gudger v. White, 141-507; Hemphill v. Annis, 119-514; Euliss v. McAdams, 108-507.

It is a question for court to decide as one of law what was the boundary and for jury to determine where it is actually located: Gudger v. White, 141-507, and cases cited on page 519 of case; Scull v. Pruden, 92-168; Echerd v. Johnson, 126-409.

Description by name, where lands have a known name, is sufficient, and a tract can be then located by its name by parol proof: Moore v. Fowle, 139-51; Euliss v. McAdams, 108-507; Scull v. Pruden, 92-168. **Descriptive words in a deed must, with the aid of the evidence aliunde, to which they point, identify the boundaries of land conveyed:** Blow v. Vaughan, 105-198. **This section applies only where there is a description which can be aided by parol, but not when there is no description:** Harris v. Woodard, 130-581, and cases there cited; Holmes v. Sapphire Co., 121-410—**a deed which fails to describe land being as void now as it was before enactment of this section:** Moore v. Fowle, 139-53. **Parol evidence will be admitted to find a corner but not to make a corner:** Holmes v. Sapphire Co., 121-410. **A description calling for a point or stake as a beginning, and course and distance for all the rest of the description of boundaries, will not permit parol evidence to locate:** Archibald v. Davis, 50-322; Mann v. Taylor, 49-272; Massey v. Belisle, 24-170.

As bearing upon subject matter of section, see Fry v. Currie, 91-436; Hinchney v. Nichols, 72-66; Waters v. Simmons, 52-541; Loften v. Heath, 3-347.

1606. Recitals in tax deeds in Haywood and Henderson. In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and paid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and

unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited.

Code, s. 1346; R. C., c. 44, s. 11. **See section 2909 and annotations thereunder.**

1607. Copies of wills in secretary of state's office; proviso. Copies of wills filed or recorded in the office of the secretary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon.

Code, s. 2181; R. C., c. 44, s. 12; 1852, c. 172; 1856-7, c. 22. **For case prior to amendment of 1856-57,** see Stephens v. French, 48-360.

1608. Copies of wills recorded in wrong counties. Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state.

Code, s. 2182; 1858-9, c. 18.

1609. Proved will lost, not recorded, copy evidence. When any will which may have been proved and ordered to be recorded shall have been destroyed during the late war, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied with the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in the chapter entitled Burnt and Lost Records.

Code, s. 2183; 1866-7, c. 127.

1610. Copies of grants in Burke. Copies of grants issued by the state within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or can not be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant.

1901, c. 513.

1610a. Copies of grants in Onslow. The copies made by the register of deeds of Onslow county, under chapter four hundred and thirty-four of the public laws of one thousand nine hundred and seven, of grants, abstracts of grants and other documents pertaining to titles of land in Onslow county issued prior to the year one thousand eight hundred, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated, as provided in said chapter four hundred and thirty-four, shall be received as evidence in all the courts of the state, and certified copies therefrom shall likewise be received as evidence.

1907, c. 434.

1611. Copies of lost records in Bladen. Whereas, the most of the records in the office of the clerk of the superior court of Bladen county were damaged by fire, and are in such a mutilated condition that it is impossible to use them, and several of them being of almost daily use, especially the judgment docket and will books: The clerk of the superior court of Bladen county shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness, and of the sufficiency of their probate, though the probates are lost and are not transcribed.

1895, c. 415; 1903, c. 65.

1612. Copies of records from Tyrrell. Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the superior court of Tyrrell county as to the records of his office and by the register of deeds as to the records of his office, and deposited in ther respective offices in Washington county, shall be treated in all respects as original records and received as evidence in all courts of Washington county.

1903, c. 199.

1613. Copies of grants in Moore. Copies of grants for land situated in Moore county and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the secretary of state, shall have the force and effect of the originals and be evidence in all courts.

1903, c. 214.

1614. Wills in Haywood. All wills recorded by the clerk of the superior court of Haywood county, under and by virtue of chapter eight of the laws of one thousand eight hundred and eighty-five, shall be deemed and held to have been duly probated and recorded, subject to the right of any person interested to show by competent proof that said will has never been proved and recorded.

1885, c. 8.

1614a. Copies of wills in Duplin. The transcript made under chapter three hundred and ninety-five of the public laws of one thousand nine hundred and seven of all originals of wills and entries of probates, and dates of registration appearing on same, which were filed prior and up to the January term, one thousand eight hundred and thirty, of the county court of Duplin county, said transcript being in a book designated as Record of Wills A, shall be as competent evidence in any court as are the originals of the said wills.

1907, c. 395.

1614b. Transcript of partition records in Duplin. The transcript made under chapter three hundred and ninety-five of the public laws of one thousand nine hundred and seven of all reports of commissioners relating to the partition of real estate on file in the clerk's office of Duplin county, together with all entries of dates and confirmation appearing upon the same, being those filed prior and up to the year one thousand eight hundred and fifty-six, upon a book entitled Reports of Commissioners A, and the transcript of such records, beginning with the year one thousand eight hundred and fifty-six, and designated and known as Reports of Commissioners B, shall be as competent evidence as are the original reports of commissioners.

1907, c. 395.

1614c. Wills in Brunswick county. The record of any instrument, or certified copy thereof recorded under the provisions of chapter numbered one hundred and six of the public laws of the extra session of one thousand nine hundred and eight, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted.

1908, c. 106.

1615. Records in Anson county. The copies of the deeds and deed books and of the wills and will books made in Anson county under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills

and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpœna or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect as the original books.

1905, c. 663, s. 3.

III. Official Writings.

1616. Copies of official writings. Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office, when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county.

Code, ss. 715, 1342; R. C., c. 44, s. 8; 1792, c. 368, s. 11; 1871-2, c. 91; 1868-9; c. 20, s. 21. **See next section for further annotations. Certified copy of original certificate of survey attached to land grant in office of secretary of state admissible in place of original:** Higdon v. Rice, 119-623.

Certified statement by register of deeds of county as to how much property listed for taxation by person, incompetent under section, not being copy of such list, for section makes competent only "copies" of official records: State v. Champion, 116-987.

Certified copy of petition in suit, upon proof of loss of original record, is admissible as evidence: Weeks v. McPhail, 128-130.

Where superior court record lost, certified copy of transcript of same in supreme court sufficient evidence of record: Aiken v. Lyon, 127-171.

Copies of grants from sovereign, when enrolled in proper office, competent as evidence: Clark v. Diggs, 28-159—**as are also certified copies of grants entered in Lord Granville's Office,** Ibid; Marshall v. Corbett, 137-557—**and copies of grants and abstracts of grants certified by secretary of state may be given in evidence without accounting for originals,** Marshall v. Corbett, 137-555; Candler v. Lunsford, 20-142; see section 1596.

Contents of records of proceedings of municipal corporations may be proved by duly certified copy thereof: Cheatham v. Young, 113-161.

Copy of record not evidence as to matters dehors same: Governor v. McAffee, 13-18.

While regularly authenticated copies of records, and entries in nature of records, should be used as evidence, yet records themselves also com-

petent: Carolina Iron Co. v. Abernathy, 94-545; State v. Voight, 90-741; Leak v. Covington, 99-559—and rule allowing properly certified copy of record to be admitted in evidence grounded upon inconvenience of obtaining original, Carolina Iron Co. v. Abernathy, 94-545; State v. Voight, 90-741.

Section merely referred to in Jarvis v. Vanderford, 116-152; Darden v. Steamboat Co., 107-446; Springs v. Schenck, 106-166; McLean v. Buchanan, 53-446.

1617. Copies from public records of the state or United States, evidence; how authenticated. All copies of bonds, contracts or other papers relating to or connected with the settlement of any account or any part thereof between the United States and an individual, or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the state or the United States, shall be received in evidence and entitled to full faith and credit in any of the courts of this state when certified to by the chief officer in said office or department to be true copies and authenticated under the seal of said office or department.

1891, c. 501. Certificate of collector of internal revenue, under his hand and seal, of a record of his office showing one to be licensed as a retail liquor dealer, is competent as evidence hereunder, and makes out a prima facie case of retailing in prohibition territory: State v. Dowdy, 145-432.

Matters appearing in transcript of any paper on file, or records of any public office of state or United States, being relative to an account which a referee was directed to take, when properly authenticated, admissible in evidence: Wallace v. Douglas, 114-450.

Regulations of state board of agriculture, certified under hand of secretary with seal of department, are properly proved: State v. R. R., 141-846—but papers purporting to be exemplifications from Treasury Department of United States, but which not authenticated in any manner whatever, not admissible in evidence, Mott v. Ramsay, 92-152—and pamphlet purporting to contain regulations of United States Department of Agriculture, not certified by any officer of department with no seal attached, and not purporting to have been issued or published by authority thereof, not admissible as evidence, State v. R. R., 141-846.

As to records of state of the weather made by one who is appointed for that purpose by United States Signal Service Bureau, see Knott v. R. R., 98-73.

IV. Records, etc., Other States.

1618. Records of administration and letters testamentary in other states, how certified. When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of

administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be allowed as evidence.

Code, s. 1343; R. C., c. 44, s. 7; 1834, c. 4; U. S. Rev. Stat., ss. 905, 906.

1619. Wills or deeds in other states, how proven. In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed can not be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of congress, or by the proper officer of the said state or territory, shall be read as evidence.

Code, s. 1344; R. C., c. 44, s. 9; 1802, c. 623. **See also, sections 3130, 3131. Will proved in another state which bears certificate of clerk of court where probate had as to oath of abetting witnesses, but no other authentication, inadmissible in evidence:** Hunter v. Kelly, 92-285—**but copy of will made in another state, with probate certified by judge of court in which proved, accompained by certificate of governor of state that person so certifying was proper officer to take probate and certify same, sufficient under section:** Knight v. Wall, 19-125.

As to authentication of records of other states generally, see Kinseley v. Rumbough, 96-193; see also in Appendix, Vol. 2, under Authentication of Records.

As bearing upon section, see Miazza v. Calloway, 74-31; Warren v. Wade, 52-494; Ward v. Hearne, 44-184.

V. Counsel and Physicians.

1620. Fraud on the state, counsel must testify; proviso. In cases where fraud upon the state is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same.

Code, s. 1349; 1874-5, c. 213. **Communications to counsel in case of fraud, where state concerned, not privileged:** Hughes v. Boone, 102-137.

1621. Privilege of attending physicians and surgeons. No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

1885, c. 159. **Person in application for insurance may waive right to object to evidence of the physician acquired while attending him, and physician may be compelled to testify:** Fuller v. Knights of Pythias, 129-318.

VI. Accounts.

1622. Book accounts under sixty dollars, and within two years. When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book; in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars.

Code, s. 591; R. C., c. 15, s. 1; 1756, c. 57, ss. 2, 6, 7; C. C. P., s. 343a. **Notwithstanding restriction contained in section 1631 in relation to person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may as heretofore, be permitted to testify under book-debt law:** Leggett v. Glover, 71-211; Armfield v. Colvert, 103-156.

Defendant has same right as plaintiff to prove book-debt as a set-off: Webber v. Webber, 79-575; Thomegeux v. Bell, 1-64.

In action on contract for sawing timber, not necessary to set out items in pleading, as section only applicable to actions brought under book-debt law: McPhail v. Johnson, 115-298.

Where plaintiff remits certain items of account, which included divers dealings, so as to give justice jurisdiction, he can not prove account under section: Waldo v. Jolly, 49-173—for under same he must swear that account sued on contains full statement of all dealings between himself and oppoising litigant, Ibid.

To entitle party to recover, he must swear not only that he sold, but also actually delivered articles for price of which suit brought: Adkinson v. Simmons, 33-416.

Plaintiff may prove by own oath balance due him of sixty dollars or under, although account produced was for more than that amount, but reduced by credits below same: McWilliams v. Cosby, 26-110.

Competent for party to swear to price, as well as to delivery of, articles in account: Colbert v. Piercy, 25-77—but book and oath only evidence of articles delivered within two years: Alexander v. Smoot, 35-461—and not evidence that book contains all credits and full and true account of all dealings between such parties so as to show that nothing due to other party, and to disprove all his claim except such items as stated in book, Ibid.

Plaintiff under section may prove work and labor done by his slaves: Mitchell v. Clarke, 1-29—also goods sold and delivered for use of defendant by sundry persons and paid for by plaintiff, Ibid. Words "make out by own oath" construed: Kitchen v. Tyson, 7-314.

Cases bearing on section: Ins. Co., R. R., 138-53; Pannell v. Scoggin, 53-410; Boggan v. Horne, 97-268; Morgan v. Hubbard, 66-394.

1623. Book accounts proved by personal representative. In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party.

Code, s. 592; R. C., c. 15, s. 2; 1756, c. 57, s. 2; 1796, c. 465; C. C. P., s. 343b. **Admissible for personal representative to offer book of accounts of decedent, containing charges against third persons made by deceased, up to amount of sixty dollars:** Bland v. Warren, 65-372; Charlton v. Lawry, 1-30. **Where administrator takes book-debt oath and swears that**

original entry is in handwriting of person who has not been heard of in seven years, and that he knows of no one who can prove such handwriting; held, account sufficiently proved: Stevelie v. Greenlee, 12-317.

1624. Copies of book accounts evidence, when. A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence.

Code, s. 593; R. C., c. 15, s. 3; 1756, c. 57, s. 3; C. C. P., s. 343c. **Duty of person to produce original account, when notice to that effect given him by other party:** Coxe v. Skeen, 25-443—**and voluntary destruction of original will not authorize introduction of copy,** Ibid.

1625. Itemized accounts evidence, when. In any actions instituted in any court of this state upon an account for goods sold and delivered, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

153-181

1897, c. 480. **Account, to be prima facie evidence of its correctness, must be properly verified, and so itemized and stated as to show indebtedness:** Knight v. Taylor, 131-84—**and must also show relation of debtor and creditor,** Ibid.

For account held to be sufficient under section, see Claus v. Lee, 140-552.

For case where plaintiff himself by evidence negatives prima facie effect of his verified account, see Kennedy v. Price, 138-173.

VII. Life Tables.

1626 Mortuary tables evidence. Whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age.	Expectation.	Completed Age.	Expectation.
10	43.7	16	44.9
11	48.1	17	44.2
12	47.4	18	43.5
13	46.8	19	42.9
14	46.2	20	42.2
15	45.5	21	41.5

Completed Age.	Expectation.	Completed Age.	Expectation.
22	40.9	59	14.7
23	40.2	60	14.1
24	39.5	61	13.5
25	38.8	62	12.9
26	38.1	63	12.3
27	37.4	64	11.7
28	36.7	65	11.1
29	36.0	66	10.5
30	35.3	67	10.0
31	34.6	68	9.5
32	33.9	69	9.0
33	33.2	70	8.5
34	32.5	71	8.0
35	31.8	72	7.6
36	31.1	73	7.1
37	30.4	74	6.7
38	29.6	75	6.3
39	28.9	76	5.9
40	28.2	77	5.5
41	27.5	78	5.1
42	26.7	79	4.8
43	26.0	80	4.4
44	25.3	81	4.1
45	24.5	82	3.7
46	23.8	83	3.4
47	23.1	84	3.1
48	32.4	85	2.8
49	21.6	86	2.5
50	20.9	87	2.2
51	20.2	88	1.9
52	19.5	89	1.7
53	18.8	90	1.4
54	18.1	91	1.2
55	17.4	92	1.0
56	16.7	93	.8
57	16.1	94	.6
58	15.4	95	.5

Code, s. 1352; 1883, c. 225. **Table in this section competent as evidence without being specially introduced in evidence on trial:** Coley v. Statesville, 121-301—**but not conclusive evidence and is to be considered with all other testimony relevant to issue,** Sledge v. Lumber Co., 140-461—**and in estimating value of life of decedent it is proper for jury to consider health and habits of deceased at time of death,** Russell v. Steamboat Co., 126-967; Coley v. Statesville, 121-301.

For example of estimation of value of life estate of deceased in fund according to section, see Miller v. Asheville, 112-759.

For proper mode of estimating value of life of decedent according to above table, see Pickett v. R. R., 117-616; Poe v. R. R., 141-525; Mendenhall v. R. R., 123-275; Benton v. R. R., 122-1007; Carter v. R. R., 139-501, and cases cited; see also section 60.

For general discussion of the table in section, see Russell v. Steamboat Co., 126-967.

1627. Present worth of annuities. Whenever it shall be necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of years annuity is to run.	Cash value of the annuity of $1.	No. of years annuity is to run.	Cash value of the annuity of $1.
1	$0.943	26	13.003
2	1.833	27	13.211
3	2.673	28	13.406
4	3.465	29	13.591
5	4.212	30	13.765
6	4.917	31	13.929
7	5.582	32	14.084
8	6.209	33	14.230
9	6.801	34	14.368
10	7.360	35	14.498
11	7.886	36	14.621
12	8.383	37	14.737
13	8.852	38	14.846
14	9.295	39	14.949
15	9.712	40	15.046
16	10.106	41	15.135
17	10.477	42	15.219
18	10.827	43	15.299
19	11.158	44	15.374
20	11.469	45	15.445
21	11.764	46	15.514
22	12.042	47	15.579
23	12.304	48	15.641
24	12.550	49	15.699
25	12.783	50	15.754

The present cash value of the annuity for a fraction of a year may be ascertained as follows: Multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year may be considered as an annuity and the present cash value be ascertained as herein provided.

1905, c. 347. **Word "annuity" defined:** Poe v. R. R., 141-526. **In action to recover damages for injuries causing death, court should not permit jury to consider section for purpose of ascertaining present value of intestate's life:** Poe v. R. R., 141-525.

For discussion of section, see Ibid. **As bearing incidentally on section,** see Ex parte Williams, 74-68.

VIII. Competency of Witnesses.

1628. Not incapacitated by interest or crime. No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills.

Code, s. 1350; C. C. P., c. 342; 1866, c. 43, ss. 1, 4; 1869-70, c. 177; 1871-2, c. 4. **See sections 1631, 1633, 1634, 3113. This section qualified by section 1631:** Fertilizer Co. v. Rippy, 124-643—**also by sections 1633 and 1634,** Bunn v. Todd, 107-266.

Section removes all disabilities on account of interest: Fertilizer Co. v. Rippy, 124-645; Clark v. Hodge, 116-761; Bunn v. Todd, 107-266; Hampton v. Hardin, 88-592; Lewis v. Fort, 75-253.

Party to action may testify in his own behalf: Sumner v. Candler, 92-637; Autry v. Floyd, 127-187.

Widow and devisee of testator competent witness to prove that script propounded was found among valuable papers of deceased: Cornelius v. Brawley, 109-542.

Devisee under holograph will competent witness to prove same: Hampton v. Hardin, 88-592—**and executor may testify as to existence and contents of will destroyed by fire, its probate and registration, and also as to qualification of executor,** Cox v. Lumber Co., 124-78—**notwithstanding he is devisee under whom some of parties to action claim,** Ibid.

In indictment for affray, one defendant may be examined as witness by

state against other defendant: State v. Weaver, 93-595; see section 1635.

Last clause of section applicable only to attesting witnesses to execution of will: Cornelius v. Brawley, 109-548; Hampton v. Hardin, 88-592.

Quaere: Whether parties in action for divorce are not competent witnesses, and compellable to give evidence for or against each other, except as to adultery: Taylor v. Taylor, 76-433.

At common law one who had direct legal interest in event of suit was thereby disqualified as witness on side of interest: Gidney v. Logan, 79-216—**but this rule changed by this section,** Ibid.

An attesting witness to a will is not made incompetent to testify to execution thereof because a devisee or legatee: Vester v. Collins, 101-114; Cornelius v. Brawley, 109-542.

Party can be examined as witness in his own behalf in a bastardy proceeding: State v. McIntosh, 64-607.

Where not excluded under section 1631 mortgagee in chattel mortgage competent, as subscribing witness thereto, to prove execution thereof: Clark v. Hodge, 116-761.

For religious belief of witness as affecting his competency, see Shaw v. Moore, 49-25.

Section merely referred to in McGowan v. Davenport, 134-535 (concurring opinion of Clark, J.); Little v. Ratliff, 126-263; Mason v. McCormick, 75-265; Ballard v. Ballard, 75-190; Lewis v. Fort, 75-253; Gray v. Cooper, 65-183; Rice v. Keith, 63-319.

Cases prior to enactment: Wilson v. Allen, 54-24; Sanderlin v. Shaw, 51-225; Wetmore v. Click, 50-155; Blum v. Stafford, 49-94; Forbes v. Williams, 46-393; Cowles v. Rowland, 47-219; Ward v. Griffin, 38-150; State v. Poteet, 29-356; Freeman v. Lewis, 27-91; Hafner v. Irwin, 26-533; Walton v. Tomlin, 23-593; Moffitt v. Gaines, 23-158; Cox v. Wilson, 24-234; Norwood v. Marrow, 20-578; Kaywood v. Barnett, 20-88; Jones v. Sasser, 18-452; Jackson v. Comrs., 18-177; Waller v. Mills, 14-513; Rhem v. Jackson, 13-187; M'Kinna v. Hayer, 9-422; Learey v. Littlejohn, 5-406; Alston v. Jones, 5-45; Hawkins v. Hawkins, 4-431; State v. Fellows, 3-340; Murray v. Marsh, 3-290.

1629. Not excluded by interest. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

Code s. 589; C. C. P., s. 342. **For annotations see section 1628.**

1630. Evidence of parties admissible; exceptions. On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, either viva voce, or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other pro-

ceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

Code, s. 1351; 1866, c. 43, ss. 2, 3. **Neither husband nor wife allowed to prove fact of access or non-access,** Boykin v. Boykin, 70-262—**though in action for divorce a vinculo husband competent witness to prove impotence of wife,** Barringer v. Barringer, 69-179—**but in action for divorce on ground of alleged adultery neither husband nor wife competent witness to prove adultery of other,** Perkins v. Perkins, 88-41; see section 1636.

Person entitled to reward upon conviction of offender is competent witness against such offender: State v. Coulter, 2-3.

In case of perjury for swearing to attendance as witness, prosecutor competent, though liable to cost: State v. Wyatt, 3-56.

Where two or more persons on trial under one indictment for same offense, they are competent and compellable to give evidence for or against each other: State v. Frizell, 111-722; State v. Weaver, 93-595; State v. Rose, 61-406; State v. Smith, 86-705; see section 1635—**provided evidence of person so testifying does not incriminate himself,** State v. Smith, 86-705.

1631. When one party to transaction is dead. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

Code, s. 590; C. C. P., s. 343. **For analysis of section,** see Bunn v. Todd, 107-266; see also Deaver v. Deaver, 137-245; Isler v. Dewey, 67-93. **For a general rule as to competency hereunder,** see Peebles v. Stanley, 77-243.

The reason of the rule against testifying to transaction with deceased is the mouth of the deceased is forever closed: Smith v. Moore, 142-277; Bonner v. Stotesbury, 139-6; Halliburton v. Carson, 100-106; Pittman v. Camp, 94-285; Watts v. Warren, 108-514; Andrews v. McDaniel, 68-386.

Section applicable only to witnesses examined on commission, or on trial or hearing of action or special proceeding: Latham v. Dixon, 82-55—**and has no reference to such affidavits as may be needed in progress of cause.** Ibid.

This section does not render witnesses to will incompetent, having no

application to them: Cox v. Lumber Co., 124-78; Young's Will, 123-358; Vester v. Collins, 101-114.

This section has no application to transactions with the living: Lehew v. Hewett, 138-8—nor does it apply when there are associates of the deceased in the transaction who are living and are parties to action, Johnson v. Townsend, 117-338; Peacock v. Scott, 90-518; In re Peterson, 136-13.

Objection to evidence of conversation or transaction of witness with intestate must be taken in apt time: Norris v. Stewart, 105-455; Quinn v. Lattimore, 120-432; Armfield v. Colvert, 103-147; Meroney v. Overy, 64-312—otherwise same waived, Ibid.

To enable court to pass on competency, witness must be permitted to testify to court whether transaction was between him and deceased or not: Lockhart v. Bell, 90-499.

Although defendant, called by plaintiff, may be competent to testify as to transactions and conversation with deceased which are against interest of witness, he can not be examined thereof against interest of other defendants, Weinstein v. Patrick, 75-344.

Where trustee of deed of trust dead and property conveyed by substituted trustee to defendant, trustor not excluded from being witness for plaintiff who also claimed title through him: Isler v. Dewey, 67-93.

Notwithstanding restrictions contained in section, person may as heretofore testify under book-debt law: Leggett v. Glover, 71-211.

Feme plaintiff in action to recover land against defendants who claimed land under deed alleged to have been executed by her and husband to ancestor of defendant, is not disqualified under section to prove that she was never privately examined by officer taking probate, such officer being dead and representative being party to action: Spivey v. Rose, 120-163.

Where witness incompetent under section to testify as to transaction between himself and deceased person, error to receive witness's testimony of subsequent unsworn declarations made to others in regard to same transaction: Perry v. Jackson, 84-230.

Any one who has acquired rights of deceased person whether by his deed, or deed of sheriff who is authorized to make deed for him, is assignee within section: McCanless v. Reynolds, 74-301.

Administrator of deceased guardian is competent to show execution of bond by debtor to his intestate, evidence being offered to effect interest of a living person: Thompson v. Humphreys, 83-416; Williams v. Cooper, 113-286.

In proceeding by administrator to sell land for assets to pay debts, competent for widow to prove declarations of intestate husband (while in possession of land) that he paid for it with funds belonging to her: Gidney v. Moore, 86-485.

Defendant not permitted to testify in own behalf for purpose of contradicting former witness whose evidence tended to show that defendant fraudently procured assignment from person deceased: Bushee v. Surles, 77-62.

Neither of parties, plaintiff nor defendant, whether claiming as original parties or as assignees, is competent witness in regard to conversations

and transactions between himself and assignees of deceased: McCanless v. Reynolds, 74-301.

Witness not incompetent to testify to conversation with two persons, one of whom dead at time of trial, in reference to contract between them and witness: Peacock v. Scott, 90-518.

Though direct evidence of conversation with person deceased may be incompetent, yet rehearsal of same in conversation with son of deceased competent under the facts of this case, as part of res gestae: Tredwell v. Graham, 88-208.

Notwithstanding section, one may testify to transaction by opposite party when against own interest: Ibid.

Section 1633 does not interfere with operation of this section: Waddell v. Swann, 91-105.

Executor competent to testify to transactions between intestate and defendant of which he has knowledge, which are in favor of estate of intestate and adverse to defendant: Pittman v. Camp, 94-283.

Testimony of executor, defendant in action to collect debt due by decedent, as to statements of testator that he owed debt and wanted same paid, not incompetent: Halliburton v. Carson, 100-99.

Defendant administrator incompetent to testify in reference to land transaction between intestate and himself in suit against him by creditors of estate to subject land which alleged to have been fraudulently conveyed by intestate to defendant: Grier v. Cagle, 87-377.

Where decedent mortgaged land alleged by plaintiff to have been purchased jointly by himself and deceased, neither vendor nor mortgagee competent witnesses for plaintiff in action against heirs to prove transaction with deceased: Carey v. Carey, 104-171.

Plaintiff is competent witness to testify as to contract made with deceased agent of railroad company in regard to company furnishing cars for transportation of plaintiff's cattle: Roberts v. R. R., 109-670.

Transactions with third persons, even though they involve or throw light upon transactions with deceased persons, will not be excluded on ground of interest under section: Watts v. Warren, 108-514.

Sons of grantor in deed, which grantor is suing heirs of grantee to have deed declared mortgage, are not incompetent witnesses to show transactions between grantor and grantee: Porter v. White, 128-42.

In action by administrator of deceased surety on note on which judgment secured, defendant surety can not testify that intestate was co-principal on note, so as to entitle him to contribution: Robinson v. McDowell, 130-246.

This section is intended to exclude even indirect testimony of interested witness as to transaction or communication with deceased: Stocks v. Cannon, 139-60.

WITNESS IS INCOMPETENT HEREUNDER, WHEN. The witness, to be incompetent, must offer to testify as to a personal transaction or communication between himself and the person deceased: Bunn v. Todd, 107-266; Poston v. Jones, 122-536; Gupton v. Hawkins, 126-81; Williams v. Cooper, 113-286; Armfield v. Colvert, 103-147; Loftin v. Loftin, 96-94; McRae v. Malloy, 90-521; Lockhart v. Bell, 86-443; Bushee v. Surles,

77-64; Ballard v. Ballard, 75-190; Kirk v. Barnhart, 74-653; Jackson v. Evans, 73-128; Andrews v. McDaniel, 68-386; and numerous other cases—**on behalf of himself or of some one succeeding to his title or interest,** Wetherington v. Williams, 134-280; In re Worth's Will, 129-223; Sumner v. Candler, 92-634—**against the executor, administrator, survivor, etc., who must be party to action,** Ledbetter v. Graham, 122-753; Spivey v. Rose, 120-163; Sumner v. Candler, 92-634; Hawkins v. Carpenter, 85-482; Shields v. Smith, 79-517; Thomas v. Kelly, 74-416; Howerton v. Lattimer, 68-370—**or against a surety for deceased, where it may eventually charge deceased,** McGowan v. Davenport, 134-528; Hawkins v. Carpenter, 85-484; Bryant v. Morris, 69-444; Lewis v. Fort, 75-251; but see Shields v. Smith, 79-517. **Interest disqualifying person other than party as witness under section is interest in event of action:** Fertilizer Co. v. Rippy, 124-643; Ledbetter v. Graham, 122-753; Bunn v. Todd, 107-266; Mull v. Martin, 85-406; and numerous cases treated in paragraph below "As to persons interested in the event."

AS TO WHO IS "A PARTY" HEREUNDER. Member of a church congregation, the trustee of which is party on behalf of congregation, is not a party in interest hereunder: Lawrence v. Hyman, 79-209. **Member of board of county commissioners is a party hereunder in action brought by board on behalf of county:** Comrs. v. Lash, 89-159. **A witness, whose interest is really that of a plaintiff is treated as a plaintiff hereunder:** Barlow v. Norfleet, 72-535—**and a defendant, who is in substance a plaintiff, is so treated, and is not allowed to testify as to personal transaction with deceased against the administrator, etc.,** Weinstein v. Patrick, 75-344; Owens v. Phelps, 92-235, and cases cited. **In trial of action on note against administrator of deceased maker, cashier of plaintiff bank, payee of note, is party in interest and disqualified to testify as to conversations with defendant's intestate:** Banking Co. v. Walker, 121-115. **Party must be named as such in process:** Mason v. McCormick, 75-263—**and no person proper party who has no interest in subject of action,** Ibid. **Propounders and caveators to contested will are parties to proceeding within spirit and meaning of section:** Pepper v. Broughton, 80-251.

AS TO PERSONS "INTERESTED IN THE EVENT." **The interest in the event hereunder must be a legal and pecuniary interest:** Jones v. Emory, 115-163; Sutton v. Walters, 118-495—**not a sentimental interest,** Ibid; Henderson v. McLain, 146-329. **Interest in subject matter of the action will not disqualify, it must be interest "in the event:"** Lemly v. Ellis, 143-200; Bunn v. Todd, 107-266; Mull v. Martin, 85-406. **The test is whether witness bears such relation to controversy that verdict and judgment can be used against him in another action:** Jones v. Emory, 115-158; Mull v. Martin, 85-406—**or where verdict can be used for him,** Williams v. Johnston, 82-288.

A person is considered to be "interested in the event" hereunder where he is a surviving partner and his deceased partner's representative is being sued on a firm obligation: Moore v. Palmer, 132-969; Fertilizer Co. v. Rippy, 124-643, 123-656; Lyon v. Pender, 118-147; Sikes v. Parker, 95-232—**or where he is a surety on the prosecution bond,** McGowan v. Davenport, 134-352; McLeary v. Norment, 84-236; Mason v. McCormick, 75-262—**or**

where he is a member of a corporation which is a party in interest, Comrs. v. Lash, 89-159; but see Lawrence v. Hyman, 79-209—or where he is assignor of bond sued upon, Jackson v. Evans, 73-128; Woodhouse v. Simmons, 73-30—or where he is to be paid $200 if plaintiff recovers, Williams v. Johnston, 82-288—or where he has contracted to buy the land involved in suit, Love v. Harbin, 87-249—or where he is devisee under will and a subsequent will is sought to be impeached, Hathaway v. Hathaway, 91-139—or where he is to receive benefit from a recision of contract, which recision is attempted to be set aside, Owens v. Phelps, 92-231—or where he is assignor of a contract to convey land and issue is between assignee and those claiming under deceased vendee in respect of payments made to him by such vendee, Shields v. Smith, 104-57—or where he is a codefendant with other heirs in partition proceeding and it is sought to establish contract between father and children that certain owelty should be paid by each, Barbee v. Barbee, 108-581—or where he is assignee of deceased and assignment attacked for fraud by creditors in action against administrator, Watts v. Warren, 108-514—or where witness's husband is caveator in contest over will and is heir at law of testator, Linebarger v. Linebarger, 143-229.

In action by executor against husband, wife, who is not party to action, is competent to prove declaration made by deceased to her husband: Bradsher v. Brooks, 71-322.

In action to foreclose mortgage, where defendant pleads usury, testimony of son of defendant, who resides on mortgage land without payment of rent, as to transaction with plaintiff's intestate, not incompetent under section: Bennett v. Best, 142-168.

Attorney who acted for plaintiff in transaction with person who has since become insane, is competent to testify in behalf of plaintiff as to such transaction, insane person being represented by guardian, and attorney having interest in action: Propst v. Fisher, 104-214.

In trial of action to recover land, person living as member of plaintiff's household on land and aiding in her support is not competent to testify to transaction with deceased father of defendants: Jones v. Emory, 115-158.

Testimony of sister of plaintiff, to whom note similar to that sued upon was executed, that before and after date of note father "was very bright" not objectionable under section: Ducker v. Whitson, 112-44.

Widow of deceased vendor, who was present at sale of mule by husband to plaintiff is competent witness as to transaction: Little v. Ratliff, 126-262.

In action against person for damages for breach of warranty in deed, witness not interested in recovery not disqualified by section, though he may have interest in land: Lemly v. Ellis, 143-200.

Where note given attorney for collection against person since deceased and attorney was to receive portion of amount thereof for services, but never collected anything and returned same to executor of client, he is competent witness as to transaction: Wise v. Beaman, 96-122.

Fact of payment to deceased person for land purchased of him can be proved when neither witness nor estate of deceased vendor interested in result of action: Cade v. Davis, 96-139.

Surety on guardian bond, principal being dead, competent witness to prove insolvency of bond: Topping v. Windley, 99-4.

Wife of deceased husband competent witness in action affecting his estate, except as to transaction and communications between herself and deceased; though she be interested in result of suit, Norris v. Stewart, 105-455; Hopkins v. Bowers, 108-298.

In controversy as to which of two parties was grantee of lost deed, grantor, when he stands between the litigants, is competent to testify that he made deed to person since deceased: Gregg v. Hill, 80-255.

Fact that attorney had interest in event of suit on account of tax fee does not disqualify him from testifying as to transaction or communication with person deceased: Syme v. Broughton, 85-367.

In suit by deputy sheriff against administrator of intestate to recover sum of money which deputy had been compelled to pay sheriff by reason of default of intestate, sheriff had no interest in event of action, and competent witness under section: Allen v. Gilkey, 86-65.

Testimony of witness interested in event of action as to transaction or communications between himself and deceased, from whom defendants derive title, not competent against them; extent of interest not being material, Campbell v. Everhart, 139-504.

Mortgagee competent witness as against deceased mortgagor to fact of payment of debt and cancellation of mortgage to secure it, where it appears that witness has no interest in controversy: Carey v. Carey, 108-267.

In action on bond against executor of deceased surety, principal obligor competent witness to prove execution of bond by defendant's testator: Peebles v. Stanley, 77-243.

Declarations of deceased attorney contained in affidavit of defendant admissible in evidence where it appears that neither estate of attorney nor interest of anyone claiming from him can be affected by event of action: Molyneux v. Huey, 81-106.

Witness interested in result of action may testify as to transaction between deceased, under whom she claims her interest, and adverse party: Johnson v. Cameron, 136-243.

AS TO "PERSONAL TRANSACTION OR COMMUNICATION" WITH DECEASED. Term "personal transaction" in section intended to describe whole of negotiation or treaty between original parties to it out of which cause of action arose: Cheatham v. Bobbitt, 118-343. The transaction or communication, to be incompetent, must be between witness and deceased: Bunn v. Todd, 107-266; Gupton v. Hawkins, 126-81; Poston v. Jones, 122-536; Williams v. Cooper, 113-286; Armfield v. Colvert, 103-147; Loftin v. Loftin, 96-94; McRae v. Malloy, 90-521; Lockhart v. Bell, 86-443; Ballard v. Ballard, 75-190; Bushee v. Surles, 77-64; Kirk v. Barnhart, 74-653; Andrews v. McDaniel, 68-386; Jackson v. Evans, 73-128—and it must appear that knowledge of witness derived from personal transaction with deceased, Thompson v. Onley, 96-9.

Testimony of a representation to grantee, the witness, by grantor, now deceased, that deed grantee was about to sign in grantor's favor was really a will is evidence of personal transaction with deceased hereunder:

Smith v. Moore, 142-277—as is also testimony tending to show services rendered by witness which were accepted by deceased upon implied promise to pay, Dunn v. Currie, 141-125; Davidson v. Bardin, 139-1; Stocks v. Cannon, 139-60; Kirk v. Barnhart, 74-653—as is also testimony that deceased had or had not made demand upon witness for payment, Davis v. Evans, 139-440—as also testimony by mortgagee in an action to foreclose mortgage given by feme covert to secure debt of husband, that debt had not been paid, McGowan v. Davenport, 134-526—as also testimony by defendant as to parol contract between plaintiff's intestate and himself under which intestate placed improvements on land, Luton v. Badham, 129-7—as also testimony by defendant claiming a set-off for goods sold plaintiff's intestate that no one had paid him for the articles, Angel v. Angel, 127-451—as also testimony by plaintiff to repel the bar of the statute that payments were made by defendant's intestate at certain times upon note due by intestate, Gupton v. Hawkins, 126-81—as also testimony of plaintiff, claiming under deceased mortgagor, that payments had been made by mortgagor on mortgage note, Simpson v. Simpson, 107-552—as also testimony that witness handed a certain book to deceased on day of marriage, Lane v. Rogers, 113-171—as also testimony by plaintiff that deceased executed certain partnership agreement with him, Sawyer v. Grandy, 113-42—as also testimony of a partner that he signed a certain partnership agreement to which name of deceased partner also attached, Ibid—as also testimony of alleged widow to fact of marriage and having lived with deceased husband, when marriage is an issue in action to which heirs of supposed husband are parties, Hopkins v. Bowers, 111-175; Woodward v. Blue, 107-409—as also testimony of plaintiff in action on note, where maker dead, that one who purports to have made cross-marks to paper, as witness, did in fact make marks thereto: Bright v. Marcom, 121-86—as also testimony of children who hold claim against deceased father, that same has not been paid and that he never informed them of his indebtedness to them, Dunn v. Beaman, No. 2, 126-768—as also testimony of plaintiff that deed alleged to have been made to deceased ancestor of defendant by him was a forgery, Spivey v. Rose, 120-163—as also testimony of brother to whom assignment made by defendant's intestate of certain insurance policies, as to such assignment, in action to set it aside brought by creditors, Watts v. Warren, 108-514—as also testimony by plaintiff, in action against defendant who claims under deceased, as to date of debt against deceased on which judgment was taken, Buie v. Scott, 107-181; see Sumner v. Candler, 86-71—as also testimony of surviving partner that defendant's intestate was a member of partnership, Moore v. Palmer, 132-969; Fertilizer Co. v. Rippy, 124-643; 123-656; Lyon v. Pender, 118-147; Sikes v. Parker, 95-232—as also testimony by plaintiff of the contents of written agreement with deceased, Hussey v. Kirkman, 95-63; Sawyer v. Grandy, 113-42—as also testimony of defendant, in action on debt due plantiff's intestate as to time and place of the signing of receipt by said intestate, Sumner v. Candler, 86-71—as also testimony of maker of note payable to guardian, since deceased, to prove payment thereof before his assignment to plaintiff, Lewis v. Fort, 75-251—as also testimony of assignee of defendant's intestate of certain bonds, subject of action, as to the real transaction, assignee having assigned same to plaintiff, Jackson

v. Evans, 73-128—as also testimony by obligee of bond to prove transaction between himself and deceased, although he may have previously assigned bond, Woodhouse v. Simmons, 73-30—as also testimony by administrator, upon issue as to assets, tending to prove discharge of his prima facie indebtedness to estate, Whitesides v. Green, 64-307.

TRANSACTIONS WITH OTHERS THAN DECEASED, OR WITH DECEASED IN PRESENCE OF OTHERS, AFFECTING HIS PROPERTY. Transaction with attorneys of deceased, before his death and in his presence is a transaction with deceased hereunder: Smith v. Moore, 142-277.

In action to correct deed to plaintiff's wife who is dead, plaintiff can testify as to what took place between him and grantor who is living: Lehew v. Hewitt, 138-6—and fact that his wife's estate affected by evidence does not render same incompetent, Ibid.

On issue devisavit vel non it is not competent to show by caveators conversation with testator, though same was in presence of person interested in action at time of trial, but not at time of conversation: In re Peterson, 136-13.

Plaintiff is competent witness to testify as to contract with railroad agent now deceased: Roberts v. R. R., 109-670; see Howerton v. Lattimer, 68-370.

Party to suit not disqualified as witness to speak transactions with deceased agent of deceased principal: Morgan v. Bunting, 86-67.

Conversation and understanding with plaintiff's testator is incompetent hereunder, but a rehearsal of conversation with agent of testator is competent as part of res gestae: Gilmer v. McNairy, 69-335.

Defendant can not testify as to conversation between third person, now deceased, and plaintiff's testator in regard to subject of controversy: Halyburton v. Dobson, 65-88.

In action against insurance company to recover premiums paid on life insurance policy, assured may testify as to conversation between himself and deceased agent of defendant company: Gwaltney v. Assurance Co, 132-925.

In action by widow against administratrix to compel payment of plaintiff's share in estate, testimony of defendant incompetent to prove conversation between decedent and third person: Wilson v. Featherston, 122-747—and testimony of such third person, who was a bailee of property in controversy at the time of the conversation, and is a party defendant to the action, is also incompetent, Ibid.

Mere fact of interest of witness does not exclude him from testifying of transactions with third persons which affect property of deceased: Watts v. Warren, 108-514.

Witness party to action not prohibited by section from testifying as to communications made to other witnesses: Waddell v. Swann, 91-105.

Party to action by administrator of deceased to enforce contract entered into between such party and deceased not competent to testify to conversation in presence of deceased with his agents and attorneys as to execution of contract: McRae v. Malloy, 90-521; Smith v. Moore, 142-277—for though conversation was with attorneys, yet they were acting for the deceased, in his presence and under his direction, and the substance of the

transaction was the making of the contract and personal to the deceased, and though agents or attorneys may be examined by either party to the suit, yet the disqualification of the party to the cause is not removed, as the statute makes no exception where others were present, McRae v. Malloy, 90-521.

DECISIONS HOLDING THAT CERTAIN FACTS NOT AMOUNTING TO TRANSACTIONS HEREUNDER MAY BE TESTIFIED TO. A witness who is excluded under this section from testifying to any personal communication or transaction with deceased person may, nevertheless, be competent to testify as to what he saw deceased do, or to any fact which does not include a personal transaction or cummunication: McCall v. Wilson, 101-598.

Interested witness can not testify that deceased signed certain papers, but he can testify as to whether signature is in handwriting of deceased; Sawyer v. Grandy, 113-42; Ferebee v. Pritchard, 112-83; Peoples v. Maxwell, 64-313—and that entries on books are in handwriting of deceased, Armfield v. Colvert, 103-147—and that certain paper writing is in handwriting of deceased, Hussey v. Kirkman, 95-63; Brush v. Steed, 91-226; Buie v. Scott, 107-181; Sumner v. Candler, 86-71; Peoples v. Maxwell, 64-313.

Testimony by daughter, to whom father had executed note similar to one which was the subject of the action, that father was "very bright" before and after execution of same, held competent: Ducker v. Whitson, 112-44.

Though plaintiff can not prove special contract with defendant's intestate for services of slaves before emancipation yet competent to prove that intestate had slaves in possession and enjoyed their services: Gray v. Cooper, 65-183.

Defendant may testify that bond given to person deceased, the subject matter of suit, was in blank as to amount payable when executed by him, having been filled up without authority in his absence: Isenhour v. Isenhour, 64-640; Brower v. Hughes, 64-642; Wester v. Bailey, 118-195.

Whether plaintiff left husband's home of her own volition, or by compulsion, is an inquiry not necessarily involving transaction or communication with husband: Hicks v. Hicks, 142-231.

Executor who is a devisee not disqualified to testify as to transactions occurring after death of testator, they not being transactions with deceased: Cox v. Lumber Co., 124-78.

Act of witness attesting will is not personal transaction with deceased within prohibition of section: Young's Will, 123-358; Cox v. Lumber Co., 124-78; Vester v. Collins, 101-114.

Testimony of plaintiff, in action against administrator for money loaned his intestate, as to mark on almanac and when placed there is competent when it appeared from the other testimony that mark not placed on almanac at time money was loaned and was therefore not a transaction with deceased: McArter v. Rhea, 122-614.

In action against administrator for fees incurred as witness for his intestate, plaintiff not precluded from testifying that he was a witness and as to number of days he attended, where witness tickets lost by

burning of courthouse, for the reason that these are facts of which others equally with intestate have knowledge: Johnson v. Rich, 118-268.

Testimony that witness carried supplies to decedent during sickness not such evidence of conversation or transaction as to make witness incompetent under section: Cowan v. Layburn, 116-526.

Competent for assignee of judgment against decedent to prove by own oath that judgment not paid, in proceeding to revive it and issue to execution, Latham v. Dixon, 82-55.

Where witness asked to state "when and where he first saw book now shown to him," object, as stated by counsel, being to show that witness first saw book in hands of defendant's intestate at time he handed book to her on day of marriage, such question incompetent: Lane v. Rogers, 113-171—since handing her book was personal transaction between plaintiff's witness and deceased, Ibid—but competent to show by witness that he saw book in hands of intestate on day of marriage, as that would not have been a transaction with deceased, Ibid.

Widow and devisee of testator competent witness to prove that script propounded was found among valuable papers of deceased, as she does not testify as to any personal transaction or communication: Cornelius v. Brawley, 109-542.

Evidence of statements of deceased witness made during trial not inhibited under section as transactions with deceased persons: Costen v. McDowell, 107-546.

Fact in no way involving transaction or communication does not come within inhibition of section: Hughes v. Boone, 102-137.

Plaintiff competent to testify that her father, since deceased, gave her money to purchase land in controversy, when none of parties to action claimed any interest under father: Loftin v. Loftin, 96-94.

Mere entry of credit on bond due intestate's estate not sufficient to raise presumption of fact that intestate present at time credit entered where it is proved that intestate's business was conducted by agent: Lockhart v. Bell, 90-499—but to raise presumption nature of transaction must be such as to require presence of deceased person in respect to it, Ibid.

Witness, principal debtor in action by plaintiff against estate of deceased surety, not disabled by section from testifying for defendant administrator as to what occurred in transaction between plaintiff and deceased: Kesler v. Mauney, 89-369.

Witness offered to prove fact which occurred out of presence of, and in no sense a transaction with deceased person, held not incompetent under section, for it is only when transaction between deceased and living party that latter prohibited from testifying: Lockhart v. Bell, 86-443.

Where plaintiff sues defendant's intestate for value of an animal, competent for plaintiff to testify as to value of such animal and that he had owned but one such animal since the war, as this is not evidence or communication with deceased person, but of substantive and independent fact, March v. Verble, 79-19.

In action of ejectment, vice-president of defendant company competent to prove where person said certain corner of land was located, it not being

a transaction or communication between him and anyone under whom plaintiff claimed title to land: McNeely v. Lumber Co., 130-637.

EFFECT OF ADMINISTRATOR OR SURVIVOR, ETC., TESTIFYING AS TO TRANSACTION. Where executor or administrator examined in own behalf concerning transaction or communication with decedent, other party to action competent to testify concerning same transaction or communication: Burnett v. Savage, 92-10; Davison v. Land Co., 126-704; Cheathan v. Bobbitt, 118-343; Hughes v. Boone, 102-137; Hawkins v. Carpenter, 85-482; Knight v. Killebrew, 86-402; Murphy v. Ray, 73-588—and other party or witness interested in the event is restricted in reply to those particular transactions and communications to which testimony of deceased person or his representative was pertinent, Armfield v. Colvert, 103-147; Hughes v. Boone, 102-137; Smith v. Smith, 101-461; Burnett v. Savage, 92-11; Sumner v. Candler, 92-634; Hopkins v. Bowers, 108-298; Kesler v. Mauney, 89-369; Redman v. Redman, 70-257.

When personal representative opens door by testifying to transaction or communication with decedent it is not his province, but that of court; to decide what testimony of adverse party may come in: Cheatham v. Bobbitt, 118-343.

Where husband of administratrix, not being party to action and having no interest in event thereof testified, same does not render admissible testimony of defendant as to transaction between deceased and defendant: Hall v. Holloman, 136-34.

Where plaintiff introduced defendants before jury for inspection to show they were of negro blood but did not examine them as witnesses, this did not open door for defendants to testify as to any communication or transaction with deceased ancestor: Hopkins v. Bowers, 108-238.

Administrator can testify that intestate delivered goods to defendant without "opening the door," as delivery is an independent fact: Cheatham v. Bobbitt, 118-343—but if he testifies that defendant purchased goods of intestate he "opens the door" for defendant to negative same with his own version of the transaction, Ibid.

Where plaintiff administrator of decedent testified only to execution of bond, this did not confer upon defendant right to testify as to payments made by him on bond, nor to cross-examine plaintiff administrator in regard to such alleged payments: Williams v. Cooper, 113-286.

Where executor who was subscribing witness to receipt given by defendant to his intestate proves execution of same on trial, he thereby opens door and defendant can testify as to transaction between himself and deceased connected with execution of receipt: Hughes v. Boone, 102-137.

Evidence of defendant as witness for plaintiff that plaintiff's testator contributed certain sum to parternership capital did not open door so as to permit defendants to testify as to other transactions between themselves and plaintiff's intestate: Armfield v. Colvert, 103-147.

When plaintiff examines defendant as to a matter not within inhibition of section, defendant is not thereby at liberty to discharge the prohibition and testify to any and all transactions with deceased: Hopkins v. Bowers, 108-298.

Incompetent for defendant claiming under deceased mother to testify

as to alleged agreement regarding the land in controversy on part of decedent plaintiff, who claimed as devisee of mother, not having offered to give evidence concerning matter: Blake v. Blake, 120-77.

GIVING IN EVIDENCE THE TESTIMONY OF DECEASED. Where deposition of decedent introduced in behalf of defendant, both parties claiming under deceased, defendant may testify in own behalf in respect to same transaction: Nixon v. McKinney, 105-23. Competent for plaintiff's witness to testify to what deceased maker of note sued upon testified on former trial as to its payment, as same does not come within section: Worth v. Wrenn, 144-656. Testimony of deceased person given in evidence regarding transaction opens door for living party interested to give evidence concerning same: Sumner v. Candler, 92-634.

AS TO DECLARATIONS OF, AND CONVERSATIONS HAD WITH, DECEASED OR HIS AGENT. In action involving validity of deed of trust, where trustor dead and estate insolvent, son of trustor competent witness as to decedent's declarations concerning trust: Gidney v. Logan, 79-214.

Executor may testify as to declarations made by deceased legatee in her own favor in presence of devisor: Medlin v. Simpson, 144-397.

An interested witness may testify to declarations of deceased person relative to boundary lines: Yow v. Hamilton, 136-357.

Rehearsal of conversation with deceased in a subsequent conversation with his agent is competent as part of res gestae: Gilmer v. McNairy, 69-335.

Where agent sent to notify person to go to see principal, such person can not after death of principal testify to declarations of agent as to statements made to him by principal: Holt v. Johnson, 129-138.

Personal representative can not introduce declarations of deceased unless same are part of some conversation or statements proven by opposite party: Johnson v. Armfield, 130-575.

Declarations of deceased attorney contained in affidavit supporting motion to vacate a judgment are not barred by this section: Molyneux v. Huey, 81-106.

In action by executor against husband, the wife, who is not party to action, is competent to prove a declaration made by deceased to her husband: Bradsher v. Brooks, 71-322. Plaintiff is competent to testify to conversation with an agent now deceased: Roberts v. R. R., 109-670; Howerton v. Lattimer, 68-370.

Section merely referred to in McKee v. Lineberger, 87-186; Macey exparte, 84-65; Henry v. Willard, 73-43; Meroney v. Avery, 64-313; Presnell v. Garrison, 121-366, 122-596; Autry v. Floyd, 127-187; State v. Raby, 121-683; Crenshaw v. Johnson, 120-270; Quinn v. Lattimore, 120-433; Clark v. Hodge, 116-761; Coggins v. Flythe, 113-105; Perkins v. Berry, 103-143; Roberts v. Preston, 100-248; Smith v. Smith, 97-28; Long v. Miller, 93-233; Wilson v. Lineberger, 88-424.

1632. Executors may testify as to estate in their hands, when; proviso. In all actions now pending or which may be hereafter instituted upon judgments rendered before the first day of August,

one thousand eight hundred and sixty-eight, or upon any bond or promissory note under seal executed prior to said date, wherein a reference has been or may be ordered by the court to ascertain the condition or state of the assets belonging to the estate of any deceased debtor in the hands of his administrator or executor, who is or may be defendant in such actions, it shall be competent for the defendant administrator or executor of such deceased debtor to testify and be examined as a witness in his own behalf concerning his administration upon the estate of his intestate or decedent. When in such cases the defendant administrator or executor shall have testified or been examined as a witness in his own behalf, it shall also be competent for the plaintiff to testify and be examined in the same in regard to such administration.

1885, c. 361. **Purpose of this enactment stated** in Coggins v. Flythe, 113-106.

1633. Party not competent, when. No person who is or shall be a party to an action founded on a judgment rendered before the first day of August, one thousand eight hundred and sixty-eight, or on any bond executed prior to said date, or the assignor, endorser or any person who has at the time of the trial, or ever has had any interest in such judgment or bond, shall be a competent witness on the trial of such action, but this section shall not apply to the trial of any action commenced before the first day of August, one thousand eight hundred and sixty-eight, nor to the trial of any action in which the defendant therein relies upon the plea of payment in fact, or pleads a counterclaim and also introduces himself as a witness to establish the truth of such plea, but in all such cases the rules of evidence as contained in this Revisal shall prevail.

Code, s. 580; C. C. P., s. 333; 1879, c. 183; 1883, c. 310, ss. 1, 2. **Cases construing section and amendments thereto:** Coggins v. Flythe, 113-102; Alston v. Hawkins, 105-9; Smith v. Smith, 97-27; Grant v. Hughes, 96-177; Borden v. Gully, 92-127; Waddell v. Swann, 91-105; Clanton v. Price, 90-96; Brown v. Cooper, 89-237; Johnston v. Jones, 87-394; Morgan v. Bunting, 86-67; Pugh v. Grant, 86-40; Jones v. Henry, 84-320; Macay ex parte, 84-63; Tabor v. Ward, 83-291; Wilkerson v. Buchanan, 83-296; Strudwick v. Broadnax, 83-403; Smith v. Hayes, 82-448; Cannon v. Morris, 81-139.

1634. Defendant competent in criminal actions; husband or wife competent for defendant. In the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. The husband, or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for

the defendant; but the failure of such witness to be examined shall not be used to the prejudice of the defense. But every such person examined as a witness shall be subject to be cross-examined as are other witnesses.

Code, s. 1353; 1881, c. 89, s. 3; 1881, c. 110, ss. 2, 3. **See annotations under section 1635.**

147-567

Defendant in criminal action can only be examined as witness at own request: State v. Ellis, 97-447—**but if he does make request and is examined his statements can be held as evidence against him,** Ibid.

Where defendant goes upon stand as witness he becomes just as any other witness, and his general character can be proven, State v. Spurling, 118-1250; State v. Goff, 117-761; State v. Johnson, 100-494; State v. Davis, 92-767; State v. Lawhorn, 88-637; State v. Spier, 86-602; State v. Efler, 85-585—**not only as it was before charge affecting it was made, but as it is at time he goes upon the stand in his own behalf,** State v. Spurling, 118-1250—**and he can be cross-examined as to any other transaction, not barred by time, tending to prove charge, unless state compelled to elect between transactions shown:** State v. Allen, 107-805.

When defendant testifying in his own behalf introduces no evidence as to general character, evidence by the state that such character bad is competent only as affecting credibility of defendant as witness: State v. Traylor, 121-674—**and not as circumstance in determining question of guilt or innocence,** Ibid. **Defendant waives constitutional privilege not to answer questions tending to criminate him when he voluntarily testifies in own behalf:** State v. Allen, 107-805; State v. Thomas, 98-599. **Defendant offering himself as witness may be asked on cross-examination, with view to affect his standing as witness, whether he has been convicted of criminal offenses:** State v. Lawhorn, 88-634.

Where defendant, in prosecution for another crime, testifies in own behalf after being informed of privilege not to testify, admission so made competent evidence against him in subsequent trial, State v. Simpson, 133-676. **Where person charged with offense before mayor of town is called to the stand by his counsel and testifies in own behalf, caution prescribed by section 3194 not being given, defendant deemed to be testifying under this section and not under section 3194:** State v. Hawkins, 115-712. **Evidence of defendant testifying in his own behalf is to be considered by jury, and he has right to have jury instructed as to effect of his evidence if believed by them:** State v. Gilmer, 97-429; see State v. Holloway, 117-730.

Defendant can testify as to any fact which would be competent to prove by any other witness: State v. Bethel, 97-459.

Declarations of one defendant are not admissible as against co-defendant: State v. Collins, 121-667.

As to instructing jury on credibility of defendant's testimony, see State v. Holloway, 117-730; State v. Gilmer, 97-429.

Defendant can be made to testify against co-defendant if testimony does not tend to incriminate himself: State v. Smith, 86-705; State v. Weaver, 93-595—**and he is also allowed to testify for his co-defendant,** State v. Rose, 61-406.

Section prohibits comment upon fact that defendant does not go upon stand to testify: State v. Harrison, 145-414; Hudson v. Jordan, 108-12; Goodman v. Sapp, 102-477—**but does not forbid prosecuting attorney making such comments upon testimony as would have been legitimate before enactment of section, for while section enlarges privileges of prisoner, it does not abridge rights of state's officers:** State v. Weddington, 103-364.

Husband or wife of defendant competent witness for defendant in all criminal actions or proceedings: State v. Harbison, 94-885; State v. Jones, 89-559—**but in fornication and adultery husband of feme defendant not competent to testify against her as to such acts committed while marital relation existed,** State v. Raby, 121-682; State v. Jones, 89-559; State v Jolly, 20-108—**though he may have obtained divorce a vinculo before trial,** Ibid. **When man and woman indicted for fornication and adultery, husband of feme defendant, as to whom nol pros entered, competent witness to show adultery between defendants before marriage of witness and feme defendant,** State v. Wiseman, 130-726.

On indictment for bigamy second wife of defendant admissible as witness either for or against him: State v. Patterson, 24-346. **When two indicted in same bill for affray and mutual assaults, wife of neither competent witness for state or other defendant:** State v. Harbison, 94-885—**though freedwoman competent witness against freedman who claimed her as wife while they were slaves, but since emancipated he had refused to marry her,** State v. Taylor, 61-508. **As to evidence of slaves cohabiting together as man and wife prior to emancipation,** see State v. Samuel, 19-177. **One charged with crime, who turns state's witness against associates under assurance that his disclosures shall not be used against him, may be cross-examined as to what he told counsel about the offense while he was himself charged:** State v. Condry, 50-418.

Section merely referred to in State v. McDowell, 101-737; State v. Kilgore, 93-536; State v. Lemon, 92-793; State v. Smith, 86-707.

1635. Defendant in criminal actions not compellable to give evidence against himself; nor husband or wife against the other. Nothing in this chapter, except as provided in the preceding section, shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense competent, or compellable, to give evidence against himself, nor shall render any person compellable to answer any question tending to criminate himself, nor shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, nor any wife competent or compellable to give evidence against her husband: Provided, that in all criminal prosecutions of a husband for an assault and battery upon the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the state against the said husband.

Code, s. 1354; 1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4. **See also annotations under section 1634.**

The privilege of refusing to answer an incriminating question is personal to the witness and to him only: State v. Morgan, 133-743. **Defendant competent and compellable to testify for or against co-defendant:** State v. Smith. 86-705; State v. Weaver, 93-595—**provided testimony does not criminate himself,** State v. Smith, 86-705—**and not error for judge to caution witness that he need tell nothing to incriminate himself,** State v. Weaver, 93-595—**but defendant waives privilege not to answer questions tending to criminate him when he voluntarily testifies in own behalf,** State v. Allen, 107-805; Smith v. Smith, 116-386; State v. Thomas, 98-599; State v. Rose, 61-406.

Defendant can be required to furnish evidence (sometimes resulting in being against himself) by making him fit his shoes to tracks: State v. Mallett, 125-725; State v. Graham, 74-646; State v. Lindsey, 78-501.

Neither husband nor wife competent or compellable to give evidence against others in criminal proceeding: State v. Harbison, 94-885—**and where two indicted in same bill for affray and mutual assaults, wife of neither is competent witness for state or other defendant,** State v. Weaver, 93-595—**nor is husband of feme defendant, indicted for fornication and adultery, competent witness against her,** State v. Jones, 89-559—**though may have obtained divorce a vinculo before trial of action,** Ibid.

Rule disqualifying wife from testifyng against husband applies only where husband has legal interest in result, State v. Parrott, 79-615—**and does not render her incompetent to contradict his testimony for state upon indictment against third person for assault and battery upon husband,** Ibid.

Where nol pros entered as to feme defendant indicted with another for fornication and adultery, husband of woman can testify as to adultery between defendants committed before marriage of woman and witness: State v. Wiseman, 130-726—**and where wife indicted for assault and battery in striking husband with axe, husband competent witness against her,** State v. Davidson, 77-522.

Section merely referred to in Broom v. Broom, 130-563.

1636. Husband and wife witnesses. In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or if in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No hus-

band or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

Code, s. 588; C. C. P., s. 341; 1866, c. 40, s. 2. **For additional annotations see under sections 1634 and 1635.**

Neither wife nor husband is a competent witness against the other upon the trial of an indictment for assault and battery when no lasting injury is inflicted or threatened: State v. Davidson, 77-522 and cases cited—**but where wife indicted for assault and battery in striking her husband with an axe, husband is competent witness against her:** Ibid.

Husband or wife of defendant is competent witness for defendant in all criminal actions or proceedings: State v. Harbison, 94-885.

Where two are indicted for a battery, the one for the act and the other for using encouraging language at the time, the wife of the one who encouraged the beating is a competent witness for the other party: State v. Mooney, 64-54.

In action for divorce on ground of adultery neither husband nor wife competent as witness to adulterous acts of other: Toole v. Toole, 112-150, Perkins v. Perkins, 88-41—**nor shall admissions of either be received in evidence to prove such fact,** Perkins v. Perkins, 88-41—**but husband of feme defendant indicted for fornication and adultery is competent witness to prove fact of her marriage to him,** State v. McDuffie, 107-885—**and wife sued for divorce on ground of adultery competent to deny evidence of witnesses that she was guilty of adultery with them,** Broom v. Broom, 130-562—**but divorced husband of feme defendant indicted for fornication and adultery is not competent to testify against her as to such acts which occurred prior to divorce,** State v. Raby, 121-682; State v. Jones, 89-559; State v. Jolly, 20-108—**though in suit for divorce a vinculo plaintiff (husband) competent witness to prove impotency of wife,** Barringer v. Barringer, 69-179—**and in indictment for bigamy first wife of defendant competent witness to prove marriage,** State v. Long, 143-672; State v. Melton, 120-591—**but confidential communications betwen husband and wife can not be received in evidence,** State v. Brittain 117-783; Toole v. Toole, 112-156.

For declaration held not to be privileged communication between husband and wife, see Toole v. Toole, 112-152.

Section merely referred to in State v. Wiseman, 130-727; Little v. Ratliff, 126-264; Toole v. Toole, 109-615; Bunn v. Todd. 107-266; Taylor v. Taylor, 76-439; Horne v. Horne, 75-103; Boykin v. Boykin, 70-266.

1637. Persons testifying in gambling not prosecuted. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery, made by the witness upon such examination, shall be used against him, in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done, or participated in by him.

Code, s. 1215; R. C., c. 35, s. 50. **See section 1688. Section not in violation of either state or federal constitution:** In re Briggs, 135-118—**and witness may be compelled to testify under section, although answer tends to**

criminate him, State v Morgan, 133-743; In re Briggs, 135-118. **Word "gaming" defined:** State v. Morgan, 133-745.

1638. Lynching, witness must testify; pardoned. In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of a cause for lynching, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself, but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall when so examined as a witness for the state be altogether pardoned of any and all participation in any crime of lynching concerning which he is required to testify.

1893, c. 461, s. 5. **For cases on section analagous to this, see section 1637. Force and effect of original act, of which section is part, not impaired by fact that same split up and different sections placed under appropriate heads in Revisal:** State v. Lewis, 142-626.

1638a. Witnesses testifying against trusts, who incriminate themselves, not prosecuted. No person who is subpœnaed and required by the state to testify under the provisions of sections three thousand and twenty-eight (c) and three thousand seven hundred and thirty-nine (a) shall be prosecuted or convicted on account of matters disclosed by the testimony of such witness, nor shall the testimony of such witness be received or used in any court in any prosecution against him or her.

1907, c. 219.

IX. Attendance of Witness.

1639. How procured. In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to-wit:

In suits where witnesses are to appear at any court, the clerk at the instance of a party shall issue a subpœna directed to the sheriff or other officer of the county where such witnesses reside, naming the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned. Every subpœna made returnable immediately, shall be issued only in term time, and shall be personally served on the witness therein named. A copy of every subpoena issued by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy certified by the sheriff or other officer,

and left as aforesaid, shall be deemed a legal summons, and the person therein named shall be bound to appear in the same manner as if personally summoned.

Code, s. 1355; R. C., c. 31, s. 59; 1777, c. 115, s. 36. **For subpoena issued by party or attorney, see section 884.**

1640. How procured before jury of view, referee or commissioners. In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referee, order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, naming the day and place when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned.

Code, s. 1366; R. C., c. 31, s. 68; 1805, c. 685, ss. 1, 2.

1641. When subpoena duces tecum may issue. In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the state, or in any office of any court, shall become necessary, the court may issue the process of subpœna duces tecum, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpoena to testify.

Code, s. 1372; R. C., c. 31. s. 81; 1797, c. 476.

1642. Cause removed, subpœnas and commissions to take depositions issued from either county. When any cause shall be removed from the superior court of one county to that of another, after the order of removal, depositions may be taken in the cause, and subpœnas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpœnas or commissions issued.

Code, s. 1371; R. C., c. 31, s. 72; 1810, c. 787; 1832, c. 8. **Upon removal of cause, jurisdiction of court from which removed ceased, unless otherwise provided in order of removal, or by consent of parties in writing duly filed:** Fisher v. Mining Co., 105-124—**but section makes exception to rule by provision that after removal subpoenas for witnesses and commissions to take depositions may issue from either court,** Ibid—**and, pending removal of cause from one county to another, and before deposit of transcript, competent for clerk of former county to take examination of parties,** Comrs. v. Lemly, 85-341.

1643. Witness to attend until discharged; penalty nonattendance, how paid; judgment nisi only. Every witness, being summoned to appear in any of the said courts, in manner before directed, shall

appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpœna issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him: Provided, that if the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge, he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party, at whose instance he was summoned, the allowance which is given to witnesses for their attendance, with costs: Provided further, that no execution shall issue against any defaulting witness for the forfeiture aforesaid, but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness.

Code, s. 1356; R. C., c. 31, ss. 60, 61, 62; 1777, c. 115, ss. 37, 38, 43; 1799, c. 528; 1801, c. 591. **No necessity for but one subpœna, or where more than one witness, one set of subpœnas:** State v. Gwynn, 61-446; Sweany v. Hunter, 5-182—**because when once summoned, witness is bound to attend from term to term until discharged,** Ibid.

Where two subpœnas served upon witness requiring attendance on same day at different places distant from each other, he may make election between them: Icehour v. Martin, 44-478—**for he is not compelled to obey subpœna first served,** Ibid.

Witness summoned in this state while casually here, but who resides in another state, can not be amerced for nonattendance where he has returned to own state and was there at time when presence required as witness: Kinzey v. King, 28-76.

If witness allege that he was unable to attend court such inability must be decided with reference to mode of travel which is in use in community: Eller v. Roberts, 25-11—**and if practicable modes of conveyance to court exist, and it is not shown by witness that same was not within his power, nonattendance can not be attributed to inability,** Ibid.

Issue in bastardy is not "criminal prosecution" so as to subject defaulting witness to fine of eighty dollars prescribed by section: Ward v. Bell, 52-79; see State v. Giles, 134-735.

Section merely referred to in Fite v. Lander, 52-249.

1644. Not arrested in civil cases while attending court. Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles which such witness has to travel to and from his place of residence.

Code, s. 1367; R. C., c. 31, s. 70; 1777, c. 115, s. 44. **Citizen of another state voluntarily attending court here as witness is privileged from arrest in civil cases, though no subpœna served upon him:** Ballinger v. Elliott, 72-596; Fentress v. Brown, 61-374.

Section does not repeal by implication the common law privilege of exemption of nonresidents from service of civil process while attending as suitor or witness in this state: Cooper v. Wyman, 122-784; Hammerskold v. Rose, 52-629; see also Greenleaf v. Bank, 133-292. **Exemption of witnesses from arrest not applicable to persons arrested in criminal proceedings:** White v. Underwood, 125-25.

X. Depositions.

1645. What may be read on the trial. Every deposition taken and returned as prescribed in section one thousand six hundred and fifty-two may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.

2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.

3. If the witness is confined in a prison outside the county in which the trial takes place.

4. If the witness is so old, sick or infirm as to be unable to attend court.

5. If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or the head of any other incorporated college in the state, or the superintendent or any physician in the employ of any of the hospitals for the insane for the state.

7. If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

8. If the witness is a member of the congress of the United States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member.

9. If the witness has been duly summoned, and at the time of the trial, is out of the state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

Code, s. 1358; R. C., c. 31, s. 63; 1777, c. 115, ss. 39, 40, 41; 1803, c. 633; 1828, c. 24, ss. 1, 2; 1836, c. 30; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; 1905, c. 366. See sections 1652, 1654. Not necessary in order to render deposition competent that it should have been taken in this action, but it is sufficient if it has been taken in another action or proceeding between same parties in relation to same subject matter or involving same material questions, and that adverse party had opportunity to cross-examine witness making same: Stewart v. Register, 108-588; Mabe v. Mabe, 122-552. Such deposition not admissible unless parties and matters in issue in latter case are the same as in former one: Bryan v. Malloy, 90-508—and it must be shown that there was an action pending and properly constituted in which deposition taken, Ibid. Deposition may be introduced whether deponent examined as witness in case being tried or not, Mabe v. Mabe, 122-552.

153.244

In taking deposition, interrogatories not required to be in writing: Bank v. Bank of Asheville, 116-815—and where nothing to indicate that deposition does not contain whole of deponent's testimony or that it was not written down at time and in presence of witness, motion to quash should be refused, Ibid.

Where it appears from the return of a deposition that it was taken on the day, at the time, and by the person designated, it will be presumed, in the absence of evidence to the contrary, that all things were done rightly, and that it was taken between the hours appointed for taking the same: Street v. Andrews, 115-417—and an objection that answers were on a separate sheet attached to the interrogatories, but not inserted at the end of each interrogatory, the whole, however, being above the signature of the commissioner is untenable, Ibid.

Where deposition read, opposite party may contradict witness by showing that he had subsequently made different statements: Roberts v. Collins, 28-223.

Party does not make person his witness by taking his deposition which he declines to read: Neil v. Childs, 32-195.

Where deposition rejected in limine because name of commissioner not inserted in commission, not incumbent upon party offering deposition to show why same should be admitted: Womack v. Gross, 135-378.

Depositions are admissible in bastardy as in other civil cases: State v. Hickerson, 72-421. Deposition in criminal action is competent to be read

in favor of one prisoner, though it contains evidence against his codefendant, but judge should instruct jury not to consider latter evidence: State v. Finley, 118-1161.

Deposition of witness adjudged to be unable to talk or remain in court admissible in evidence: Willeford v. Bailey, 132-402.

Deposition of witness residing in another state may be read in evidence, though witness be in state at time of trial: Meredith v. Kent, 1-52

Where deposition of resident taken de bene esse, and he leaves state before opening of court and is absent at trial, deposition may be read under section, it being shown that he was out of state and more than 75 miles from place of trial: Barnhardt v. Smith, 86-473—and finding by trial judge that witness whose deposition offered was not in state, there being some evidence of such fact, will not be reviewed in supreme court: Branton v. O'Bryant, 93-99: Sparrow v. Blount, 90-514.

For case before amendments to subsection 9, see Sparrow v. Blount, 90-514. As bearing upon subsection 9, see Cunningham v. Cunningham, 121-413. Subsection merely referred to in Davenport v. McKee, 98-506.

1646. In justices' courts. Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action; and to do so, he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace, before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court.

Code, s. 1359; 1872-3, c. 33.

1647. Not quashed after trial begun. No deposition shall be quashed, or rejected on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection.

Code, s. 1360; 1869-70, c. 227, s. 12. Exceptions to depositions, especially those which relate to its regularity, should be disposed of at latest before trial entered upon: Ivey v. Cotton Mills, 143-189—and where adverse party had notice of taking of deposition long enough for him to file objections, same will not be quashed for irregularity in manner of taking after trial begun, Davenport v. McKee, 98-500; Katzenstein v. R. R., 78-286; Carson v. Mills, 69-32.

Deposition will not be quashed on oral objection made at trial where same has been on file in clerk's office two or three months before trial, and opened by clerk in presence of counsel for both parties, Carroll v. Hodges, 98-418—but where it appears that no notice given adverse party of taking of deposition, and same not passed upon by clerk as pro-

vided by section 1652, objection to reception of deposition may be taken on trial of action, Bryan v. Jeffreys, 104-242. Where notice served that depositions will be taken at same time in two different places, person notified may attend at either place designated, and disregard notice as to other: Ivey v. Cotton Mills, 143-189—and depositions taken in his absence at other place will on motion be quashed or suppressed, Ibid—but where he elects to appear by counsel and cross-examine witness without making objection at time, this is waiver as to any defect in notice, Ibid.

Failure to insert name of commissioner in commission is waived by objecting party appearing at taking of deposition and making no objection thereto until after trial begun: Womack v. Gross, 135-378.

Exceptions on trial to deposition offered on two former trials without objection, and to which no objection made either at time of taking or opening same, it is properly overruled: Bank v. Burgwyn, 116-122.

Objection that answers were on separate sheet attached to interrogatives but not inserted at end of such interrogatory, whole, however, being above commissioner's signature, is untenable: Street v. Andrews, 115-417.

Custom of reserving right to have exceptions, especially those relating to regularity of deposition, passed upon when deposition offered in evidence disapproved by court: Ivey v. Cotton Mills, 143-197.

Section merely referred to in Sparrow v. Blount, 90-517; Barnhardt v. Smith, 86-480.

1648. Objection taken before trial. At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing.

Code, s. 1361; 1895, c. 312; 1903, c. 132; 1869-70, c. 227, ss. 13, 17. Objection to irregularities in taking of depositions must be made in writing: Willeford v. Bailey, 132-402; Brittain v. Hitchcock, 127-400; Davenport v. McKee, 98-507; Woodley v. Hassell, 94-157—and passed on before trial, Ivey v. Cotton Mills, 143-189; Willeford v. Bailey, 132-402; Brittain v. Hitchcock, 127-400; Glover v. Flowers, 101-134; Woodley v. Hassell, 94-157; Katzenstein v. R. R., 78-286—for, unless same so made, objection to deposition is waived, Woodley v. Hassell, 94-157; Kerchner v. Reilly, 72-171.

153-244

Deposition on file for reasonable time up to trial without objection presumed to have been passed upon: Kerchner v. Reilly, 72-171—and deposition will not be quashed for irregularity in manner of taking after trial commenced where adverse party had notice of taking same long enough before trial to allow him to file objections, Davenport v. McKee, 98-500; Carson v. Mills, 69-32. Deposition on file in clerk's office two or three months before trial and opened by clerk in presence of counsel of both parties can not be quashed on oral objection made at trial: Caroll v. Hodges, 98-418—and too late to object on trial of action to reading of deposition which

had been on file for six years without any objection and motion for various purposes had been made, Wasson v. Linster, 83-575.

Where deposition objected to on ground that testimony contained therein was incompetent though no particular point so indicated and no error assigned, objection will not be considered: Smith v. McGregor, 96-101.

Objection that commissioner to take deposition was related to one of parties must be taken at time of opening same before clerk: Kerr v. Hicks, 131-90.

Appearance before commissioner waives irregularity in commission: Willeford v. Bailey, 132-402; Womack v. Gross, 135-378; Davison v. Land Co., 118-368; Barnhardt v. Smith, 86-473.

For case prior to enactment of section, see Hix v. Fisher, 60-474. **Section merely referred to** in Sparrow v. Blount, 90-517; Street v. Bryan, 65-622.

1649. Commissioners may subpœna witness and punish for contempt. Commissioners to take depositions appointed by the courts of this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue subpœnas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness, appearing before any of the said persons, and refusing to give his testimony on oath touching such matters as he may be lawfully examined upon, shall be committed by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it.

Code, s. 1362; R. C., c. 31, s. 64; 1777, c. 115, s. 42; 1805, c. 685, ss. 1, 2; 1848, c. 66; 1850, c. 188. **Commissioner to take deposition presumed to be properly qualified until contrary shown:** Gregg v. Mallet, 111-74. **Duty of witness to answer proper question propounded by him just as though examination conducted before judge or clerk:** Fertilizer Co. v. Taylor, 112-146. **Power to commit to common jail person refusing to testify before commissioner not given exclusively, if at all, to commissioner, but he may invoke aid of judge from whom he derived his appointment:** Fertilizer Co. v. Haylor, 112-141. **Deposition will be rejected if witness refuses to answer proper questions on cross-examination,** Mosely v. Mosely, 1-631.

1650. Attendance before commissioner, how enforced. The sheriff of the county where the witness may be shall execute all such subpœnas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in

the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpœnaed five days before the time of his required attendance, and shall fail to appear according to the subpœna and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the state, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpœnaed fifty dollars, and on the trial for such penalty, the subpœna issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpœna, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended.

Code, s. 1363; R. C., c. 31, s. 65; 1848, c. 66, s. 2; 1850, c. 188, ss. 1. 2.

1651. Remedies against defaulting witness before commissioner. But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this state, then the same shall be certified under his hand, and returned with the subpœna to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned, the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, of he can, against the issuing thereof.

Code, s. 1364; R C., c. 31, s. 66; 1850, c. 188, s. 2.

1652. How taken. Any party in a civil action or special proceeding may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States. Written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party or his attorney. The time for serving such notice shall be as follows: Three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the state, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the state, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be

taken. When a deposition is to be taken beyond the state, ten days' notice of the taking thereof shall be given, when the party whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days' notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon the party objecting to satisfy the court of the truth of his allegation. Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk. Depositions shall be subscribed and sealed up by the commissioners, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent. In all criminal actions pending before the superior court it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court in which said action is pending that it is important for the defense that he have the testimony of any person or persons, whose names must be given, and that such person or persons are so infirm, or otherwise physically incapacitated, or nonresident of this state, that he can not procure their attendance at court. Upon the filing of said affidavit it shall be the duty of the clerk to appoint some responsible person to take the deposition of said person, which deposition may be read in the trial of said criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor of the district in which said suit is pending have ten days' notice of the taking of said deposition, who may appear in person or by a representative to conduct the cross-examination of such witness

Code, s. 1357; 1893, cc. 80, 360; 1891, c. 522; R. C., c. 31, s. 63; 1881, c. 279. **Where notice served that depositions will be taken at same time in two different places party notified may attend at either place designated and disregard notice as to other, and depositions taken in his absence at other place will on motion be quashed or suppressed, but where he elects to appear by counsel and cross-examine witness without making objection at time, this is waiver as to any defect in notice:** Ivey v. Cotton Mills, 143-189.

Discretionary with trial judge whether or not answers to leading questions shall be stricken out of deposition: Bank v. Carr, 130-479.

Depositions of witnesses never taken by court while engaged in trial of cause: Worthy v. Shields, 90-192.

Depositions are admissible in evidence on trial of issue in bastardy as they are in other civil cases: Tidline v. Hickerson, 72-421.

Error to permit deposition taken out of state on Monday of term at which cause tried to be read in evidence: Taylor v. Gooch, 50-404.

Part of deposition can not be offered to contradict witness: Barton v. Morphis, 15-240.

Irrelevant facts in deposition are incompetent: Downey v. Murphey, 18-82.

Failure to take in time for trial, where laches, no ground for continuance: Duncan v. Hill, 19-291.

AS TO APPOINTMENT OF COMMISSIONER. Commissioner should not be related to either of the parties: Kerr v. Hicks, 131-90. Where commission to take deposition is issued to be executed within county where issued, no seal required to be affixed thereto: McArter v. Rhea, 122-614—otherwise where a deposition is to be executed outside of such county, for without such seal it is void, Freeman v. Lewis, 27-91. Appearance before commissioner waives irregularity in commission: Willeford v. Bailey, 132-402; Womack v. Gross, 135-378; McArter v. Rhea, 122-614; Davison v. Land Co., 118-368; Barnhardt v. Smith, 86-473. Commissions to take depositions may be made returnable to any subsequent term of court from which issued: Duncan v. Hill, 19-291. Surplusage in stating title of court does not invalidate commission: Armstrong v. Dalton, 15-568. A mistake in issuing commission as from "supreme court" when it appears to be from the superior court, does not invalidate: Dobson v. Finley, 53-495. Commissioner to take depositions presumed to be properly qualified until contrary shown: Gregg v. Mallett, 111-74.

CONTENTS OF NOTICE. The notice must be properly entitled, inferred from Erwin v. Bailey, 123-628. Where notice specifies that deposition will be taken between certain hours of day same can not be read unless appears to have been taken between hours specified: Farrar v. Hamilton, 1-105; Harris v. Yarborough, 15-166. Where irregularity in notice, it is waived by attendance and cross-examination of witness: Erwin v. Bailey, 123-628. As to immaterial variance between notice and deposition, see Ridge v. Lewis, 1-599; Ellmore v. Mills, 2-359. Notice to take a number of depositions on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th, of a particular month does not, of itself furnish ground for suppressing depositions: Kea v. Robeson, 39-427—for if adverse party attended, his action cured all indefiniteness, Ibid.

No ground of exception to deposition that notice was given to take "deposition of A. B. C. and others" and deposition of neither A. B. nor C. was taken: McDugald v. Smith, 33-576.

Notice to take deposition on Sunday is not good, and deposition taken under such notice must be rejected: Sloan v. Willeford, 25-307.

Notice to take deposition on a particular day of every week, for three successive months, is insufficient: Bedell v. State Bank, 12-483—while

notice to take deposition of witness in Georgia on one of three successive specified days is sufficient: Harris v. Peterson, 4-358.

Notice must specify in what house deposition is to be taken: McNaughton v. Lester, 2-423—and it must be taken at house specified, Alston v. Taylor, 2-381—and where slight inaccuracy in description of house, it will be sufficient if it can be identified, Pursell v. Long, 52-102.

Notice to a particular agent is not sufficient: Lindsey v. Lee, 12-464, Where time not definitely stated notice is sufficient: Bedell v. State Bank, 12-483.

SERVICE OF NOTICE. Town constable can not serve notice in action pending in superior court: Cullen v. Absher, 119-441. Where several defendants in criminal action not necessary to notify each of the others when one wishes deposition for use on his behalf: State v. Finley, 118-1161. For method of computing time of service of notice, see Beasley v. Downey, 32-284. Depositions taken by one party and filed in court, they may be read by other party without proof of notice, and on second trial they may be read by party who took same without proof of notice: Collier v. Jeffries, 3-400.

Notice by advertisement, party being a nonresident and his attorney having died, held good in Maxwell v. Holland, 2-302.

THE TAKING OF THE DEPOSITION. Not error to take deposition in place of business of one of parties if such place named in notice and no suggestion that other party suffered any prejudice thereby: Bank v. Carr, 130-479. Deposition will be rejected where written down by attorney of party taking deposition: Mosely v. Mosely, 1-631. Interrogatories need not be in writing: Bank v. Bank of Asheville, 116-815—and answers need not be inserted after each interrogatory, where both interrogatories and answers are above the signature of commissioner: Street v. Andrews, 115-417. Name of commissioner should be inserted, inferred from Womack v. Gross, 135-378. Duty of witness to answer proper questions just as he would before judge or clerk: Fertilizer Co. v. Taylor, 112-146. Deposition unsigned by witness may be read in evidence: Rutherford v. Nelson, 2-105; Murphy v. Work, 2-105. Adjournments by commissioner must be from day to day: Rutledge v. Read, 3-242. That witness was sworn only to the truth of the deposition does not render it inadmissible: Welborn v. Younger, 10-205.

THE RETURN OF THE DEPOSITION. Deposition must be sealed up by commissioner: Ward v. Ely, 12-372. Deposition certified to have been taken on day and in county in another state, as specified in notice, but without stating particular place, not admissible in evidence: English v. Camp, 2-358. Deposition must show names of parties to action either in caption or body of it: Murray v. Marsh, 3-290. One commissioner can not amend return made by himself and another: Collier v. Jeffries, 3-400.

OPENING THE DEPOSITION. Provisions of section allowing clerk to pass upon depositions are only applicable to depositions of competent witnesses: Sehorn v. Williams, 51-575—and where clerk passed upon and allowed one to be read which was taken out of county, under commission without seal, court may disregard such action, Ibid.

Custom, when opening deposition, to reserve the right to file exceptions

as to its regularity, disapproved of in Ivey v. Cotton Mills, 143-197. Objection that commissioner related to one of parties must be made at time of opening before clerk: Kerr v. Hicks, 131-90. Party offering to read deposition as evidence must prove that he has given notice of opening of deposition before clerk as prescribed by section or show facts that would amount to waiver by opposite party of statutory requirement: Berry v. Hall, 105-154. Where it appeared that no notice was given adverse party of taking deposition and that same had not been passed upon by clerk, objection to its reception might be taken on trial of action: Bryan v. Jeffreys, 104-242. For objections to deposition which must be taken before trial, see sections 1647 and 1648.

Section merely referred to in Stern v. Herren, 101-518; Carroll v. Hodges, 98-420; Branton v. O'Briant, 93-99; Hill v. Bell, 61-122.

1653. How taken in hearings before municipal authorities. Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending for a commission to take the same, and said clerk, upon such application, shall issue such commission; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or can not after due diligence be found within this state, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court.

1889, c. 151.

1654. In quo warranto proceedings, how taken. In all cases now pending or hereafter to be brought in any county of this state for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such depo-

sitions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination of such witnesses by either party on the trial as they may summon in their behalf.

1889, c. 428.

1655. Taken in the state, action in another state. In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or any of the possessions thereof, or any foreign country, may obtain by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of the books and papers within the state to be used in the action, suit or special proceedings. Where a commission to take testimony within the state has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the state pursuant to the laws of the state or country wherein the court is located or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, any justice of the supreme court or judge of the superior court shall, in a proper case, on the presentation of a verified petition, issue a subpœna to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the state, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper by his title or office, at a time and place specified in the subpœna, to testify in the action, suit or special proceeding. If the witness shall fail to obey the subpœna, or refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpœna, or to subscribe his deposition, the justice or judge issuing the subpœna shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. The petition prescribed by this section must state generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and shall set forth the substance of or have annexed thereto a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpœna to compel the production of books or papers, the petition shall specify the particular books or papers, the produc-

tion of which is sought, and show that such books or papers are in the possession of or under control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken. Unless the justice or judge is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall deny the application. Where the subpœna directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but said books and original papers shall not be taken from the witness. This subpœna must be served upon the witness at least two days, or, in case of a subpœna requiring the production of books or papers, at least five days before the day on which the witness shall be commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpœnaed to attend and give his testimony, may apply to the court issuing said subpœna to vacate or modify such subpœna. Upon proof by affidavit that a person to whom a subpœna was issued has failed or refused to obey such subpœna, to be duly sworn or affirmed, to testify or answer a question or questions propounded to him, to produce a book or paper which he has been subpœnaed to produce, or to subscribe to his deposition when correctly taken down, the said justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed, testify, answer a question or questions propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall also set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the said justice or judge, as the case may be, shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such persons should be required to appear, be sworn or affirmed, testify, answer the question or questions propounded, produce the books or papers, or subscribe to his deposition as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge, as the case may be, shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the

order to show cause, the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, the justice or judge, as the case may be, shall enforce the order and prescribe the punishment as hereinbefore provided. The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this state for attendance upon the superior courts, and from such deposit said commissioner shall retain whatever amount may be due him for services, pay such witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands he shall pay the same to the party by whom it was advanced.

1903, c. 608.

XI. Writings, Production, Inspection.

1656. Inspection before trial. The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; C. C. P., s. 331; 1828, c. 7. **Court has power to order production of paper which contains evidence pertinent to issue, and which is in possession or control of adverse party:** Whitten v. Tel. Co., 141-361; McDonald v. Carson, 94-497; Austin v. Secrest, 91-214; McLeod v. Bullard, 84-515; Linker v. Benson, 67-150; McGibboney v. Mills, 35-163.

Order for administrator, who as bank cashier kept intestate's accounts, to produce books of bank and also such bonds as belong to intestate for inspection of plaintiffs, is valid under section: Comrs. v. Lemly, 85-341.

Petition or motion supported by affidavit will be sustained for inspection and copy of books of adverse party: Justice v. Bank, 83-8—**where it is made to appear that party applying for order can not obtain information sought otherwise than by such inspection,** Ibid—**and order will be granted before complaint filed when it is averred by applicant and not denied by opposing litigant that such discovery necessary to enable plaintiff to accurately frame complaint,** Ibid; Holt v. Warehouse Co., 116-480; but see Branson v. Fentress, 35-165.

Supreme court will not pass upon propriety of discharging rule under

section unless facts stated upon which application based: Maxwell v. McDowell, 50-391.

Section does not authorize order that respondent be required to deposit papers in clerk's office: Mills v. Lumber Co., 139-524.

Order of judge reversing order of clerk with reference to production of papers is discretionary matter, but motion may be renewed and new order obtained, Ibid.

Person will not be ordered to allow inspection of paper writing if party making request knows contents thereof: Sheek v. Sain, 127-266—and an order allowing others than defendant to inspect paper writing in possession of plaintiff is erroneous, Ibid.

Motion to nonsuit plaintiff for not producing books or papers under section can not be made unless previous order of court obtained for production of same: Graham v. Hamilton, 25-381.

Due notice is notice sufficient to enable a party to have document present when called for: McDonald v. Carson, 95-377. As to answer to the rule to produce papers, see Ward v. Simmons, 46-404; Fuller v. McMillan, 44-206. Appeal lies from order requiring person to allow inspection of paper writings: Sheek v. Sain, 127-266. Notice hereunder to party in action is in law notice to his attorney: Banking Co. v. Walker, 121-115.

In action by stockholder of corporation to set aside as fraudulent an assignment of contract by corporation plaintiff entitled to inspect books of corporation in order to obtain information upon which to frame complaint: Holt v. Warehouse Co., 116-480; Justice v. Bank, 83-8; but see Branson v. Fentress, 35-165.

Section merely referred to in Bernhardt v. Brown, 122-587; Coates Bros v Wilkes, 92-387; Morrow v. Allman, 65-510; Murchison v. McLeod, 47-241.

1657. Production on trial. The courts shall have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default.

Code, s. 1373; R. C., c. 31, s. 25; 1821, c. 1095; 1828, c. 7.

Court has power to order production of papers which contain evidence pertinent to issue and which are in possession or control of adverse party: Whitten v. Tel. Co., 141-361; McDonald v. Carson, 94-497; McLeod v. Bullard, 84-515; McGibboney v. Mills, 35-163; Scarborough v. Tunnell, 41-103. Generally if party dwells in another town than that in which trial had, service of notice upon him at place where trial had, or after he has left home to attend court, to produce papers, not sufficient: Beard v. R. R., 143-136.

Contents of paper writing can not be proved by parol unless notice has been given to adverse party who has same in possession to produce it on trial: Murchison v. McLeod, 47-239; Ivey v. Cotton Mills, 143-198.

As to sufficiency of affidavit accounting for nonproduction of paper ordered to be produced upon trial, see Fuller v. McMillan, 44-206.

Court can not, under this section, order production of papers by defendant on application of plaintiff where no complaint filed: Branson v. Fentress, 35-165.

Under section, no affidavit necessary in order to obtain order for production of papers in possession of adverse party: McDonald v. Carson, 95-377—but court has power, on motion and due notice, to require production of papers or books which contain evidence pertinent to issue, Ibid.

Due notice is notice sufficient to enable party to have documents present when called for, Ibid. When papers are produced hereunder they are competent evidence for all legitimate purposes: Austin v. Secrest, 91-214; Fertilizer Co. v. Taylor, 112-141.

Court below excluded paper writing which plaintiff "alleged was a substantial copy of the greater part of his letter to defendant," when defendant was not notified to produce original: Ivey v. Cotton Mills, 143-189.

1658. Admission of genuineness procured. Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal.

Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; 1828, c. 7; C. C. P., s. 331. Admission in writing under section that instrument is genuine does not preclude comments by counsel as to truth of contents suggested by its appearance, fact of being written by amanuensis, etc., Knight v. Houghtalling, 85-17.

XII. Confederate Currency.

1659. Scale of depreciation. Contracts solvable in Confederate currency may be discharged according to the following scale of depreciation of Confederate currency, the gold dollar being the unit and measure of value, from November first, one thousand eight

hundred and sixty-one, to May first, one thousand eight hundred and sixty-five:

Months.	1861.	1862.	1863.	1864.	1865.
January	$.....	$ 1.20	$ 3.00	$21.00	$ 50.00
February	.....	1.30	3.00	21.00	50.00
March	.....	1.50	4.00	23 00	60.00
April	.....	1.50	5.00	20.00	100.00
May	.....	1 50	5.50	19.00	
June	.....	1.50	6.50	18.00	
July	.....	1.50	9.00	21.00	
August	.....	1.50	14.00	23.00	
September	.....	2.00	14.00	25.00	
October	.....	2.00	14.00	26.00	
November	1.10	2.50	15.00	30.00	
December	1.15	2.50	20.00	.....	
" 1st to 10th, inclusive	.....	.....	.....	35.00	
" 10th to 20th, inclusive	.....	.....	.....	42.00	
" 20th to 30th, inclusive	.....	.....	.....	49.00	

This scale applies to the time of contracting and not to the times said debts become due.

Code ss. 2495, 2496; 1866, c. 39, s. 1; 1866-7, c. 44. **Cases construing section and amendments thereto:** Coggins v. Flythe, 113-102; Young v. Kennedy, 95-265; Grant v. Reese, 94-720; Depreist v. Patterson, 92-402; Jennings v. Copeland, 90-572; White v. Jones, 88-166; Wilson v. Powell, 86-230; Brickell v. Bell, 84-82; Melvin v. Stevens, 84-78; Derr v. Stubbs, 83-539; Green v. Barbee, 84-69; Drake v. Drake, 82-443; Palmer v. Love, 82-478; Boykin v. Barnes, 76-318; Holt v. Patterson, 74-650; Farmer v. Willard, 71-284; Wooten v. Sherrard, 71-374; Bryan v. Harrison, 69-151; Cable v. Hardin, 67-472.

For evidence in indictment for enticing minors from state, see section 3630. For evidence in cases of hunting by night, see section 3462. For evidence necessary in cases of disposing of mortgaged property, see section 3435. For evidence in indictments for secreting seamen, see section 3557. For students as witnesses against lewd women, see section 3353. For evidence to convict of seduction, see section 3354. For what necessary to allege and prove in prosecutions for selling seed cotton, see section 3812. For evidence in prosecution for selling liquor in local option territory, see section 2060. For evidence in cases of gaming, see Gaming Contracts. For evidence in suits against sureties on official bonds, see Bonds. For recitals in tax deeds as evidence, see section 2909. See Burnt and Lost Records. For proof of loss of baggage, see Innkeepers, section 1914. For certified copies of judgments as evidence, see section 569. See Commissioners of Affidavits. Vouchers evidence of payment by administrator, see Administration, section 101. For evidence against principal as against surety, see section 285.

CHAPTER 35.

FENCES AND STOCK LAW.

I. Lawful Fences.

1660. Fences to be five feet high. Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided for in this chapter, unless there shall be some navigable stream or deep water-course that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district wherein the stock law may be in force.

Code, s. 2799; R. C., c. 48, s. 1; 1777, c. 121, s. 2; 1791, c. 354, s. 1. **Proof that plaintiff's fence is a "good, ordinary" one, such as his neighbors have, does not dispense with statutory obligations:** Runyan v. Patterson, 87-343.

Plaintiff whose fence is insufficient not entitled to damages for defendant's stock breaking through it: Ibid; Jones v. Witherspoon, 52-555. **What is a sufficient lawful fence, or proper substitute therefor, is a question of law:** State v. Lamb, 30-229. **Whom the word "planter" herein comprehends,** see State v. Taylor, 69-543; see State v. Bell, 25-506. **A pasture field is not "cleared ground under cultivation:"** State v. Perry, 64-305.

Cases referring to section: State v. Anderson, 123-708; State v. Bloodworth, 94-918; Farmer v. R. R., 88-564; Roberts v. R. R., 88-560; State v. Staton, 66-640; State v. Waters, 51-276.

1661. Four and a half feet in certain counties. A fence four and one-half feet high shall be a lawful fence in the counties of Cumberland, Currituck, Cherokee, Burke, Rutherford, Yancey, Wilkes, Caldwell, Duplin, Jackson, Alleghany, Davidson, Harnett, Henderson, Wake, Craven, Richmond, Davie, Bladen, Northampton, Washington, Randolph, Robeson, Tyrrell, Brunswick and Lenoir: Provided, this section shall not apply to stock law fences.

1889, c. 175; 1891, c. 36; 1891, c. 233; 1905, c. 333.

1662. Four feet in certain counties. A fence four feet high shall be a lawful fence in the counties of Carteret, Pamlico, Hyde, New Hanover, Buncombe, Madison and McDowell.

1885, c. 304; 1887, c. 66; 1889, c. 390; 1903, c. 66; 1903, c. 211.

1663. Water-courses, on application to commissioners, made. Any five electors, residents of the same county, may apply to the board of commissioners of the county, at any regular meeting of the same, by written petition praying that any water-course, or any

part of any water-course, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any water-course, or any part of any water-course to which the petition applies, a lawful fence. And the several acts of the general assembly, declaring certain water-courses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any of such acts or parts thereof, to be null and void in said county. Any order made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting.

Code, ss. 2808, 2809, 2810; 1872-3, c. 98. **See section 1660.**

II. Joint Fences.

1664. Jointly maintained. Where two or more persons shall have lands adjoining, which shall be either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line.

Code, s. 2800; 1868-9, c. 275, s. 1.

1665. Jointly paid for, when. Where the owner of one piece of land shall have chosen neither to cultivate his land, nor to pasture, nor to permit his stock to run on it, if he shall afterwards do either, without so enclosing such stock that they cannot enter on the lands of such adjoining owner, he shall refund to such owner one-half the value at that time of any fence erected by him on the dividing line.

Code, s. 2801; 1868-9, c. 275, s. 2.

1666. Value of dividing fence ascertained, how. The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situate; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to act as a juror of the township, and if the complainant refuses

the justice shall name one for him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence of the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments.

Code, s. 2803; 1868-9, c. 275, s. 3.

1667. Jurors to report how fence kept up. The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up.

Code, s. 2804; 1868-9, c. 275, s. 4.

1668. Report registered by register of deeds. The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him.

Code, s. 2805; 1868-9, c. 275, s. 5.

1669. Final judgment binding. The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed.

Code, s. 2806; 1868-9, c. 275, s. 6.

1670. Remedy against delinquent owner. If any person who is liable to build or keep up a part of any division fence shall fail at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction.

Code, s. 2807; 1868-9, c. 275, s. 7.

1671. How removed. If any owner of land liable to contribute for the keeping up of a division fence shall determine neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months' notice of his determination; and

in that case, at any time after the expiration of such notice, and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same.

Code, s. 2802; 1903, c. 20; 1868-9, c. 275, s. 8; 1883, c. 111. **In stock-law territory, landowner may remove his part of division fence without notice:** State v. Edmonds, 121-679. **One may remove division fence entirely on his own land:** State v. Watson, 86-626.

III. Stock Law.

1672. County elections. Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of said commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast shall be in favor of said stock law, then the provisions of this chapter relating to the stock law shall be in force over the whole of said county.

Code, s. 2812. **The provisions of this subchapter are not in conflict with the principle of local self-government:** Smalley v. Comrs., 122-607. **Adoption of stock law does not abrogate a general statute or rule of law:** Shephard v. R. R., 140-391.

Persons already in stock law territory may petition in new territory: Perry v. Comrs., 130-558; Smalley v. Comrs., 122-607.

"Qualified voters" hereunder are those who have lawfully registered and paid their poll tax: Pace v. Raleigh, 140-65; see Clark v. Statesville, 139-490; Harris v. Scarborough, 110-232; Smith v. Wilmington, 98-343; Wood v. Oxford, 97-233; McDowell v. Construction Co., 96-514; Markham v. Manning, 96-132; Duke v. Brown, 96-127; Southerland v. Goldsboro, 96-49.

Commissioners must do all things necessary to carry this chapter into effect, but need not personally superintend work: State v. Comrs., 97-388; Coor v. Rogers, 97-146.

Findings by commissioners of result of election is final: Cain v. Comrs., 86-8; Norment v. Charlotte, 85-387; Simpson v. Comrs., 84-158.

1673. Township elections. Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein said township is situated, it shall be the duty of said commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of said township; and if at any such township election a majority of the votes cast shall be in favor of "stock law," then the said stock law shall be in force in said township.

Code, s. 2813. **See annotations under section 1672.**

1674. District elections. Upon the written application of one-fifth of the qualified voters of any district or territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners at any time, and setting forth well-defined boundaries of said district, it shall be the duty of the said commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of said district, and if at any such election a majority of the votes cast shall be in favor of "stock law," then the said stock law shall be in force over the whole of said

Code, s. 2814. **See annotations under section 1672. Commissioners can not consolidate several adjoining districts and provide for one boundary fence and assess uniform tax on all real property within boundary to pay for fence:** Bradshaw v. Comrs., 92-278.

As to boundaries being sufficiently defined in application, see Newsom v. Earnheart, 86-391.

1675. Persons within territory allowed to withdraw. Upon the written application of a majority of the qualified voters in any district, territory or well-defined boundary, made to the board of county commissioners, at any time, setting forth that the citizens of said district, territory or boundary are within the stock law boundary, and are desirous of being released from the laws governing said stock law territory, it shall be the duty of said commissioners to submit the question of "no stock law" or "stock law" to the qualified voters of said district or territory, and if at any such election a majority of the votes cast shall be against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock law fence: Provided, that in any territory where stock law now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" or "no stock law" shall take effect during crop season. This section shall apply only to the counties of Jackson, Graham, Swain, Clay, Macon, Cherokee and Randolph.

1895, c. 35; 1897, cc. 461, 516; 1903, c. 60.

1676. Elections, how held. Every election under this chapter shall be held and conducted under the same rules and regulations

and according to the same penalties provided by law for the election of members of the general assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same.

Code, s. 2815. **See chapter Elections.**

1677. Powers and duties of commissioners. The board of commissioners of the county may provide for a new registration of voters, designate places for holding elections, and make all regulations, and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law.

Code, s. 2826. **See chapter Elections. See also** Coor v. Rogers, 97-146; State v. Comrs., 97-391.

1678. Land adjoining stock law territory. Any person, or any number of persons, owning land in a county, district or township, which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to live stock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of land owners, whose lands are contiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no live stock shall run at large within any such enclosure, under the pains and penalties prescribed in this chapter.

Code, s. 2821. **Referred to** in Edwards v. Supervisors, 127-63.

1679. Stock not to run at large, impounded. Any person may take up any live stock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the same, with the right to use it under proper care until all legal charges for impounding said stock and for damages caused by the same are paid, said damages to be ascertained by two disinterested freeholders, to be selected by the owner and said impounder, said freeholders to select an unpire, if they cannot agree, and their decision to be final.

Code, s. 2816. **This section is constitutional:** Hogan v. Brown, 125-251 —**and it relieves planter from keeping lawful fence,** State v. Anderson, 123-705.

Resident owners may be required to pay more than nonresident owners for stock running at large: Broadfoot v. Fayetteville, 121-418.

The fact that stock law prevails is no excuse for inflicting wilful and wanton injury on stock running at large: State v. Brigman, 94-888.

An ordinance prescribing that nonresident stock shall be taken up when found running at large in stock law territory is valid: Rose v. Hardie, 98-44.

Where prosecutor impounded stock while owner was in pursuit of same and within view and had sent word to prosecutor that she was trying to catch them; quaere as to whether such impounding illegal: State v. Hunter, 118-1196.

1680. Owner notified; sale of stock; application of proceeds. If the owner of said stock be known to such impounder he shall immediately inform such owner where his stock is impounded, and if said owner shall for two days after such notice wilfully refuse or neglect to redeem his stock, then the impounder, after ten days' written notice posted at three or more public places within the township where said stock is impounded, and describing the said stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days' notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the preceding and succeeding sections, and the balance he shall turn over to the owner if known; and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner.

Code, s. 2817. **Section constitutional:** Hogan v. Brown, 125-251. **Proceeding hereunder is in rem:** Ibid. **No sale without notice:** Daniels v. Homer, 139-252.

1681. Stock defined. The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese.

Code, s. 2822.

1682. Impounded stock may be fed; pay for same. In case any animal shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place, in which any animal shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal.

Code, s. 2485; 1881, c. 368, s. 4.

1683. Fence built around territory. The stock law authorized by this chapter shall not be enforced until a fence shall have been erected around any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, all streams which are or may be declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township or district where a stock law prevails.

Code, s. 2823.

1684. Lawful fence in stock law territory. In any county in the state in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any water-course, mountain, mountain ranges or parts of same, and also other natural and sufficient obstruction along the line of said stock law territory to be and constitute a sufficient stock law fence, and in that event such water-course, mountain, mountain range or part thereof and obstructions so declared by said commissioners shall be and constitute a lawful fence to all intents and purposes.

149-546

1901, c. 542.

1685. Fence built by assessment on land owners. For the purpose of building stock law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the state and county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property.

Code, s. 2824. **Excepted district can not be taxed for a common county fence:** Harper v. Comrs., 133-106. **Local assessments for local improvements are constitutional:** Harper v. Comrs., 133-110; Comrs. v. R. R., 133-216; Hilliard v. Asheville, 118-845; Raleigh v. Peace, 110-32; Putt v. Comrs., 94-709; Busbee v. Comrs., 93-143; Comrs. v. Comrs., 92-180; Shuford v. Cmrs., 86-552; Cain v. Comrs., 86-8. **This is not a tax within the constitutional prohibition as to uniformity:** Harper v. Comrs., 133-110; Shuford v. Comrs., 86-552.

The provision of this section applies both to cases where adoption of stock law is dependent on popular vote and where it is made absolute by act of general assembly: Busbee v. Comrs., 93-143.

1686. Land condemned. If the owner of any land shall object to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway as land is condemned for railroad purposes under the chapter entitled Railroads.

Code, s. 2825. No appeal lies from order appointing commissioners: Comrs. v. Cook, 86-18.

For punishment for allowing stock to run at large in stock law territory, see section 3319. Misapplication of funds by impounder, see section 3312. Punishment for releasing impounded stock, see sections 3411, 3310. Injuring fences and leaving gates open, see sections 3413, 3411. Persons living in stock law territory allowing stock to run at large outside said territory, see section 3322. Trespassing on lands along roadway, see section 3321. Wilful riding or driving on land, see section 3320.

CHAPTER 35a.

FLUME COMPANIES.

1686a. Common carriers; under control of corporation commission. All flume companies which shall avail themselves of the right of eminent domain under the provisions of subchapter five of chapter sixty-one shall become public carriers of freight, for the purposes to which they are adapted, and shall be under the control, direction and supervision of the corporation commission of North Carolina, in the same manner and for the same purposes as is by law provided for other public carriers of freight.

1907, c. 39, s. 4.

CHAPTER 36.

GAMING CONTRACTS.

1687. Gaming and betting contracts void. All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid shall be void.

Code, s. 2841, 2842; R. C., c. 51, ss. 1, 2; 1810, c. 796. **This section construed liberally:** Turner v. Peacock, 13-303. **Gambling contracts are void:** Banking Co. v. Tate, 122-313; Turner v. Peacock, 13-303.

One buying "futures" for another can not recover money lost: Garseed v. Sternberger, 135-501; Williams v. Carr, 80-294.

Note given in consideration of a bet on horse race in another state not enforceable here: Gooch v. Faucett, 122-270.

Renewal note to purchaser for value, without notice that original was for gaming debt, is valid: Calvert v. Williams, 64-168.

It is settled that money, or a horse, or a judgment won at cards and actually paid and delivered can not be recovered if the game was fairly played: Teague v. Perry, 64-41, and cases cited; Dunn v. Holloway, 16-322; Hodges v. Pittman, 4-276—**but can be recovered when game unfairly played, or fraud perpetrated,** Webb v. Fulchire, 25-485.

Note given subsequently, in purchase of a magistrate's judgment which had been won at cards by payee from maker, is not void under statute against gaming: Teague v. Perry, 64-39.

Where stakeholder pays over money after being notified by loser not to do so, he is liable to loser: Wood v. Wood's Executor, 7-172—**for as long as money is in hand of stakeholder it belongs to the one having the legal right,** Forrest v. Hart, 7-458.

Where A won a justice's judgment from B at a game of cards unfairly played, and took from defendants in the judgment a bond payable to himself for the amount, upon which he brought suit, and to which the statute against gaming was pleaded: Held that he could not recover: Warden v. Plummer, 49-524.

Bond, the consideration of which is based upon a gaming contract is void in toto: Turner v. Peacock, 13-303; Bettis v. Reynolds, 34-344.

Ten pins is not a game of chance: State v. King, 113-631; State v. Gupton, 30-271.

"Shooting for beef" where party pays for his privilege of shooting is not a game of chance: State v. DeBoy, 117-702.

For other annotations as to gambling contracts, see section 1689.

1688. Players and betters competent witnesses. No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking.

Code, s. 2843; R. C., c. 51, s. 3. **See section 1637 and annotations thereunder.**

1689. Certain contracts for future delivery void. Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person whether the person to

whom such article is so agreed to be sold and delivered shall be a party to such contract or not when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered; and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be uttterly null and void; and no action shall be maintained in any court to enfore any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency. This section shall not be construed so as to apply to any person, firm, corporation or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business.

1889, c. 221, s. 1; 1905, c. 538, s. 7. **For punishment for dealing in futures, see sections 3823-3826.** 147-634 147-645

"Bucket shop" defined in State v. McGinnis, 138-724. **One buying "futures" for another can not recover for loss:** Garseed v. Sternberger, 135-501; Williams v. Carr, 80-294. **As to sufficiency of evidence of gambling contract** see Cantwell v. Boykin, 127-64. **Lender of money to pay losses in futures may recover, if not connected with the speculation:** Ballard v. Green, 118-390; Williams v. Carr, 80-294. **Statutes forbidding the**

running of a bucket shop are clearly within police power of state: State v. McGinnis, 138-724.

Last sentence of section does not render section void under the fourteenth amendment to constitution of United States: Ibid.

If intention of the contract is not to make actual delivery of the articles bought or sold for future delivery it is within the prohibition of this section: State v. Clayton, 138-732; Rankin v. Mitchem, 141-277; State v. McGinnis, 138-724; Williams v. Carr, 80-294.

If there is in the contract the right to require actual delivery and an intention to demand it if the exigencies of party's business shall require it, this is a legal contract, notwithstanding mere expectation that delivery will not be demanded: State v. Clayton, 138-732.

Gambling contracts are not protected by the interstate commerce clause of the federal constitution: Ibid.

Where contract not a gambling one on its face, proper to leave that question to jury: Rankin v. Mitchem, 141-277.

Contracts for actual future delivery are valid hereunder: State v. Clayton, 138-732; State v. McGinnis, 138-724.

As to intention in the enactment of the last sentence of section, see Ibid.

1690. Procedure and evidence under preceding section. Proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such agreement deposited or secured, or agreed to deposit or secure, what are commonly called "margins," shall constitute prima facie evidence of a contract declared void by the preceding section.

1889, c. 221, s. 2; 1905, c. 538, ss. 5, 7. **Where parties to a purchase or sale for future delivery upon "margin" will not need the commodity in ordinary course of business, this section makes the purchase in such case prima facie evidence that such contract is a wagering contract:** State v. Clayton, 138-732; State v. McGinnis, 138-724.

1691. Invalidity pleaded shifts burden of proof; plea and proof not used in criminal action. When the defendant in any action pending in any court shall allege specifically in his answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this chapter made void, and such answer shall be verified, then the burden shall be upon the plaintiff in such action to prove by the proper evidence, other than any written evidence thereof, that the contract sued upon is a lawful one in its nature and purposes; and the defendant may likewise produce evidence to prove the contrary: Provided, nevertheless, that any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party.

147648

1889, c. 221, s. 2.

CHAPTER 37.

GRANTS.

I. To Whom Issued.

1692. Citizens and bona fide residents. Any citizen of this state, and all persons who have or shall come into the state with the bona fide intent of becoming residents and citizens thereof, shall have the right and privilege of making entries of, and obtaining grants for, vacant and unappropriated lands.

Code, s. 2754; 1869-70, c. 19, s. 1. **As to entry by a resident Cherokee Indian, see** Colvord v. Monroe, 63-288—**by nonresident who has not expressed intention of becoming resident,** Wilson v. Land Co., 77-445—**by nonresident, grant being issued to a person qualified to hold lands,** Ibid—**by nonresident coming into state with intention of becoming citizen,** Mackridge v. Howerton, 72-221—**by two persons, one of whom is nonresident,** Weaver v. Love, 146-.

Even if an alien is prohibited from entering lands, he can nevertheless hold as against all others except the state: Johnston v. Lumber Co., 144-720, and cases cited.

Land subject to entry, and grant issued therefor, such grant can not be collaterally attacked for fraud, irregularity or other cause: Janney v. Blackwell, 138-437; Dosh v. Lumber Co., 128-84; Wyman v. Taylor, 124-431; Gilchrist v. Middleton, 107-663; 108-705; Brown v. Brown, 103-213; Dugger v. McKesson, 100-1; Harshaw v. Taylor, 48-513; Barwick v. Wood, 48-312; Stammire v. Welch, 48-214; Stammire v. Taylor, 48-210; McCormick v. Monroe, 46-14; Munroe v. McCormick, 41-85; Lovinggood v. Burgess, 44-408; Stammire v. Powell, 35-312; Tate v. Greenlee, 9-231; Storther v. Cathey, 5-162; Reynolds v. Flinn, 2-106.

Land not subject to entry, grant void, and may be attacked collaterally: Janney v. Blackwell, 138-437; Holley v. Smith, 130-85; Dew v. Pyke, 145-300; Dosh v. Lumber Co., 128-84; Gilchrist v. Middleton, 107-663; 108-705; Brown v. Brown, 103-213; Dugger v. McKesson. 100-1; Barnett v. Wood, 58-433; Harshaw v. Taylor, 48-513; Barwick v. Wood, 48-312; Stammire v. Taylor, 48-210; McCormick v. Monroe, 46-14; Lovinggood v. Burgess, 44-408; Stammire v. Powell, 35-312; Strother v. Cathey, 5-162; University v. Sawyer, 1-159; 3-98; Avery v. Strother, 1558.

Interesting discussion of action to quiet title claimed by defendants by adverse possession under a grant obtained by entry of land under this section: Weaver v. Love, 146.

II. What May be Granted.

1693. Land subject to. All vacant and unappropriated lands, belonging to the state, shall be subject to entry by any citizen thereof, in the manner hereinafter provided, except—

1. Lands covered by navigable waters.

2. Lands covered by the waters of any lake, or which, though now covered, may hereafter be gained therefrom by the recession, draining, or diminution of such waters, or have been so gained heretofore, and not lawfully entered.

3. Marsh or swamp land, where the quantity of land in any one marsh or swamp exceeds two thousand acres, or where, if of less quantity, the same has been surveyed by the state, or by the state board of education, with a view to draining and reclaiming the same.

Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21. **For special act excepting from entry lands covered by Little River in Richmond and Montgomery counties, see 1907, chapter 433.**

Land covered by navigable waters not subject of grant: State v. Young, 138-572; State v. Twiford, 136-603; Holley v. Smith, 130 86; State v. Spencer, 114-777; Bond v. Wool, 107-139; Hodges v. Williams, 95-331; Skinner v. Hettrick, 73-53; State v. Glen, 52-325; Ward v. Willis, 51-183; Collins v. Benbury, 27-126; Tatum v. Sawyer, 9-226. **"Navigable waters" defined:** State v. Twiford, 136-607; State v. Baum, 128-600; Mnfg. Co. v. R. R., 117-579; State v. Eason, 114-787; State v. Narrows Island Club, 100-477; Hodges v. Williams 95-331; State v. Glen, 52-325; Collins v. Benbury, 25-277; Wilson v. Forbes, 13-30.

When lands are granted they are no longer subject to entry as "vacant and unappropriated lands:" Berry v. Lumber Co,. 141-386; Lumber Co. v. Coffey, 144-560; Stewart v. Keener, 131-487; Dew v. Pyke, 145-300; Rowe v. Lumber Co., 129-97; Janney v. Blackwell, 138-437; Newton v. Brown, 134-442; Midgett v. Midgett, 129-21; State v. Bevers, 86-588; Hoover v. Thomas, 61-184; Harry v. Graham, 51-462; Lovinggood v. Burgess, 44-408; Stammire v. Powell, 35-312; O'Kelly v. Clayton, 19-249; Featherston v. Mills, 15-596; Strothers v. Cathey, 5-164; University v. Sawyer, 1-159; 3-98.

By making entry, no title to land is acquired, but only right to call for grant upon compliance with statute, entry being a mere option to buy: Dew v. Pyke 145-300; Frasier v. Gibson, 140-272; Janney v. Blackwell, 138-437; Newton v. Brown, 134-442; Kimsey v. Munday, 112-816; Gilchrist v. Middleton, 107-678; Bryan v. Hodges, 107-497; Hall v. Hollofield, 76-476; Plemmons v. Fore, 37-312.

Rocks in river above surface of water are vacant and unappropriated lands and subject to entry: Jones v. Jones, 2-488; McKenzie v. Hulet, 4-613.

Grant covering land, part of which not subject to entry, is good as to that part not covered by prior entry: Hough v. Dumas, 20-473.

As to burden of proof under section, see Walker v. Carpenter, 144-674; Bowser v. Wescott, 145-56.

1694. What swamp lands may be. Marsh or swamp lands, lying in a swamp where the quantity of land in that swamp or marsh does not in the whole swamp or marsh exceed two thousand acres, and which has not been surveyed by the state or state board of education,

and marsh or swamp lands, unsurveyed as aforesaid, not exceeding fifty acres in one body, though lying within a marsh or swamp of a greater number of acres than two thousand, may be entered, when the same shall be situated altogether between the lines of tracts heretofore granted,

Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21.

1695. Swamp lands defined. The words "marsh and swamp land" wherever employed in this chapter, and the words "swamp lands" employed in the statutes creating the literary fund and literary board of North Carolina and the state board of education of North Carolina, or in any act in relation thereto, shall be construed to include all those lands which have been or may now be known and called "swamp" or "marsh" lands, "pocosin bay," "briary bay" and "savanna," and all lands which may be covered by the waters of any lake or pond.

1891, c. 302. **Statute referred to** in Board of Education v. Makely, 139-38.

1696. Land covered by water, for wharves. Persons owning lands on any navigable sound, river, creek or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, may make entries of the lands covered by water, adjacent to their own, as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. When any such entry shall be made in front of the lands of any incorporated town, the town corporation shall regulate the line on deep water, to which wharves may be built. This shall not affect existing rights. For all lands thus entered there shall be paid into the treasury not less than one dollar per acre. When any person shall have erected a wharf on public lands of the description aforesaid, before the first day of January, one thousand nine hundred and three, such person shall have liberty to enter said land, including his wharf, under the restrictions and upon the terms above set forth: Provided, no land covered by water shall be subject to entry within thirty feet of any wharf, pier or stand used as a wharf already in existence, or which may hereafter be erected by any person on his own land or land under his control, or on an extended line thereof; but land covered by water as aforesaid for the space of thirty feet from the landing place or line of any wharf, pier or stand used as a wharf, as aforesaid, shall remain open for the free ingress and egress of said owner and other persons to and from said wharf, pier or stand: Provided

further, no person shall be allowed to enter and obtain a grant for any land in the waters of Onslow county, in which the tide ebbs and flows, within thirty feet of the shore at low-water mark, unless the enterer shall be the owner of the adjacent shore.

Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21; 1889, c. 555; 1893, c. 17; 1893, c. 4; 1893, c. 349; 1901, c. 364; 1891, c. 532. **Entry of riparian owner for purpose of erecting wharf is confined to straight lines including front of his own land:** Holley v. Smith, 132-36; Bond v. Wool, 107-139—**and such owner acquires absolute right in land up to deep water,** Bond v. Wool, 107-139—**and may erect wharf next to land up to deep water and by entry obtain title,** Ibid; Gregory v. Forbes, 96-77. **Only owner of abutting land can make entry:** Zimmerman v. Robinson, 114-39. **Right of riparian owner to construct wharves is subject to legislative control, and also regulations of adjoining incorporated town:** Bond v. Wool, 107-139. **Right granted can only be transferred by conveyance of abutting land:** Zimmermann v. Robinson, 114-39; Land Co. v. Hotel, 132-517.

Duty of incorporated town, upon application of reparian owner, to regulate line to which wharves may be built: Wool v. Edenton, 113-33; 117-1; Wool v. Saunders, 108-730—**and this performance of duty may be enforced by courts:** Wool v. Edenton, 113-33.

State can only grant land under navigable water for wharves and county commissioners have no power to authorize building of wharf for purpose of public road: Gregory v. Forbes, 96-77.

Grant to riparian owner of land covered by navigable water for purpose of erecting wharves, etc., conveys only easement therein: Land Co. v. Hotel, 132-517.

Riparian owner has right to erect and maintain wharves subject to provisions of section declaring that navigation shall not be obstructed: Riddick v. Dunn, 145-34.

For right of fisheries on land entered, see section 2460 and annotations thereunder.

1697. Fisheries established. Whenever any person shall acquire title to lands covered by navigable water as required by law for wharves, the owner or person so acquiring title shall have the right to establish fisheries upon said lands; but this right shall not authorize any person to obstruct navigation.

Code, s. 2752; 1874-5, c. 183, ss. 1, 6. **See section 2460.**

1698. Prior right of fishery in whom. Whenever the owners of lands covered by navigable waters shall improve the same by clearing off and cutting therefrom logs, roots, stumps or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, then and in that case the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drift-

ing or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines thereon. This section shall apply where the owner of such lands shall erect, or shall have erected, platforms or structures of any kind thereon to be used in fishing with nets and seines.

Code, s. 2753; 1874-5, c. 183, ss. 2, 3, 4. **See section 2460.**

1699. What void; not color of title. Every entry made, and every grant issued, for any lands not authorized by this chapter to be entered or granted, shall be void; and every grant of land made since the sixth day of March, one thousand eight hundred and ninety-three, in pursuance of the statutes regulating entries and grants shall, if such land or any portion thereof has been heretofore granted by this state, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights whatever upon the grantee or grantees therein or those claiming under such grantee or grantees, and shall in no case and under no circumstances constitute any color of title whatsoever to any person whomsoever.

Code, s. 2755; 1893, c. 490; R. C., c. 42, s. 2. **See annotations under sections 382 and 1693. Entry made and grant issued in violation of provisions of chapter, void:** Holley v. Smith, 130-85; Dosh v. Lumber Co., 128-86.

Provisions of section that junior grant shall be color of title so far as it covers land previously granted does not apply to grants issued before March 6, 1893: Weaver v. Love, 146-.

Though grant from state covers same land included in older grant yet, title being no longer in state, junior grant is nevertheless color of title which will ripen into complete title by adverse possession: Ibid.

Adverse possession of plaintiffs, under a junior grant (which was color of title) from Oct., 1888, to Dec., 1897, vested the title in them as against owners of legal title under a senior grant, it not appearing that any of latter were exempt from operation of statute of limitations, by reason of any disability, and a married woman who acquired no title by another junior grant issued to her, can not use her disability to defeat rights of plaintiffs: Berry v. Lumber Co., 141-386.

III. Entry-Taker.

1700. How elected; term of office. The board of commissioners of the several counties shall elect one person to receive entries of claims for lands within each county; and such entry-taker shall hold his office for four years.

Code, s. 2756. **Entry taker can not hereunder appoint deputy:** Pearson v. Powell, 100-86; Maxwell v. Wallace, 38-593. **Acts done by one in ca-**

pacity of deputy can not be validated by subsequent acquiescence of entry-taker: Maxwell v. Wallace, 38-593. **Entry made in presence of entry-taker but without his authority is void:** Pearson v. Powell, 100-86.

1701. Register of deeds acts as, when. When a vacancy exists in the office of entry-taker, the register of deeds shall act as entry-taker until such vacancy is filled by an election by the commissioners. The register of deeds, in such case, shall take charge of the books belonging to the office, shall discharge all the duties and receive the emoluments, and shall be subject to the rules, regulations and penalties prescribed for entry-takers.

Code, s. 2757; 1868-9, c. 100, s. 2; 1868-9, c. 173, s. 2. **Section referred to** in Pearson v. Powell, 100-88.

1702. Who issues warrant on death of entry-taker. In all cases where an entry shall be made, and the entry-taker shall die or resign before a warrant shall be issued thereupon, his successor shall issue a warrant.

Code, s. 2772; R. C., c. 42, s. 15; 1835, c. 19.

1703. Oath of office; fees. The entry-taker shall take the oath of office and receive the fees, and no other, prescribed in the chapters respectively entitled Oaths and Salaries and Fees.

Code, s. 2760; 1868-9, c. 173, s. 5.

1704. Office of entry-taker at courthouse. The entry-taker shall keep his office at the courthouse of his county, or within one mile thereof, on pain of forfeiting one hundred dollars to the county, to be sued for by the county treasurer.

Code, s. 2759; 1868-9, c. 173, s. 4.

1705. Makes annual returns. Every entry-taker shall make return to the secretary of state annually, on the first day of January, of all lands entered with him, under a penalty of two hundred dollars.

Code, s. 2775; R. C., c. 42, s. 18; 1796, c. 455, s. 9; 1881, c. 265.

1706. Penalty failing to make returns, how recovered. The secretary of state shall furnish the attorney general, at every spring term of the superior court of Wake county, with a certificate of failure in every case where an entry-taker shall fail to make return according to law; and the attorney general shall move for judgment against such entry-taker and his sureties, and the courts shall give judgment accordingly.

Code, s. 2776; R. C., c. 42, s. 19; 1833, c. 15.

IV. Entries.

1707. In writing, and describe land. The claimant of land shall produce to the entry-taker a writing, signed by such claimant, setting forth where the land is situated, the nearest water-courses and remarkable places, and such water-courses and remarkable places as may be therein, the natural boundaries and the lines of any other person, if any, which divide it from other lands; and every such writing shall be one-quarter sheet of paper at least.

Code, s. 2765; R. C., c. 42, s. 11; 1777, c. 114, s. 5; 1783, c. 185, s. 11; 1885, c. 132; 1891, c. 70; 1893, cc. 120, 270; 1903, c. 272, s. 3. **As to sufficiency of description,** see Fisher v. Owen, 144-649; Grayson v. English, 115-358; McDiarmid v. McMillan, 58-29; Currie v. Gibson, 57-25; Ashley v. Sumner, 57-121; Horton v. Cook, 54-270; Fuller v. Williams, 45-162; Munroe v. McCormick, 41-85; Allen v. Gilreath, 41-252; Johnston v. Shelton, 39-85; Harris v. Ewing, 21-369.

Requirement that entry shall set out "nearest water courses," etc., merely directory: Harris v. Ewing, 21-369.

Entry-taker has no authority to act upon application for land not situated in his county, and entry of application in such case is void: Harris v. Norman, 96-59; Lunsford v. Bostinon, 16-483; Avery v. Strother, 1-558.

Cases referring to section: In re Williams, 146-268; Walker v. Carpenter, 144-677.

1708. Duty of entry-taker. The entry-taker shall immediately endorse the same with the name of the claimant, the number of acres claimed, and date of the entry; and shall copy the same in a book well bound, and ruled with a large margin into spaces of equal distance, each space to contain one entry only, and every entry to be made in the order of time in which it shall be received, and numbered in the margin. The entry-taker shall thereupon cause a copy of the entry to be posted for thirty days at three public places in the township or townships in which the land covered by the entry is located. A copy of the entry shall also be posted for thirty days at the courthouse door of the county in which such land lies, and advertised for thirty days in a newspaper published at the county seat of such county. If there be no newspaper published in such county, then the advertisement provided for shall be made in the nearest newspaper.

Code, s. 2765; 1903, c. 272, s. 3. **Entry made on books of entry-taker by person in his presence but without authority is void:** Pearson v. Powell, 100-86—**also entry made by person in capacity of deputy,** Maxwell v. Wallace, 38-593. **Entry-taker's books are no notice of prior entry:** Merrill v. Sloan, 5-121. **Duties of entry-takers defined:** Harris v. Norman, 96-61. **Section referred to in** In re Drewry, 129-457.

1709. Protest filed, when and by whom. If any person shall claim title to or an interest in the land covered by the entry, or any

part thereof, he shall, within the time of advertisement as above provided, file his protest in writing with the entry-taker against the issuing of a warrant thereon; and upon the filing of such protest, the entry-taker shall certify copies of the entry and protest to the superior court, and thereupon a notice shall be issued by the clerk of the superior court to both parties, commanding them to appear before said clerk in twenty days and file their respective bonds for costs as in other cases where the title to real estate is in controversy, and to the claimants to appear at the next term of said court and show cause why his entry shall not be declared inoperative and void: Provided, that this shall not deprive either party of the advantages of sections four hundred and fifty-one and four hundred and fifty-four of this Revisal.

Code, s. 2765; 1903, c. 272, s. 3; 1907, c. 66. **Person claiming title to interest in lands covered by entry may file protest against issuing of warrant of survey thereon:** In re Williams, 146-268; In re Drewery, 130-342, overruling same case in 129-457.

Proceedings of protest against enterer on state's lands is not a civil action but is to determine right of enterer, and burden of proof is on enterer to show, as against potestant alone, that land was vacant: Bowser v. Wescott, 145-56; In re Williams, 146-268.

Proceeding hereunder can not be terminated by protestant taking a nonsuit. He may withdraw his protest, but he remains a party to the proceeding and may except to form of judgment and appeal therefrom, he being bound by the judgment: In re Williams, 146-268.

For form of judgment in proceeding hereunder and taxation of costs, see Ibid.

Upon insufficient notice given claimant, alias notice should be issued: Lumber Co. v. Coffey, 144-560.

Where protestant shows that grant was issued to his grantor prior to entry by claimant, not error for court below to refuse to dismiss action under Hinsdale act, or to refuse to charge jury in favor of protestant if they believed the evidence, the right of entry being on "vacant and unappropriated land:" Lumber Co. v. Coffey, 144-560.

Not necessary that protestant make out a perfect chain of title, with no link unbroken, as in ejectment: Ibid.

Section referred to in Johnson v. Wescott, 139-29.

1710. When entry lapses, subsequent entry valid. Whenever an entry of land shall be made in any entry-taker's office, and the enterer shall fail to have the land surveyed and pay the price for the same, within the time limited by law, any person who may have made a subsequent entry for the same land may have the same surveyed and pay the price and have a grant.

Code, s. 2767; R. C., c. 42, s. 9; 1809, c. 771. **Enterer failng to pay price within statutory period, subsequent enterer paying price entitled to grant:** Kimsey v. Munday, 112-816; Stanly v. Biddle, 57-383.

Entry by A. lapsing and subsequent entry by B. also lapsing, first one obtaining grant held to have title: Horton v. Cook, 54-270. **One claiming under grant obtained upon lapsed entries can not fall back upon subsequent entry made before issuance of such grant:** Kimsey v. Munday, 112-816; Stanly v. Biddle, 57-383. **Not necessary that entry should lapse before another can be made:** Ibid.

Effect of notice of first entry upon person obtaining grant under junior entry: Gilchrist v. Middleton, 107-678; Dew v. Pyke, 145-300; Plemmons v. Fore, 37-312; Harris v. Ewing, 21-374; Featherston v. Mills, 15-598.

After lapse of so many years and without actual notice that purchase money for older grant had been paid, another might innocently enter and take out a grant for the land for his own benefit: Gilchrist v. Middleton, 108-705.

1711. When for benefit of entry-taker. If any entry-taker shall desire to make an entry in his own name, the same shall be made in its proper place, before a justice of the peace of the county, not being a surveyor or assistant; which entry the justice shall return to the next meeting of the board of county commissioners, who shall insert it; and every entry made by or for such entry-taker, in any other manner, shall be void.

Code, s. 2773; R. C., c. 42, s. 16; 1777, c. 114, s. 17. **Entry made by entry-taker otherwise than as above is void:** Terrell v. Manney, 6-375.

1712. Lapsed entries, not renewed within one year. No lands entered on the books of the entry-taker, the entry of which shall be suffered to lapse by nonpayment of the price thereof, shall be re-entered within one year after the time at which such entry shall lapse, by the person in whose name such entry was made, but such re-entry shall be void.

Code, s. 2768; R. C., c. 42, s. 10. **Section referred to** in Gilchrist v. Middleton, 107-679.

V. Surveys.

1713. When warrant for survey issued. If no protest be filed, or where the protest is filed, and the right of the claimant to make the entry is sustained, the entry-taker shall deliver to the party a copy of the entry with its proper number and a warrant to the surveyor to survey the same, which warrant shall contain a copy of the entry with its number and date, and a certificate that notice has been given as above provided, and that no protest has been filed, or that protest has been filed and that the court has decided in favor of the claimant. Each warrant shall be delivered to the surveyor in the order of time in which the entry was made.

Code, s. 2765; 1903, c. 272, s. 3. **Section referred to in** Pearson v. Powell, 100-86. **Where protestant withdraws protest, court can not tax protestant**

with cost of survey of entry made after withdrawal, but all costs, including costs of any survey made by direction of court, should be taxed against him: In re Williams, 146-268.

1714. Duplicate warrants. When any person shall duly make an entry of lands which shall not have become void by lapse of time, and upon which the entry-taker shall issue his warrant of survey, and the same be lost by accident, the entry-taker, on due proof being made to his satisfaction, by affidavit of the claimant or the surveyor or deputy surveyor, may issue a duplicate warrant of survey, of the same tenor and date, taking care to set forth, on the face of said warrant, that the same is a duplicate; in which case such warrant shall be made as valid as the original.

Code, s. 2771; R. C., c. 42, s. 14; 1814, c. 878, s. 1.

1715. Order of survey. The surveyor shall survey all entries of land according to the priority of entry, paying due respect to the number of each warrant; and every grant obtained by any subsequent entry, otherwise than is by this chapter directed, shall be void: Provided, nothing herein shall be construed to prevent any person who shall make a subsequent entry from surveying and obtaining a grant, as the law directs, for all such surplus land as shall remain, after the enterer of such land hath surveyed his entry as aforesaid.

Code, s. 2770; R. C., c. 42, s. 13; 1787, c. 279. **Second entry good as to land remaining after survey of prior entry:** Stanley v. Biddle, 57-383. **Enterer can not survey his own land even as deputy surveyor:** Avery v. Walker, 8-140.

1716. How made. Every county surveyor, upon receiving the copy of the entry and order of survey for any claim of lands, shall, within ninety days, lay off and survey the same agreeably to this chapter; and make thereof two fair plots, the scale whereof and the number of the entry shall be mentioned on such plots; and shall set down in words the beginning, angles, distances, marks and watercourses, and other remarkable places crossed or touched by or near to the lines of such lands, and also the quantity of acres; and land lying on any navigable water shall be surveyed in such manner that the water shall form one side of the survey, and the land be laid off back from the water.

Code, s. 2769; 1903, c. 272, s. 4; R. C., c. 42, s. 12; 1777, c. 114, s. 10. **Original plot part of grant for purpose of indicating shape and location of boundaries, though not conclusive evidence as to same:** Redmond v. Mullenax, 113-505.

Line actually run, marked and corner made, party claiming under patent entitled to hold accordingly, notwithstanding mistake in patent: Higdon v. Rice, 119-623; Cherry v. Slade, 7-82.

Not necessary that entry should be so specified as to entirely identify boundaries, as survey is provided for that purpose: Harris v. Ewing, 21-373.

Rule of law that deeds and grants shall be so run as to include land actually surveyed with view to its execution: Higdon v. Rice, 119-626; Shaffer v. Gaynor, 117-15; Baxter v. Wilson, 95-143; Houser v. Belton, 32-358; Hough v. Horne, 20-369; Haley v. Morgan, 19-425; Cherry v. Slade, 7-82; Bradford v. Hill, 2-22; Reed v. Schenck, 2-415.

Section referred to in In re Drewery, 130-343.

1717. Sworn chainbearers. No survey for the purpose of obtaining a grant shall be made until the chainbearers shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor. The chainbearers shall actually measure the land surveyed. The surveyor is empowered to administer the oath.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10. **Chainbearers must be sworn to measure justly and truly, and to deliver a true account thereof to surveyor:** Avery v. Walker, 8-160.

1718. Plots made and transmitted to secretary of state. The surveyor shall, within one year, transmit the plots, together with the warrant or order of survey, to the office of the secretary of state, or deliver them to the claimant.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10. **Surveyor required to transmit plots to secretary of state:** Higdon v. Rice, 119-631; Redmond v. Mullenax, 113-512.

1719. Special surveyor, when and how appointed. When the office of county surveyor is vacant, the county commissioners may appoint a special surveyor to survey any lands that may be entered; and the plots and certificates of such special surveyor, accompanied by a copy of the order of the county commissioners appointing him, shall be held valid, as if done by a county surveyor duly elected.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.

1720. May appoint deputies. Every surveyor may appoint deputies, who shall, previous to entering on the duties of their office, be qualified in a similar manner with the surveyor; and the surveyor making such appointment shall be liable for the conduct of such deputies, as for his own conduct in office.

Code, s. 2763; R. C., c. 42, s. 6; 1779, c. 140, s. 5. **Must not appoint the enterer,** inferred from Avery v Walker, 8-160.

1721. When county surveyor interested. When a county surveyor shall wish to have lands surveyed in a county where he acts as principal surveyor, for the purpose of obtaining a grant, the board of county commissioners of said county shall appoint some person to make the survey, and the entry-taker shall direct his warrant of survey to such person; and all certificates, surveys and plots

of the same shall be made under the same regulations as prescribe the duty of the county surveyor in similar cases.

Code, s. 2774; R. C., c. 42, s. 17; 1828, c. 23. **For case where enterer held could not make his own survey,** see Avery v. Walker, 8-160.

1722. Record of, kept by surveyor, in register's office. The county commissioners of the several counties of the state shall provide a suitable book or books for recording of surveys of entries of land to be known as Record of Surveys, to be kept in the office of register of deeds as other records are kept. And such record shall have an alphabetical and numerical index, the numerical index to run consecutively. And it shall be the duty of every county surveyor or his deputy surveyor who makes a survey to record in such book a perfect and complete record of all surveys of lands made upon any warrant issued upon any entry, and date and sign same as of the day such survey was made, whether such survey was made by him before or after the second day of March, one thousand nine hundred and five.

1905, c. 242.

1723. What record to show; received as evidence. All surveys so recorded in such book shall show the number of the tract of land, the name or names of the party entering, and the name of the assignee if there be any assignee, and shall be duly indexed, both alphabetically and numerically in such record in the name or names of the party making the entry, and the name of the assignee if there be any assignee. Such record of any surveyor or deputy surveyor when so made shall be read in evidence in any action or proceeding in any court: Provided, that if such record differs from the original certificates of survey heretofore made or on file in the office of secretary of state, such original or certified copy of the certificate in secretary of state's office shall control.

1905, c. 242, ss. 2, 3, 6.

1724. Fees. For recording and indexing such surveys the surveyor may charge twenty-five cents, which shall be paid by the party for whom the survey is made; and any surveyor shall not be required to make any survey until his fees provided by law are paid, including the twenty-five cents for recording and indexing.

1905, c. 242, s. 4.

1725. Former surveys recorded; indexed; fee. Where any ex-county surveyor is alive and has correct minutes or notes of surveys of land on entries made by him during his term of office, it shall be lawful for him to record and index such survey in such record of

surveys, and the county commissioners shall pay for such services ten cents for each survey so recorded and indexed.

1905, c. 242, s. 2.

1726. Penalty for failure to perform duty. Any county surveyor or deputy surveyor failing to make such record of any survey within sixty days after he makes a survey shall forfeit and pay to any party who may sue for the same two hundred dollars, and be subject to be removed from office by the board of county commissioners, and if any surveyor is removed the county commissioners shall appoint his successor, and all papers and records of a public nature in the possession of such surveyor so removed, or who may die, shall be turned over to his successor in office.

1905, c. 242, s. 5; 1907, c. 579.

VI. Grants.

1727. When secretary of state may withhold grant. When application is made for a grant if the secretary of state has reason to believe that the land covered by any entry and the surveys made in pursuance of the same is the property of the state board of education, he may, in his discretion, withhold the issue of a grant for same until the engineer of the state board of education or surveyor appointed by said board shall have examined into the matter and made his report. And if said engineer or surveyor shall report that the lands in question are the property of the state board of education and not subject to entry, the secretary of state shall not issue a grant on such entry and surveys. If the secretary of state shall have reason to believe that the land for which a grant is sought has already been granted and does not belong to the state, he shall not issue grant for the same until it appears to his satisfaction that the land does belong to the state and is subject to entry.

1903, c. 272, s. 3. **Where claimant has complied with law, and it appears from warrant and survey that officers have performed their duties secretary must issue grant:** Wool v. Saunders, 108-729. **Secretary may refuse to issue grant where warrant and survey show that land not subject to entry, or only subject to entry upon conditions which are not complied with:** Ibid. **Secretary has no right to receive and act upon testimony outside of paper filed by claimant:** Ibid **(note this decision was made before passage of this section).**

1728. On what grant issued. No grant shall issue on the treasurer's receipt for the money; but the auditor shall make out and deliver to the secretary of state a certificate, conformable to each receipt by him countersigned, on which the secretary shall issue the grant.

Code, s. 2778; R. C., c. 42, s. 21; 1799, c. 525, s. 4.

1729. When, how and to whom issued. The secretary, on application of claimants, shall make out grants for all surveys returned to his office, which grants shall be authenticated by the governor, countersigned by the secretary and recorded in his office. The date of the entry shall be inserted in every grant, and no grant shall issue upon any survey, unless the same be signed by the surveyor of the county; and every person obtaining a grant for land shall, within two years after such grant shall be perfected as aforesaid, cause the same to be registered in the county where the land shall lie; and any person may cause to be there registered any certified copy of a grant from the office of the secretary of state, which shall have the same effect as if the original had been registered. Upon certificate from the enry-taker that the claimant has assigned his interest under the entry, a grant shall be issued in the name of the assignee: Provided, that the said assignee is a citizen and resident of this state, or shall have come into the state with the bona fide intent of becoming a resident and citizen thereof.

Code, s. 2779; R. C., c. 42, s. 22; 1783, c. 185, s. 14; 1796, c. 455; 1799, c. 525, s. 2. **Evidence to be received and acted upon by secretary in issuing grant:** Wool v. Saunders, 108-729—**and discretion of secretary in issuing same,** Ibid. **Authority to issue grant:** Harris v. Norman, 96-59; Terrell v. Manney, 6-375. **Time within which grant may issue:** Krous v. Long 41-259.

Effect on grant where record fails to show that great seal was affixed to grant: Broadwell v. Morgan, 142-475; Aycock v. R. R., 89-323; Steele v. Anthony, 2-98—**where secretary fails to countersign it,** Hunter v. Williams, 8-221—**where it contains clause of reservation,** Brown v. Rickard, 107-639—**where it was taken out upon lapsed entry,** Wilson v. Land Co., 77-445; Horton v. Cook, 54-270. **Effect of mistake in grant,** Lunsford v Bostion, 16-483; Van Pelt v. Pugh, 18-210. **Effect where grant not recorded in office of secretary of state,** Slade v. Green, 9-226—**of mistake in recording grant,** Van Pelt v. Pugh, 18-210; Hughes v. Debnam, 53-131—**of registration,** Ritchie v. Fowler, 132-788; Dew v. Pyke, 145-300—**where time extended for registration of grant,** Hill v. Jackson, 31-333; Dew v. Pyke, 145-300.

Great seal of state, together with certificate of secretary of state, sufficient authority to warrant registration of grant: Barcello v. Hapgood. 118-712; Coltrane v. Lamb, 109-209; Ray v. Stewart, 105-472—**certificate of clerk of court not being necessary in such case,** Coltrane v. Lamb, 109-209; Barcello v. Hapgood, 118-732; Bay v. Stewart, 105-472.

Where two grants issued for same land, second conveys no title: Stewart v. Keener, 131-486; see Dew v. Pyke, 145-300. **As to priority of grants issued same day,** see Reddick v. Leggat, 7-539; Andrews v. Mulford, 2-311; Foreman v. Tyson. 2-496.

First grant, not first entry, gives title: Seekright v. Bogan, 2-176; Andrews v. Mulford, 2-318; Dickey v. Hoodenpile, 2-358.

Grant issued can not be made void by subsequent legislation: State v. Spencer, 114-770; Gilchrist v. Middleton, 108-705.

Act of 1885, chapter 147 (Connor Act), not applicable to registration of grants, same being governed by this section: Wyman v. Taylor, 124-426.

Registration of grant, describing land by meets and bounds, and referring to another registered grant is not defective for failure to copy entire grant: Weeks v. Wilkins, 134-516.

Grants are proven by the seal, but the fact that a scroll or imitation of seal does not appear of record does not invalidate registry of grant: Broadwell v. Morgan, 142-475.

A state grant issued in 1852 was not registered until 1888, at which time there was no law permitting it to be registered. Another grant to the same land had been issued in 1880 which was registered in 1881; but during that time the first grant could have been registered under extending acts then in force. An act was subsequently passed (Act of 1893) legalizing the registry of grants theretofore registered, but providing that nothing therein should have the effect to divest any rights, title or equities in the land covered by such grant: Held, that second grant was invalid because state had no title at time it was made, and especially since first grant could have been registered at time of issue and registry of second grant, and during intervening time, and hence there was no vested title or equity to be affected by the act of 1893: Dew v Pyke, 145-300.

1730. Claimant dying, right descends. In case of the death of any person having made an entry of lands, pending the same or before making out the grant, the secretary shall issue the grant in the name of the decedent; and those interested, as heirs at law, devisees, tenants in dower, by the courtesy or otherwise, shall have the same estate as if the land had been granted during the life of the decedent.

Code, s. 2780; R. C., c. 42, s. 23; 1715, c. 44, s. 6; 1798, c. 493; s. 6. Enterer's death before grant, same issued in decedent's name: Henry v. McCoy, 131-587.

1731. When entry price paid. All entries of land shall, in every event, be paid for within one year from the date of entry, unless a protest be filed to the entry, in which event they shall be paid for within twelve months after final judgment on the protest; and all entries of land, not thus paid for, shall become null and void, and may be entered by any other person.

Code, s. 2766; R. C., c. 42, s. 8; 1854-5, c. 49. Provision that purchase money must be paid within time prescribed above not applicable to Cherokee lands: Frazier v. Gibson, 140-272; Kimsey v. Munday, 112-816.

Land must be paid for within statutory period or entry lapses: Gilchrist v. Middleton, 108-705; Wyman v. Taylor, 124-426; Wilson v. Land Co., 77-457; Bryson v. Dobson, 38-139; Plemmons v. Fore, 37-312.

1732. Price paid state treasurer, when. The state treasurer shall receive the money for vacant and unappropriated lands upon

the presentation to him of the certificate of the secretary of state, setting forth the number and date of the entry, and the quantity of acres found by the surveyor to be vacant, as the same may appear by the returns made to him from the surveyor or entry-taker, or from the entry-taker's warrant, or the plots of survey.

Code, s. 2777; R. C., c. 42, s. 20; 1827, c. 23; 1829, c. 30. **Payment without certificate of secretary does not entitle party to grant:** Buchanan v. Fitzgerald, 41-121.

109 .37 771

1733. Price of land; may be sold to other than claimant. Not less than fifty cents shall be paid to the state treasurer for every acre of land that may be entered, and the secretary of state may in his discretion charge a greater sum, and is authorized to issue a grant to any person other than the claimant if the claimant refuses to pay the sum bona fide offered by such other person. In case the land is sold to a person other than the claimant, the purchaser of the land shall, in addition to the amount paid for the land, pay to the secretary of state an amount sufficient to repay to the claimant all sums expended by him in making th centry and advertising same. And the secretary of state shall pay over such sum to the claimant.

Code, s. 2764; 1903, c. 272, s. 2; 1885, c. 185.

1734. Plot attached to grant. The secretary of state shall, on receipt of the plots, file one in his office; the other shall be attached to the grant.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10. **Original plat made part of grant, though not conclusive evidence as to shape and location of land:** Higdon v. Rice, 119-623; Redmond v. Mullenax, 113-505.

1735. Number of survey put in grant. It shall be the duty of the secretary of state, upon issuing a grant, to place in the grant issued the number of the survey from the certificate of survey upon which the grant is founded.

1889, c. 522.

VII. Correcting.

1736. County line changed after entry, before grant and registration, grant valid. All grants issued on entries for lands which were entered in one county, and before the issuing of the grants therefor, or the registration of said grants, by the change of former county lines, or the establishment of new lines, the lands so entered were placed in a county, or in counties different from that in which they were situate, and the grants were registered in the county where the entry, or entries, were made, shall be good and valid, and

the registration of said grants shall have the same force and effect as if they had been registered in the county or counties where the lands were situate; and any and all persons claiming under and by said grants, may have them, or a certified copy of the same, from the office of the secretary of state, or from the office of the register of deeds when they had been erroneously registered, recorded in the office of the register of deeds of the county or counties where the lands lie, and such registration shall have the same force and effect as if the said grants had been duly registered in said county or counties.

1897, c. 37. **The provisions of this section applied** in Wyman v. Taylor, 124-426. **Formation of new county after entry, grant issued as of lands in new county:** McMillan v. Gambill, 106-359.

1737. Entries in wrong county, grant valid. Whereas, many citizens of the state, on making entries of lands near the lines of the county wherein they reside, either for want of proper knowledge of the land laws of the state, or not knowing the county lines, have frequently made entries and extended their surveys on such entries into other counties than those wherein they were made, and obtained grants on the same; and whereas, doubts have existed with respect to the validity of the titles to lands situated as aforesaid, so far as they extend into other counties than those where the entries were made; for remedy whereof, it is hereby declared, that all grants issued on entries made for lands situated as aforesaid, shall be good and valid against any entries thereafter made or grants issued thereon.

Code, s. 2784; R. C., c. 42, s. 27; 1805, c. 675; 1834, c. 17. **Provisions of this section applicable where entry of land lying partly in two counties, which is unknown to grantee, is made only in one county:** Harris v. Norman, 96-59; Lunsford v. Bostion, 16-483; Avery v. Strother, 1-558.

1738. How errors in surveys or plots corrected. Whenever there may be an error by the surveyor in plotting or making out the certificate for the secretary's office, or the secretary shall make a mistake in making out the courses agreeable to said returns, or misname the claimant, or make other mistake, so as such claimant shall be injured thereby, the claimant may prefer a petition to the superior court of the county in which the land lies, setting forth the injury which he might sustain in consequence of such error or mistake, with all the matters and things relative thereto; and the said court may hear testimony respecting the truth of the allegations set forth in the petition; and if it shall appear by said testimony, from the return of the surveyor or the error of the secretary, that the patentee is liable to be injured thereby, the court shall direct the clerk to certify the facts to the secretary of state, who

shall file the same in his office, and correct the error in the patent, and likewise in the records of his office. The costs of such suit shall be paid by the petitioner, except when any person may have made himself a party to prevent the prayer of the petitioner being granted, in which case the costs shall be paid as the court may decree. The benefits granted by this section to the patentees of land shall be extended in all cases to persons claiming by, from or under their grants, by descent, devise, or purchase. When any error is ordered to be rectified, and the same has been carried through from the grant into mesne conveyances, the court shall direct a copy of the order to be recorded in the register's books of the county: Provided, no such petition shall be brought, but with three years after the date of the patent; and if brought after that time the court shall dismiss the same, and all proceedings had thereon shall be null and of no effect: Provided further, nothing herein shall affect the rights or interests of any person claiming under a patent issued between the period of the date of the grant alleged to be erroneous, and the time of filing the petition, unless such person shall have had due notice of the filing of the petition, by service of a copy thereof, and an opportunity of defending his rights before the court according to the course of the common law.

Code, s. 2785; R. C., c. 42, s. 28; 1790, c. 326; 1798, c. 504; 1804, c. 655; 1814, c. 876.

1739. Resurvey of lands to correct grants, how obtained. Persons who have heretofore entered or may hereafter enter vacant lands shall not be defeated in their just claims by mistakes or errors in the surveys and plots furnished by surveyors, but in every case where the purchase money has been paid into the state treasury within the time prescribed by law after entry and the survey or plot furnished shall be found to be defective or erroneous, the party having thus made entry and paid the purchase price may obtain another warrant of survey from the entry-taker of the county where the land lies, and have his entry surveyed as is directed by existing laws, and on presenting a certificate of survey and two fair plots thereof to the secretary of state within six months after said payment of the purchase money, the party making such entry and paying such purchase price shall be entitled to receive, and it shall be the duty of the secretary of state to issue to him the proper grant for the lands so entered.

1901, c. 734.

1740. Seal lost, how replaced. In all cases where the saal annexed to a grant is lost or destroyed, the governor may, on the certificate of the secretary of state that the grant was fairly obtained, cause the seal of the state to be affixed thereto.

Code, s. 2781; R. C., c. 42, s. 24; 1807, c. 727. **Section referred to in Ray v. Stewart, 105-473.**

1741. Errors in grants, how corrected. If in issuing any grant the number of the grant or the name of the grantee or grantees or any material words or figures suggested by the context has been omitted or not correctly written or given, or the description in the body of the grant does not correspond with the plot and description in the surveyor's certificate attached to the grant, or if in recording the grant in his office the secretary of state has heretofore made or may hereafter make any mistake or omission by which any part of any grant has not been correctly recorded, the secretary of state shall, upon the application of any party interested and the payment to him of his lawful fees, correct the original grant by inserting in the proper place the word or words, figure or figures, name or names omitted or not correctly given or suggested by the context; or if the description in the grant does not correspond with the surveyor's plot or certificate, he shall make the former correspond with the latter as the true facts may require. In case the party interested prefer it, the secretary of state shall issue a duplicate of the original grant, including therein the corrections made; and in those cases in which grants have not been correctly recorded he shall make the proper corrections upon his records, or by re-recording, as he may prefer; and any grant corrected as aforesaid may be recorded in any county of the state as other grants are recorded, and have relation to the time of the entry and date of the grant as in other cases.

1889, c. 460. **Mistake in grant caused by either surveyor or secretary of state can not prejudice grantee in certain cases:** 2-378 (note by reporter).

1742. In Macon and Jackson; notice given. All corrections or attempted corrections of any grant, heretofore made, or hereafter to be made, by the secretary of state, under the preceding or any other section of this chapter, shall be null and void, unless all adverse claimants of the land covered by such grant, and all persons affected in any way by such correction or proposed correction shall have been, or shall be, duly notified in writing of the time and place of such application to have said grants corrected, and in what respect the same may be defective or incorrect. If upon the hearing of the proof of both sides by the secretary of state, it does not clearly appear that such correction should be made he shall refuse to make the said change or correction. In all cases the burden of proof that such notice was given shall be upon the party claiming under such corrected grant. This section shall apply only to Jackson and Macon counties.

1901, c. 505.

1743. Irregular entries validated. Wherever persons have prior to January first, one thousand eight hundred and eighty-three, irregularly entered lands and have paid the fees required by law to the secretary of state, and have obtained grants for such lands duly executed, then and in that case the title to the said lands shall not be affected by reason of such irregular entries; and the said grants are hereby declared to be as good and valid as if such entries had been properly made.

Code, s. 2761; 1868-9, c. 100, s. 4; 1868-9, c. 173, s. 6; 1874-5, c. 48.

The validating of irregular entries: Wyman v. Taylor, 124-426.

1744. Grants signed by deputy secretary of state validated. Where state grants have heretofore been issued and the name of the secretary of state has been affixed thereto by his deputy or chief clerk, or by any one purporting to act in such capacity, such grants are hereby declared valid; but nothing herein contained shall interfere with vested rights.

1905, c. 512.

1745. Grants issued prior to 1820, validated. All grants issued by the secretary of state, previous to the year one thousand eight hundred and twenty, on surveys made fairly and without fraud, and signed by the deputy surveyor only, shall be good and effectual to pass all the right of the state in and to said land, in as full and ample a manner as if such returns had been made in due form; Provided, nothing herein shall affect any entries made, or grants obtained on legal returns for such lands, previous to the year one thousand eight hundred and twenty-nine.

Code, s. 2783; R. C., c. 42, s. 26; 1828, c. 46.

1746. Grants to surveyors prior to 1829, confirmed. Grants of land made by the state to surveyors and deputy surveyors, prior to the first day of January, one thousand eight hundred and twenty-nine, upon surveys, plots, and certificates of the same, made by them for themselves respectively, without other illegality, and without fraud or partiality, the certificates in all cases being signed by the principal surveyor, are confirmed and declared to be good and valid.

Code, s. 2782; R. C., c. 42, s. 25; 1828, c. 23, s. 2.

1747. Time for registering grants extended. All grants from the state of North Carolina of lands and interests in land heretofore made, which were required or allowed to be registered within a time or times specified by law, or in the grants themselves, may be registered in the counties in which the lands lie respectively at any time within eight years from the first day of January, nineteen hundred and one, notwithstanding the fact that such specified times

have already expired, and all such grants heretofore registered after the expiration of such specified time or times shall be taken and treated as if they had been registered within such specified time: Provided, that nothing herein contained shall be held or have the effect to divest any rights, titles or equities in or to the land covered by such grants, or any of them, acquired by any person or persons from the state of North Carolina by or through any entry or entries, grant or grants, made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or entries, grant or grants.

1905, c. 6; 1893, c. 40; 1901, c. 175; 1907, c. 805. **Time extended for registering grants, but same not affecting existing rights:** Janney v. Blackwell, 138-437; Morehead v. Hall, 132-133; McCall v. Wilson, 101-598.

VIII. Vacated.

1748. Suits to vacate grants, when and where brought. When any person claiming title to lands under a grant or patent from the king of Great Britain, any of the lords proprietors of North Carolina, or from the state of North Carolina, shall consider himself aggrieved by any grant or patent issued or made since the fourth day of July, one thousand seven hundred and seventy-six, to any other person, against law or obtained by false suggestions, surprise or fraud, the person aggrieved may bring a civil action in the superior court for the county in which such land may be, together with an authenticated copy of said grant or patent, briefly stating the grounds whereon such patent should be repealed and vacated, whereupon the grantee, patentee, or the person, owner or claimant under such grant or patent shall be required to show cause why the same shall not be repealed and vacated.

Code, s. 2786; R. C., c. 42, s. 29. **Grant can only be set aside at suit of state or of prior grantee:** Crow v. Holland, 15-417. **Action only available to senior against junior grantee:** Henry v. McCoy, 131-588; State v. Bland, 123-739; McNamee v. Alexander, 109-246; Carter v. White, 101-30; Holland v. Crow, 34-275; Hoyt v. Rich, 20-677; Miller v. Twitty, 20-10; O'Kelly v. Clayton, 19-246; Hoyle v. Logan, 15-495; Crow v. Holland, 15-417; Featherston v. Mills, 15-596. **Action must be founded on fraud or mistake:** State v. Spencer, 114-778; McNamee v. Alexander, 109-246; Hoyt v. Rich, 20-677.

1749. Judgment vacating grant, recorded in secretary of state's office. If, upon verdict or demurrer, the court believe that the patent or grant was made against law or obtained by fraud, surprise, or upon untrue suggestions, they may vacate the same; and a copy of such judgment, after being recorded at large, shall be filed by the petitioner in the secretary's office, where it shall be

recorded in a book kept for that purpose; and the secretary shall note in the margin of the original record of the grant the entry of the judgment, with a reference to the record in his office.

Code, s. 2787; R. C., c. 42, s. 39.

1750. When state will bring suit to vacate grants. An action may be brought by the attorney general, in the name of the state, for the purpose of vacating or annulling letters patent granted by the state, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Code, s. 2788; C. C. P., s. 367. **Section only applicable where, upon cancelling letters, land would revest in state:** Henry v. McCoy, 131-589; State v. Bland, 123-739; State v. Bevers, 86-588. **License is not letters patent, and this section not applicable thereto:** Hargett v. Bell, 134-396. **Attorney general can not of his own motion bring action under this section to vacate charter of incorporation:** Attorney General v. R. R. 134-481. **Grant can only be vacated on part of state by proceedings under this section:** Kimsey v. Munday, 112-830; see Crow v. Holland, 15-417. **Action must be founded on fraud or mistake:** State v. Spencer, 114-778; Attorney General v. Carver, 34-234; see section 1748. **Section referred to in** Harris v. Norman, 96-60; Ray v. Castle, 79-585; McDowell v. Asbury, 66-449.

IX. Phosphate Beds.

1751. Phosphate rock under navigable waters, when entered. Any resident of this state who shall make affidavit before the clerk of the superior court of any county through which such navigable stream may flow, that he has discovered in any navigable stream or waters of this state any phosphate rock or phosphate deposit therein, shall have authority and power to enter under the entry laws of this state so much of the bed of any such navigable stream or waters as shall not exceed in any one entry two miles in length up the middle of any such stream or water for the purpose of digging, mining or removing any such deposit or rock.

1891, c. 476.

1752. How grant obtained; term; royalty. Upon such affidavit being filed with the entry-taker, and upon a survey and plot being made of such entry by the county surveyor, as is now required by law in cases of entry of land, being made and certified to the secretary of state with a copy of such affidavit and entry so made, the said secretary of state shall issue a patent or grant to the said person, his heirs or assigns, for a term of twenty-five years for such land, with the proviso and condition inserted therein that the grantee therein shall pay to the treasurer of the state at the end of every three months a royalty of one dollar per ton for each and every ton of the crude phosphate rock or deposit mined, dug or removed.

1891, c. 476, s. 2.

1753. Exclusive right to mine; bond for royalty. Such grantee, his heirs or assigns, shall have the exclusive right to mine, dig or remove any such phosphate rock or deposit for the term of twenty-five years from the date of said patent upon paying the said royalty of one dollar specified in said patent: Provided, however, that as a condition precedent to the granting of any such patent each such company or person making any such entry shall enter into bond with sufficient security in the penal sum of five thousand dollars, conditioned for the making of faithful and true returns to the treasurer of the state of the number of tons of phosphate rock and phosphate deposit so dug, mined or removed, at the end of every month, and the punctual payment to the said treasurer of the royalty of one dollar per ton upon each and every ton of the crude rock, without being steamed or dried, at the end of every three months, and the said bond and sureties shall be subject to the approval now required by law for the bonds of state officers.

1891, c. 476, s. 3.

1754. Navigation not obstructed by grantee. No grant issued under the provisions of this subchapter shall confer upon the person receiving the same right to obstruct the navigation or any such stream or water, nor confer upon any such person or his assigns any other right than that granted to take, mine or dig phosphate rock or deposit therefrom.

1891, c. 476, s. 4.

1755. Fees for issuing grant for phosphate beds. No fee or cost shall be charged or collected by the secretary of state of any person or corporation receiving any patent or grant under this subchapter, except the fee allowed by law to the said secretary of state for issuing a patent under the entry laws of the state.

1891, c. 476, s. 5.

1756. Failure to operate for two years vacates grant. Any person, company or corporation who shall fail to dig, mine or remove phosphate rock or deposit from any such stream of water to which he or it may be entitled under any patent or grant issued under the provisions of this subchapter for the period of two years from the date of said patent, or after beginning digging, mining or removing the same, shall fail to continue to so dig, mine or remove the same for the period of two years, shall forfeit any and all rights therein granted, and said territory shall immediately thereupon become subject to entry under the provisions of this subchapter without making the affidavit of the discovery of any such deposits or rocks.

1891, c. 476, s. 6.

1757. May be mined without grant, how. Any person or corporation resident of this state shall have the right to mine, dig or remove phosphate rock or deposits from any of the navigable streams or waters in this state to which no exclusive patent or grant may have been issued, upon such person or corporation first entering into bond in the penal sum of five thousand dollars, payable to the treasurer of the state, for the payment of the same royalty, in the same manner and under the same regulations as are prescribed in section one thousand seven hundred and fifty-three; but nothing in this section shall be construed to give to any such person or corporation any exclusive franchise or privilege to dig, mine or remove any such phosphate rock or deposit from any stream or water of this state.

1891, c. 476, s. 7.

CHAPTER 38.

GUARDIAN.

I. Public Guardians.

1758. How appointed; tenure. There may be in every county a public guardian to be appointed by the clerk of the superior court for a term of eight years.

Code, s. 1556; 1874-5, c. 221.

1759. Oath of office. The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court.

Code, s. 1560; 1874-5, c. 221, s. 5.

1760. When letters issued to. The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian: Provided, it shall be lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation.

Code, s. 1561; 1874-5, c. 221, ss. 6, 7.

1761. Powers, duties, liabilities, compensation. The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws: and shall receive the same compensation as other guardians.

Code, s. 1561; 1874-5, c. 221, ss. 6, 7. **As to bond of public guardian, see sections 321, 322.**

II. Appointed by Parent.

1762. Father, and if dead, mother may appoint. Any father, though he be a minor, may, by deed executed in his lifetime or by his last will and testament in writing, dispose of the custody and tuition of any of his infant children, being unmarried and whether born at his death or in ventre sa mere, for such time as the children may remain under twenty-one years of age, or for any less time. Or in case such father shall be dead and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, may do so.

Code, s. 1562; R. C., c. 54; 1762, c. 69; 1868-9, c. 201; 1881, c. 64. **Where testator by will directs that children should be placed with certain person until their majority, of whose circumstances testator was aware, such person entitled to their custody in absence of finding of unfitness:** In re Young, 120-151.

Father entitled to custody of children against claims of everyone: Newsome v. Bunch, 144-16; Latham v. Ellis, 116-30—**except those to whom he may have committed their custody and tuition by deed,** Latham v. Ellis, 116-30—**or unless found to be unfitted for their care and custody,** Ibid.

Testator can not appoint testamentary guardian except to his own children: Camp v. Pittman, 90-615.

Court intimates that mother can not make disposition of her child so as to confer upon another the right to its custody and control: In re Lewis, 88-31.

Provisions of section allowing father to appoint testamentary guardian for children does not embrace grandchildren: Williamson v. Jordan, 45-46.

Father can not appoint guardian for children, nor impose upon anyone the duties and obligations of that office, except by deed executed in his lifetime, or by last will and testament executed in writing: Peyton v. Smith, 22-325—but where it can be clearly collected from will of father that certain persons are thereby appointed to have custody of person and estate of children until they arrive at age, such appointment will constitute them guardian, Ibid.

No one has right to guardianship of an infant, except as testamentary guardian, or as appointed by father by deed, or by the court: Long v. Rhymes, 6-122.

1763. Effect of such appointment. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children.

Code, s. 1563; R. C., c. 54; 1762, c. 69, s. 2; 1868-9, c. 201, s. 2. **Testamentary guardian entitled to custody of child:** In re Young, 120-151.

1764. Powers and liabilities of other guardians. Every guardian by deed or will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians.

Code, s. 1564; R. C., c. 54; 1762, c. 69; 1868-9, c. 201, s. 3.

1765. Mother natural guardian, father dead. In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and to the appointment of guardians.

Code, s. 1565; 1883, c. 364. **Mother, if suitable person, entitled to care and custody of infant child, even if there be others more suitable:** Ashby v. Page, 106-328. **Court intimates that mother can not make a disposition of child so as to confer upon another right to its custody and control:** In re Lewis, 88-31. **As to mother's duty to support her child, see Ibid.**

III. Jurisdiction of Clerk of Superior Court Over.

1766. May appoint, for infants, idiots, lunatics and inebriates. The clerks of the superior court within their respective counties shall have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics and inebriates, except where otherwise prescribed by law.

Code, s. 1566; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 7; 1868-9, c. 201, s. 4. See section 1890. Powers which court of equity formerly exercised in regard to orphans and their estates now conferred upon clerk: Duffy v. Williams, 133-197.

Jurisdiction of clerk in appointment of guardians of infants does not extend to a case where petitioner asks for custody of child who had been placed by mother under control of another: In re Lewis, 88-31. Appointment of guardian is matter of discretion: Battle v. Vick, 15-294; Long v. Rhymes, 6-122; Grant v. Whitaker, 5-231; Mills v. McAllister, 2-303—exercise of which can not be reviewed by supreme court, Battle v. Vick, 15-294.

Court not bound to confirm choice of guardian made by infant of fourteen years of age and upwards: Grant v. Whitaker, 5-231; Wynne v. Always, 5-38.

For old case dealing with jurisdiction of courts under section, see Harriss v. Richardson, 15-279.

1767. May commit custody to one, estate to another. Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever and at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's or lunatic's estate, and to his suitable maintenance, nurture and education.

Code, s. 1567; R. C., c. 54, s. 3; 1840, c. 31. Section merely referred to in Duffy v. Williams, 133-197.

1768. May allow yearly sum for support and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require.

Code, s. 1568; R. C., c. 54, s. 3; 1840, c. 31; 1868-9, c. 201, s. 6. As to maintenance and education of ward generally, see Duffy v. Williams, 133-195; Tharrington v. Tharrington, 99-118.

1769. What disbursements and commissions allowed. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only.

Code, s. 1569; R. C., c. 54, s. 3; 1840, c. 31, s. 3; 1868-9, c. 201, s. 7.
See section 1808. As to commissions generally, see section 1809.

1770. Appointed by, in case of divorce. When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother.

Code, s. 1571; R. C., c. 54, s. 4; 1838, c. 16; 1868-9, c. 201, s. 9.

1771. May appoint when father is alive. The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor.

Code, s. 1572; R. C., c. 54, ss. 4, 7; 1806, c. 707; 1868-9, c. 201, s. 10.

1772. Proceedings on application for. On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate or lunatic, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant or of any other person; and if none of the relatives of the infant, idiot, inebriate or lunatic are present at such application, the clerk must assign, or, for any other good cause, he may assign a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate or lunatic, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate or lunatic.

Code, s. 1620; C. C. P., s. 474. **Failure to notify relative who has custody of child of proceedings to appoint guardian is irregularity under section, which does not render appointment of guardian void, though not conclusive upon such relative:** In re Parker, 144-170.

Except as between parents, under section 1853, right of custody of child can not be determined under writ of habeas corpus: Ibid.

As to who may take proper steps to set aside appointment of guardian, see Ibid.

1773. Must issue letters. The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office.

Code, s. 1621; C. C. P., s. 475.

1774. Removed, when. The clerks of the superior court shall have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it shall be their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.

2. Where the guardian in any manner mismanages the estate.

3. Where the guardian is about or intends to marry any ward in disparagement.

4. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.

5. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.

6. Where the guardian or his sureties are likely to become insolvent or nonresidents of the state.

Code, s. 1583; R. C., c. 54, ss. 2, 13; 1762, c. 69; 1868-9, c. 201, s. 20; C. C. P., ss. 470, 476. **Court (now clerk superior court) can at any time remove guardian upon proper cause shown, and has entire discretion in appointment of successor:** Bray v. Brumsey, 5-227.

Use by guardian of funds of his ward for his own business is sufficient to warrant his removal: Ury v. Brown, 129-270.

Word "disparagement" with reference to marrying off ward, defined: Shutt v. Carloss, 36-232. **Guardian not answerable in pecuniary damages for marrying female ward in disparagement:** Ibid.

Where guardian of infant moves to another state, taking with him part of infant's property, court has right to remove him and appoint another in his place: Cooke v. Beale, 33-36.

An order by superior court clerk in a cause pending before him for removal of testamentary guardian, where it is not alleged nor found as a fact by clerk that estate of ward had been wasted, nor that guardian insolvent so that ward should be unable to recover balance due on final settlement, is improperly made: Sanderson v. Sanderson, 79-369.

For annotations on removal of administrators, see under section 38, which may be useful in construing this section.

1775. Interlocutory orders pending controversy. In all cases where the letters of a guardian are revoked the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation.

Code, s. 1607; 1868-9, c. 201, s. 44.

1776. Resignation of; must first account. Any guardian wishing to resign his trust may apply in writing to the superior court,

setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation.

Code, s. 1608; 1868-9, c. 201, s. 45. **Where permission given to guardian by clerk of court to file ex parte final account and turn over guardianship to another, he is not thereby discharged from liabilities connected with his trust arising before resignation:** Luton v. Wilcox, 83-20. **Section merely referred to** in Ellis v. Scott, 75-111.

IV. Bonds.

1777. Not to receive property till approved. No guardian appointed for an infant, idiot, lunatic, insane person, or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court.

Code, s. 1573; C. C. P., s. 355. **See sections 265, 273, 323. Guardian and his bond liable for all moneys due his wards which he has collected or ought to have collected:** Loftin v. Cobb, 126-58—**and where administrator of former guardian himself becomes guardian, he and his guardian bond become liable for any balance due from solvent estate of former guardian,** Ibid.

Giving of bond required of guardians not essential to validity of appointment itself: Howerton v. Sexton, 104-75—**though failure to take bond subjects the officer whose duty it is to see that it is made, to consequences of omission,** Ibid.

1778. Given before letters issued; increased if property sold. Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property, and the rents and profits issuing from the real estate of the infant; which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge, touching the guardianship of the estate committed to him. If, on

application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold.

Code, s, 1574; R. C., c. 54, s. 5, 1762, c. 69, s. 7; 1825, c.1285, s. 2; 1833. c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214. **For mortgage in lieu of guardian's bond, see section 265. For giving bond in surety company see section 273. For annotations on the bond itself and on same, see section 323.**

A receipt under seal will not avail as a defense to a bill brought to have an account against a guardian by his former wards, on ground of mistake, which defendant admits: Felton v. Long, 43-224—**nor will lapse of time bar such bill when, during the greater part of the time, plaintiffs were under age and coverture and especially where defendant, claiming benefit of such lapse, was trustee of plaintiffs,** Ibid.

Until account and settlement be demanded, or his conduct renders this unnecessary, certain condition of guardian bond held not broken: Barrett v. Munroe, 20-334. **Settlement between guardian and ward, and receipt by latter of former's personal bond for balance, is sufficient defense to action on guardian bond:** State v. Cordon, 30-179; Ledford v. Vandyke, 44-480.

A defense, good in action by ward against guardian, is good in action on bond: Ibid.

In construing a bond, meaningless words may be rejected: Iredell v. Barbee, 31-250.

For gross neglect and abuse of trust in failing to educate wards and protect estate, see Boyett v. Hurst, 54-166.

1779. Recorded in clerk's office; injured person may sue on. The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions.

Code, s. 1575; R. C., c. 54, s. 5; 1868-9, c. 201, s. 12. **For action on guardian bonds, see section 323. Person to whom court of equity has decreed that guardian should pay fund according to tenor of bond is person injured within meaning of section:** State v. Brown, 67-481. **As to breach of bond,** see Ibid.

1780. One bond where wards have common property. When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action.

Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13.

1781. Renewed every three years. Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship..

Code, s. 1581; R. C., c. 54, s. 10; 1868, c. 201, s. 18. **See section 324. As to liabilities of sureties upon first bond where same renewed,** see Jones v. Blanton, 41-115; Butler v. Durham, 38-589; Jones v. Hays, 38-502. **Section merely referred to** in Topping v. Windley, 99-8.

1782. Duty of clerk on failing to renew. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, as directed in the preceding section, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor.

Code, s. 1582; R. C., c. 54, s. 10; 1762, c. 69, s. 15; 1868-9, c. 201, s. 19. **Clerk not liable upon official bond for failure to issue ex officio a notice to guardian to renew bond:** Sullivan v. Lowe, 64-500; see also Jones v. Biggs, 46-364; but see State v. Watson, 29-289.

1783. Sureties relieved. Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease.

Code, s. 1606; R. C., c. 54, s. 35; 1762, c. 69, ss. 21, 22; 1868-9, c. 201, s. 43. **Where sureties of guardian obtain order for counter-security under section, and at that time guardian owes ward, and never afterwards returns account or makes payment, no presumption of satisfaction arises from his then being able to pay sum he owed, and sureties to first bond liable for it, although order for counter security expressly releases them:** Foye v. Bell, 18-475. **Where new sureties ordered to be given, obligation of bond given by new sureties extends to entire guardianship, retrospective as well as prospective:** Bell v. Jasper, 37-597—**and such second bond is at least additional and cumulative security for ward,** Ibid.

1784. Liability of clerk for taking insufficient. If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any per-

son without taking good and sufficient security for the same as directed by law such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the supeior court shall not be liable.

Code, s. 1614; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 6; 1868-9, c. 201, s. 51. **Giving bond required of guardian is not essential to validity of appointment, but failure to take bond subjects officer to consequences of such omission:** Howerton v. Sexton, 104-75—**and neither clerk nor his sureties will be heard to deny that guardian, appointed by former, improperly received funds which he is shown to have taken possession of for ward,** Topping v. Windley, 99-4.

Clerks of superior court liable upon official bonds for all losses sustained by reason of their failure to require proper security upon guardian bonds: Ibid. **As to when action may be maintained against clerk on offical bond,** see Jones v. Biggs, 46-364; also section 295.

For old case under section now practically valueless, see Davis v. Somerville, 15-382.

1785. Liability of clerk for other defaults. If any clerk of the superior court shall wilfully or negligently do, or omit to do, any other act prohibited, or other duty imposed upon him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as in the preceding section directed.

Code, s. 1615; 1868-9, c. 201, s. 52.

V. Powers and Duties.

1786. Must take charge of estate. Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor.

Code, s. 1588; R. C., c. 54, s. 21; 1762, c. 69, s. 3; 1868-9, c. 201, s. 25. **Guardian having no title to land of ward, it is not his duty to sue for recovery of realty:** Cross v. Craven, 120-331. **Guardian may exchange personal for real security for debt due ward:** Christmas v. Wright, 38-549.

1787. Must sell perishable goods on order of clerk. Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale.

Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1868-9, c. 201, s. 26.

1788. Sales and rentings, how made. All sales and rentings by guardians shall be publicly made, between the hours of ten o'clock a. m. and four o'clock p. m., after twenty days' notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. In cases where guardians have heretofore rented their ward's land at private rentings in good faith and for the benefit of the ward's estate, they shall not be liable to the penalty heretofore prescribed by law. The proceeds of all sales of personal estate and rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security.

Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391.

Section impliedly declares it to be to the interest of wards to rent lands publicly: Duffy v. Williams, 133-198.

Provisions of section requiring sales by guardians to be public does not apply to sales made under direction of superior court in exercise of its general jurisdiction in equity: Barcello v. Hapgood, 118-712. **Provisions of section requiring all sales and rentings of real and personal property by guardians to be made publicly, and upon terms therein prescribed are peremptory:** Pate v. Kennedy, 104-234—**and leave no discretion to guardian,** Ibid. **Private renting is valid as to third parties:** Perry v. Perry, 127-23.

Section merely referred to in Norman v. Dunbar, 53-317.

1789. May lease lands, when. The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall come of age, or die in nonage. But no guardian without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land.

Code, s. 1591; R. C., c. 54, s. 25; 1762, c. 69, s. 13; 1794, c. 413, s. 2.

Section merely referred to in Melton v. McKesson, 35-475.

1790. When timber may be sold. In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of, or use so much the lightwood, and box or rent so many pine

trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon and no more.

Code, s. 1596; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 33. **Where guardian sold timber on land of ward without order of court as required by section, and took note for purchase money, maker of note can not, when sued upon same by guardian and ward, set up failure of guardian to observe statutory mandate:** Evans v. Williamson, 79-86.

1791. Plate and jewelry to be kept. All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity.

Code, s. 1597; 1895, c. 74; 1868-9, c. 201, s. 34.

1792. Funds invested by fiduciaries. Guardians, trustees, and others acting in a fiduciary capacity, having surplus funds of their wards and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, or in consolidated bonds of the state of North Carolina, and in settlements by guardians, trustees and others acting in a fiduciary capacity, such bonds or other security of the United States, and such bonds of the state of North Carolina, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Code, s. 1594, 1870-1, c. 197; 1885, c. 389. **For interest guardian notes bear, see section 1953. Guardian's primary duty is to invest trust fund, and he will be charged with interest in absence of proof that it remained in his hands unemployed without his fault:** Wilson v. Lineberger, 88-416. **Guardian may authorize trustee of insolvent bank to borrow money to run bank, ward being a shareholder:** Bank v. Cocke, 127-467. **Guardian may use own discretion in investment of ward's money:** Gary v. Cannon, 38-64.

For additional annotations on this subject see under section 1953.

1793. Deposit of trust funds, at fiduciaries' risk. No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds.

1889, c. 470. **Section merely referred to** in Smith v. Patton, 131-398.

1794. Executor of deceased, pays money to clerk. In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person shall die, it shall be competent for the executor or administrator of such deceased guardian, at any time after

the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid.

Code, s. 1622; 1881, c. 301, s. 2. **Administrator of deceased ward not entitled to recover from administrator of deceased guardian moneys which came into guardian's hands as proceeds of ward's real estate sold under decree of court in partition:** Allison v. Robinson, 78-222. **As bearing on section,** see Jennings v. Copeland, 90-572.

1795. When liable for debts. Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same.

Code, s. 1593; R. C., c. 54, s. 23; 1762, c. 69, s. 10; 1868-9, c. 201, s. 30

Guardian responsible not only for what he receives but for all he might have received by exercise of ordinary diligence and highest degree of good faith: Armfield v. Brown, 73-81.

Guardian accountable to ward for sum of money in hands of administrator if such administrator or his sureties were solvent at time when such funds ought to have been paid to guardian: Covington v. Leak, 65-594—**or within time when judgment could have been obtained upon administration bond.** Ibid,

Where guardian waited six months after principal in note, held by him as guardian, died insolvent, before he sued surety who also became insolvent before suit brought, guardian having opportunity of knowing condition of affairs, he is liable for debt. Williamson v. Williams, 59-62.

Guardian having no title to land of ward, it is not his duty to sue for recovery of realty: Cross v. Craven, 120-331.

Guardian liable to ward for negligence in failing to sue on note due ward until parties thereto become insolvent: Coggins v. Blythe, 113-102. **Where guardian carelessly and without consideration, upon hasty opinion of counsel, employed by debtor, and not by way of compromise of doubtful claim, accepted from solvent debtor half sum he should have collected, he is responsible for what he failed to collect:** Culp v. Stanford, 112-664.

Guardian acting in good faith not responsible for omitting to collect note during late war, when it appears that obligors solvent during war, and rendered insolvent by its results: Love v. Logan, 69-70.

For additional annotations hereunder, see section 1953.

1796. Liable for land sold for taxes. If any guardian suffer his ward's lands to lapse or become forfeited or be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward.

Code, s. 1595; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 32.

1797. Liable for costs, when. All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults, shall be paid by the party found in default.

Code, s. 1611; 1868-9, c. 201, s. 48.

VI. Estates Sold.

1798. By special proceeding; approved by judge. On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale be had by such person, in such way and on such terms as may be most advantageous to the interests of the ward; but no sale shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

Code, s. 1602; R. C., c. 54, ss. 32, 33; 1827, c. 33; 1868-9, c. 201, s. 39.

Powers of court hereunder settled, in Ex parte Dodd, 62-99; Troy v. Troy, 45-87; Williams v. Harrington, 33-616.

Clerk should require satisfactory proof of necessity to sell in addition to verified petition: In re Propst, 144-562—**and decree should not be made upon ex parte affidavit,** Harrison v. Bradley, 40-136.

Court may sell land of minors for better investment when they are properly represented before court: Hutchinson v. Hutchinson, 126-671—**and court will act, when all interests are found in classes, if one of each class is before court,** Ibid.

By this section clerk and court in turn have concurrent jurisdiction in matter of ordering sale of infant's lands upon petition of their guardians: Barcello v. Hapgood, 118-712.

Not erroneous or irregular to order sale of infant's land to be made privately by guardian: Ibid.

Where judge renders judgment, upon finding by referee that sale should be made, that sale be made privately, purchaser acquires good title: Ibid

While formal direction to make title is not always necessary, confirmation of sale can not be dispensed with: In re Dickerson, 11-108.

Where court directed sale to be made without taking any means to ascertain necessity therefor, and report of sale was never confirmed not error in court, upon motion of infant, to set aside sale and order another: Ibid.

Ward has right to subject land sold by his guardian to payment of purchase money: Murrill v. Humphrey, 88-138.

Where ward's land sold under decree of court upon petition of guardian the title acquired is not rendered invalid by reversal of decree on account of irregularity in proceeding of which purchaser had no notice: Sutton v Schonwald, 86-198.

One who conducts suit as guardian of infants is not party of record, but infants themselves are real plaintiffs: George v. High, 85-113—nor will anyone who has an interest in action hostile to that of infants be permitted to conduct same, Ibid.

Court of equity not only has power, but should, in exercise of its discretion in proper cases, authorize and confirm private sale of land of infants, therefore, where guardian, in accordance with order of court, exposes at public sale land of wards, but no sale for want of bidders at fair price, and land subsequently sold privately, upon terms approved by court, purchaser acquires good title: Rowland v. Thompson, 73-504.

For cases under section prior to enactment of section 1590, allowing sale of estates limited to persons not in esse, see Ex parte Dodd, 62-97; Houston v. Houston, 62-95; Watson v. Watson, 56-400.

Where all persons who have an interest in land whether vested, contingent or executory, are in esse, and are before court, court may make order of sale: Houston v. Houston, 62-95 (note that court can sell land in certain cases where some of parties not in essee under section 1590.)

After sale, it ought to appear to be for the benefit of infant to confirm same: Harrison v. Bradley, 40-136.

Where guardian obtains decree of court for sale of ward's land to make him liable for any loss in consequence of such sale it must appear that he wilfully practiced deception on court by false allegations and false evidence, or by industriously concealing material facts: Harrison v. Bradley, 40-136.

Where purchaser fails to pay note for purchase money of land under section, land may still be held liable for purchase money, although irregular and invalid deed made by commissioners contrary to directions of court: Singletary v. Whitaker, 62-77.

Bidder at judicial sale acquires no rights until proposition accepted by court: Dula v. Seagle, 98-458.

Decree directing commissioner to sell lands, receive purchase money and make title, without requiring report and confirmation of sale by court, is irregular: Ibid.

Superior courts have authority to direct sales of property of infants, both real and personal in proper cases: Tate v. Mott, 96-19.

Guardian appointed in another state has no authority to represent his wards in suits and procedings in this state, but when he brings suit for them as guardian he will be treated as if he were next friend: Ibid.

Section merely referred to in Ex parte Miller, 90-627; Morris v. Gentry, 89-252.

1799. Property and fund held on same trusts. Whenever, in consequence of any sale under the preceding section, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart

a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all such cases of sale, whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been, had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner, and restored to its character proper.

Code, s. 1603; R. C., c. 54, s. 33; 1827, c. 33, s. 2; 1868-9, c. 201, s 40. **Although duty of court of equity, where real estate of infant is sold under its decree, to direct proceeds to be held as real estate:** Harrison v. Bradley, 40-136—**yet husband of such infant, who has received proceeds from wife's guardian, has no right to complain that such course has not been adopted:** Ibid.

Where female ward's land sold for her benefit, and she marries and dies before coming of age: Held, that money retained character of realty: Wood v. Reeves, 58-271.

Section merely referred to in Tate v. Mott, 96-22; Ex parte Miller, 90-627; Douglas v. Caldwell, 59-21.

1800. Sold to pay ward's debts. When a guardian has notice of a debt or demand against the estate of his ward he may apply by petition, setting forth the facts to the clerk of the superior court wherein the guardianship was granted, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court.

Code, s. 1604; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, s. 41. **Before lands of infant can be sold for payment of debts, there must be a judgment of court that there is a debt against estate of ward, which renders sale necessary:** Pendleton v. Trueblood, 48-96; Coffield v. McLean, 49-15; Leary v. Fletcher, 23-259—**and must be alleged in petition that debt to be satisfied was one against ancestor and not simply debt contracted by ward or his guardian,** Coffield v. McLean, 49-15—**but amount of such debts, to whom due, or other particular description not essential to validity of order authorizing sale:** Pendleton v. Trueblood, 48-96. **Court must select part or parts of property which can be disposed of with least injury to ward:** Leary v. Fletcher, 23-259.

Where court, on petition of guardian of infant, made order that he, said guardian, sell land of said deceased, or so much thereof as will be sufficient to discharge debt, such order unauthorized and void and purchaser thereunder acquired no title: Ducket v. Skinner, 33-431; Leary v. Fletcher, 23-259.

Guardian of lunatic may, by order of county court, (now clerk superior

court) rightfully sell personal property of ward for payment of debts, provided no fraud in proceeding: Howard v. Thompson, 30-367.

Order "to sell land of ward named in petition, adjoining lands of A B, and others, containing about 110 acres," is sufficient specification of land under section, where it appears that ward had no other land: Pendleton v. Trueblood, 48-96.

Sale of land by guardian under order of clerk superior court, made without ascertaining that there were debts against ward which made sale necessary, and which did not designate with certainty land to be sold, is void: Spruill v. Davenport, 48-42.

1801. Proceeds assets for creditors; reached as against executors. The proceeds of sale under the preceding section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

Code, s. 1605; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, s. 42. **Money from sale of lands belonging to wards is subject to attachment in hands of clerk after confirmation of sale:** LeRoy v. Jacobosky, 136-443. **When guardian of infant under order of court sells ward's land for payment of debts of ancestor, he is bound to observe same priority in payment of debts as administrator or executor in applying personal assets:** Marchant v. Sanderlin, 25-501.

VII. Returns and Accounting.

1802. First, within three months. Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months.

Code, s. 1577; R. C., c. 54, s. 11; 1762, c. 69, s. 9; 1868-9, c. 201, s. 14. **Duty of guardian within three months after his appointment to exhibit account, upon oath, of estate of ward, to clerk superior court, and to make annual return:** Norman v. Walker, 101-26. **Section merely referred to** in Self v. Shugart, 135-186; Sanderson v. Sanderson, 79-371.

1803. Compelled by attachment. In cases of default to exhibit the return required by the preceding section, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall

issue an attachment against him, and commit him to the common jail of the county, till he files such return.

Code, s. 1578; R. C., c. 54, s. 12; 1762, c. 69, s. 15; 1868-9, c. 201, s. 15.

1804. To be made of new assets. Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in the preceding section.

Code, s. 1579; 1868-9, c. 201, s. 16.

1805. Annual accounts. Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctnes.

Code, s. 1617; R. C., c. 54, ss. 11, 12; 1762, c. 69, ss. 9, 15; 1871-2, c. 46. **Word "account" defined:** State v. Dunn, 134-668. **Vouchers should show character of, and necessity for, expenditures:** McLean v. Breese, 109-564. **Ex parte accounts filed are taken to be correct until shown erroneous:** Turner v. Turner, 104-572. **Guardian should set out how he invested ward's estate and nature of securities which he holds as guardian:** Collins v. Gooch, 97-186. **Ward entitled to demand of guardian annual statement of manner and nature of his investments of ward's estate:** Moore v. Askew, 85-199. **Annual accounts are presumptive evidence against sureties:** Loftin v. Cobb, 126-58. **Section merely referred to** in Sanderson v. Sanderson, 79-317.

1806. Compelled by attachment and removal. If any guardian omit to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the

superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office.

Code, s. 1618; C. C. P., s. 479. **Word "account" defined:** State v. Dunn, 134-668. **Clerk must require guardians to make quarterly and annual returns, and on failure to do so to attach and remove guardians from office:** Sanderson v. Sanderson, 79-371.

1807. Final account. A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior clerk.

Code, s. 1619; C. C. P., s. 481. **Section not intended to bestow upon guardian ward's money and property for six months after he becomes of age:** Self v. Shugart, 135-189—**nor to deprive him of right to bring action during that period, but simply means that guardian presumed to have settled with ward within six months, and after its lapse clerk can call on guardian to file final account, with receipts of ward, in full settlement, to complete record in his office, for section states that such return shall be audited and recorded,** Ibid—**but such final account is intended to be subsequent to settlement with ward, not preparatory thereto,** Ibid.

Ten years after ward coming of age bars action by him against his guardian for settlement: Dunn v. Beaman, 126-766.

Clerk of superior court has jurisdiction of proceeding against guardian for account and settlement: McNeill v. Hodges, 105-52; Donnelly v. Wilcox, 113-408; McLean v. Breece, 113-390; Clodfelter v. Post, 70-733; Rowland v. Thompson, 65-110—**and of course between guardian and ward's personal representative,** McLean v. Breece, 113-390—**therefore judgment rendered therein is estoppel to action in superior court between same parties and upon same question,** Donnelly v. Wilcox, 113-408.

Where guardian surrendered office to one whom he supposed to be legal successor and made settlement with him, although he was not regularly appointed guardian until nine months thereafter, management of fund during that period is treated as exercise of agency of former guardian: Jennings v. Copeland, 90-572.

Superior court has no original jurisdiction of action for an account by existing guardian of infant children against their foremr guardian: Sudderth v. McCombs, 65-186; Rowland v. Thompson, 65-110—**such action must be brought before clerk,** Ibid.

As to jurisdiction of deputy clerk in proceeding for account and settlement, see Rowland v. Thompson, 65-110.

For practice before clerk in taking accounts of guardians, see Rowland v. Thompson, 64-714.

Settlement between guardian and ward and receipt by latter of former's personal bond for balance, is sufficient defense to action on guardian bond: State v. Cordon, 30-179; Ledford v. Vandyke, 44-486.

For charging guardian with compound interest in making final settlement, see section 1953.

1808. Allowed reasonable disbursements and expenses. Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he hath really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward.

Code, s. 1612; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1799, c. 536, s. 2; 1868-9, c. 201, s. 49. **See section 1769. For annotations as to allowances made administrators, etc, see under section 149 (reasoning very similar).**

In passing the accounts of a guardian he can not, except under rare circumstances, be allowed disbursements beyond income of ward: Caffey v. McMichael, 64-507; Johnston v. Coleman, 56-290; Long v. Norcom, 37-354.

Court may allow money in excess of income expended in education without permission of clerk: Duffy v. Williams, 133-195.

Clerk may allow costs of suit brought by guardian for ward where guardian went on prosecution bond and had to pay costs individually: Green v. Burgess, 117-495—**may allow disbursements made to pay debts of lunatic (his ward) contracted before his lunacy, he being dead and his child being of age,** McLean v. Breece, 113-390—**may allow reasonable attorney's fees paid in good faith,** Burke v. Turner, 85-500; Whitford v. Foy, 65-265; Moore v. Shields, 69-50—**may allow expenditures demanded by such circumstances amounting to physical necessity as would compel court to authorize them without hesitation,** Long v. Norcom, 37-354.

No allowance to father, though he be guardian, for maintenance of child, if he is able to maintain it: Burke v. Turner, 85-500—**nor to father as guardian for education of child, he being able to educate it,** Walker v. Crowder, 37-478. **No allowance for counsel fees when counsel employed for personal advantage of guardian:** Johnston v. Haynes, 65-509—**or to keep ward out of just rights,** Moore v. Shields, 69-50—**or in defending action brought by ward for settlement,** Ibid.

Guardian who advances money for ward over and above income of estate in order to set him up in business or for other purposes, without applying to court for leave, not entitled to charge ward with it: Shaw v. Coble, 63-377.

Where guardian grossly abusing his trust, claims credit for certain amount for ward's expenditures, and files no exhibit of items of expenditures, and does not make it apppear that same proper, such credit will not be allowed him: Boyett v. Hurst, 54-166.

Guardians are chargeable with highest rate of interest where funds are used in his own business: Fisher v. Brown, 135-198.

1809. Commissions. The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors.

Code, s. 1613; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1868-9, c. 201, s. 50. For annotations as to commissions allowed administrators, etc., see under section 149 (may be of service in construing this section). Where guardian uses funds of ward, but makes regular annual settlement, charging himself with interest thereon, he is entitled to his commissions: Fisher v. Brown, 135-198; Carr v. Askew, 94-194.

Where sum received was $10,000 and there was no trouble or litigation connected with estate, commission of 2 1-2 per cent on receipts and 5 per cent on disbursements was allowed: Carr v. Askew, 94-194.

Commissions allowed by referee will not be reduced unless they are manifestly excessive: Wilson v. Lineberger, 88-416.

Ex parte order of court allowing commissions to guardian not conclusive in litigation between ward and guardian: Walton v. Erwin, 36-136.

Possibly there may be cases in which, office being troublesome, and guardian faithful, and dying or giving up office upon some necessity, court may give to such guardian full commission and also reasonable compensation to successor: Ibid.

Two and one-half per cent is reasonable commission where guardian had received nearly whole of ward's estate in notes, had collected very little on notes, and paid same over to succeeding guardian: Ibid.

Guardian not entitled to commissions on money collected and used by him in own business: Burke v. Turner, 85-500; but see Fisher v. Brown, 135-198; Carr v. Askew, 94-194—nor on debts of his ward paid to firm of which guardian is a member, Burke v. Turner, 85-500.

Compensation of guardians should depend upon time employed, labor performed, services rendered and responsibility encountered in performance of duties: Whitford v. Foy, 65-265; Hodge v. Hawkins, 21-564; Shutt v. Carloss, 36-232.

Guardian entitled to commissions although he omitted to keep and render regular accounts, where no imputation cast upon his integrity by reason of neglect: McNeill v. Hodges, 83-504. Guardian not entitled to commissions upon any disbursements made after ward arrives at full age: Ibid. Reasonable commissions will always be allowed to guardian unless in case of fraud or very culpable negligence: Whitford v. Foy, 65-265—but rate will depend upon amount of estate, trouble of managing same, and whether fees paid to counsel for assisting in management, last of which will lessen rate, Ibid. Commissions should be allowed guardian on amount of notes and other securities for debt delivered to ward upon cessation of guardianship: Whitford v. Foy, 65-265. Not unreasonable to allow 5 per cent. commissions to guardian on receipts and disbursements, which embrace large number of receipts and vouchers extending through period of fourteen years: Covington v. Leak, 65-594. Guardian entitled to commissions upon payments made for goods bought of firm of which

he is a member: Williamson v. Williams, 59-62—**but not on charges for board while ward lived in his family,** Ibid.

Where guardian keeps no account and makes no report of trust, as general rule he will not be allowed commissions: Topping v. Windley, 99-4.

Compensation can not be allowed independent of commissions to guardian for time and trouble: Shutt v. Carloss, 36-232.

VIII. Estate Protected when no Guardian.

1810. Duty of grand jury relating to orphans; clerk to furnish it list of guardians. The grand jury of every county is charged with, and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him.

Code, s. 1609; R. C., c. 54, s. 18; 1762, c. 69, s. 17; 1868-9, c. 201, s. 46.

1811. Solicitor to apply for receiver, when. Whenever an orphan, having any estate, is presented by a grand jury, for whom no suitable person will become guardian, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed.

Code, s. 1610; R. C., c. 54, s. 19; 1846, c. 43; 1868-9, c. 201, s. 47.

Section merely referred to in Rodgers v. Odom, 86-432.

1812. Action brought by solicitor. Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward.

Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21.

Action under section is properly action brought by solicitor for benefit of ward when guardian has been removed, and infant is not necessary party, perhaps not proper party, to it: Temple v. Williams, 91-89; Becton v. Becton, 56-419—**therefore infant not bound as party to action by record and it is not conclusive upon him when afterwards, suing by next friend, or suing after he comes of age, to call former guardian to account:** Temple v. Williams, 91-89; Becton v. Becton, 56-423.

1813. Receiver appointed. The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship.

Code, s. 1585; R. C., c.54, s. 15; 1844, c. 41, s. 2; 1868-9, c. 201, s. 22.

Appointment of receiver for insane person's estate should be made only on motion of solicitor after wife and one or more adult children, if there are such, or some near relative or friend, have been brought before judge at chambers or in term: In re Hybart, 119-359.

Where in order of court appointing A. B. clerk superior court, receiver of infant's estate, word "as" was omitted before words "clerk superior court" the intention of court to appoint clerk receiver in his official capacity was sufficiently indicated: Waters v. Melson, 112-89.

Under section, court has authority to appoint clerk of superior court receiver of infant's estate: Ibid—and sureties on official bond liable for any breach of his duties as such receiver, Ibid; Boothe v. Upchurch, 110-62; Syme v. Bunting, 91-48; Rogers v. Odom, 86-432.

Burden upon receiver and his sureties to show that he used due diligence in investing money in his hands: Waters v. Melson, 112-89. As a general rule receiver is responsible for his own neglect only, and is protected when he acts in entire good faith: Collins v. Gooch, 97-186—but when receiver appointed to take charge of infant's estate who has no guardian and is directed to lend out money and pay income over to ward, he will be held to same accountability as guardian, Ibid.

Receiver may keep money in bank as safe place of deposit, or may use bank as means of transmitting money to distant places, and if he uses reasonable diligence, will not be held liable if bank fails: Ibid—but this does not authorize loan to bank by such trustee without taking security, Ibid.

Where receiver was appointed to take charge of infant's estate and invest same, and report to court annually, and deposited portion of money in bank in another state, which afterwards failed, he is liable for loss if he failed to report to court manner of the investment of estate, though he acted in the best faith: Ibid. Receiver appointed to take charge of ward's estate when guardian removed is not invested with powers of guardian, but acts under control of court until another guardian appointed: Temple v. Williams, 91-82—and a settlement with such receiver, even

though under direction of court, is not conclusive against ward, but only raises presumption that account and settlement correct: Ibid.

For procedure where receiver alleged to have committed breach of trust, see Atkinson v. Smith, 89-72.

Section merely referred to in Timberlake v. Green, 84-660; Harris v. Harrison, 75-433.

1814. Property obtained from receiver. When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the ward, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver.

Code, s. 1587; R. C., c. 54, s. 17; 1844, c. 41, s. 4; 1868-9, c. 201, s. 24. Settlement with receiver, even if had under direction of court, not conclusive against ward: Temple v. Williams, 91-82—but only raises presumption that account and settlement correct, Ibid.

Section merely referred to in Timberlake v. Green, 84-660.

1815. Solicitor shall prosecute action. The solicitor shall prosecute the action and take all necessary orders therein, and for his services, shall be allowed such reasonable compensation as may be just, not to exceed ten dollars; in passing on the returns of receivers, where the estate of the infant does not exceed five hundred dollars, not to exceed five dollars; and where the estate exceeds five hundred dollars, not to exceed ten dollars. The amount in each case to be fixed by the judge.

Code, s. 1586; 1895, c. 14, R. C., 54, s. 16; 1844, c. 41, s 3; 1868-9, c. 201, s. 23. Section merely referred to in Timberlake v. Green, 84-660.

IX. Foreign Guardians.

1816. May have ward's estate removed. Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, may apply to have such estate removed to the residence of the ward, idiot, lunatic or insane person by petition filed

before the clerk of the superior court of the county in which the property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings.

Code, ss. 1598, 1601; R. C., c. 54, s. 29; 1820, c. 1044; 1842, c. 38; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168. **Where it appears that property of ward residing in another state is in this state, consisting of good bonds at interest in hands of guardian here, and ward nearly of age, no special necessity appearing for such transfer, court will refuse order to transfer property:** Douglas v. Caldwell, 59-20.

For cases prior to enactment of section and rendered nugatory by same, see McNeely v. Jamison, 55-186; Pugh v. Mordecai, 41-61. **Section referred to** in Tate v. Mott, 96-28.

1817. What petition must show. The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated.

Code, s. 1599; R. C., c. 54, s. 30; 1820, c. 1044, s. 2; 1842, c. 38; 1868-9, c. 201, s. 36. **Section merely referred to** in Tate v. Mott, 96-28.

1818. Who may be made defendants. Any person may be made a party defendant to the proceeding who is specified in section four hundred and ten.

Code, s. 1600; R. C., c. 54, s. 30; 1868-9, c. 201, s. 37.

For rate of interest guardian notes to bear, see section 1953.
For guardians of idiots, inebriates and lunatics, see sections 1890-1895.
For cross-index of appointments of guardian, see section 915.
For payment of owelty of partion due ward, see section 2497.

CHAPTER 39.

HABEAS CORPUS.

I. Generally.

1819. Cause of restraint of liberty enquired into. Every person restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed.

Const., Art. 1., s. 18.

1820. Habeas corpus shall not be suspended. The privileges of the writ of habeas corpus shall not be suspended.

See Art. 1., sec. 21, Constitution of North Carolina, page 8 of Appendix hereof.

II. The Application.

1821. Who may prosecute writ. Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.

Code, s. 1623; 1868-9, c. 116, s. 1. **Writ of habeas corpus can never be made to perform office of writ of error or appeal:** Ex parte McCown, 139-95—**though in direct contempt, proceedings are reviewable by habeas corpus,** Ibid.

Where defendant, charged with burglary with intent to commit murder, pleaded guilty of larceny and was sentenced to imprisonment in penitentiary, he is entitled to writ of habeas corpus that he may be taken from penitentiary and held to answer charge in court below: State v. Queen, 91-659.

Person illegally detained in hospital for the dangerous insane can not be released on habeas corpus if he is insane at time of return of writ: In re Boyett, 136-415.

The filing of a true bill for murder does not deprive court of power to issue habeas corpus and to admit defendant to bail: State v. Herndon, 107-934.

1822. When denied. Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has wilfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application.

Code, s. 1624; 1868-9, c. 116, s. 2. **See section 1848. Writ of habeas corpus will not be issued when it appears on face of petition that petitioner is detained by virtue of final judgment of court of competent jurisdiction:** In re Brittain, 93-587—**as power is denied to courts in such cases,** Ledford v. Emerson, 143-356; In re Schenck, 74-607—**and application must be refused even where it appears that applicant imprisoned in state's prison and sentence of court erroneous,** In re Schenck, 74-607; but see State v. Queen, 91-659.

1823. By whom made. Application for the writ may be made either by the party for whose relief it is intended, or by any person in his behalf.

Code, s. 1625; 1868-9, c. 116, s. 3.

1824. How and to whom. Application for the writ shall be made in writing, signed by the applicant—

1. To any one of the justices of the supreme court.

2. To any one of the superior court judges, either at term time or in vacation.

Code, s. 1626; 1868-9, c. 116, s. 4. **Presenting petition to judge for writ of habeas corpus gives him jurisdiction of subject:** State v. Edney, 60-463. **Section merely referred to** in State v. Herndon, 107-938; In re Schenck, 74-608.

1825. What it must state. The application must state in substance, as follows:

1. That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint be alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has no been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

Code, s. 1627; 1868-9, c. 116, s. 5. **Parties may waive all errors and dispense with all forms in proceedings on petition for habeas corpus:** State v. Edney, 60-463. **As to what may constitute waiver of errors in proceedings,** see Ibid.

Petition must allege that the imprisonment has not been already adjudged upon prior writ of habeas corpus: In re Brittain, 93-587.

Where defendant was not originally liable for arrest and had been discharged upon habeas corpus, he can not be held upon a surrender by his sureties: Ledford v. Emerson, 143-527.

1826. When issued without. Whenever the supreme or superior court, or any judge of either, shall have evidence from any judicial proceeding before such court or judge, that any person within this state is illegally imprisoned or restrained of his liberty, it shall be the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ.

Code, s. 1632; 1868-9, c. 116 s. 10. **Section merely referred to** in State v. Jones, 113-672; State v. Applewhite, 75-232; In re Schenck, 74-610.

III. The Writ.

1827. When granted. Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ.

Code, s. 1628; 1868-9, c. 116, s. 6. **Duty of judge to whom application for writ of habeas corpus made, to issue same if petition made in conformity to statute:** In re Patterson, 99-407—**and if it has been obtained upon false statements, or by suppression of facts which would prevent its issue, will be dismissed upon hearing,** Ibid.

As to whether appeal can be taken from judge's decision or remedy is by certiorari, see Ledford v. Emerson, 143-535; State v. Herndon, 107-934; Walton v. Gatlin, 60-318.

If, upon certiorari, supreme court reverses and sets aside judgment of court below and proceedings are remanded, no procedendo issues to any particular judge, but petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ: State v. Herndon, 107-934.

Presumption of innocence applies only on a trial, and does not avail to furnish presumption that detention of party on regular process, when committing officer has jurisdiction, is alleged: State v. Jones, 113-669.

Where writ is taken out after prisoner committed by magistrate, the

judge, if no evidence at all is shown, may hear case de novo, and may discharge prisoner: State v. Jones, 113-672.

1828. Penalty for refusal to grant. If any judge authorized by this chapter to grant writs of habeas corpus shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars.

Code, s. 1631; 1868-9, c. 116, s. 9.

1829. When sufficient. No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned as restrained be designated either by his name of office, if he have any, or by his own name, or if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended.

Code, ss. 1629, 1630; 1868-9, c. 116, ss. 7, 8.

IV. The Return.

1830. When returnable. Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein.

Code, s. 1656; 1868-9, c. 116, s. 31.

1831. What to contain; when verified. The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person shall be a sworn public officer and shall make his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

1. Whether he have or have not the party in his custody or under his power or restraint.

2. If he have the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

3. If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the

return of the writ to the court or judge before whom the same is returnable.

4. If the person or officer upon whom such writ is served shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

Code, s. 1633; 1868-9, c. 116, s. 11.

1832. Body produced, when. If the writ require it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided.

Code, s. 1636; 1868-9, c. 116, s. 14.

1833. Served, how and by whom. The writ of habeas corpus may be served by any qualified elector of this state, thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person can not be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer, or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed, or of the place where the party is confined for whose relief it is sued out.

Code, s. 1657; 1868-9, c. 116, s. 32. See Ex parte Kerr, 64-816.

V. Obedience Compelled.

1834. Attachment for failure to obey. If the person or officer on whom any writ of habeas corpus shall have been duly served shall refuse or neglect to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse be shown for such refusal or neglect, it shall be the duty of the court or judge before whom the writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge, and on being so brought such person or officer

shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ shall have been issued.

Code, s. 1637; 1868-9, c. 116, s. 15. **Where officer of troops, acting under and by authority of orders from governor, the commander in chief, refuses to obey the writ of habeas corpus there is "sufficient excuse" under section:** Ex parte Moore, 64-809. **As bearing upon section,** see Ex parte Moore, 65-349.

1835. Penalty, judge refusing attachment. If any judge shall wilfully refuse to grant the writ of attachment, as provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Code, s. 1638; 1870-1, c. 221, s. 2.

1836. Sheriff attached, writ to coroner; penalty. If a sheriff shall have neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own.

Code, s. 1639; 1868-9, c. 116, s. 16.

1837. Precept to bring up party detained. The court or judge, by whom any such attachment may be issued, may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith, before such court or judge, the party, wherever to be found for whose benefit the writ of habeas corpus has been granted.

Code, s. 1640; 1868-9, c. 116, s. 17. **See** Ex parte Moore, 64-810.

1838. Penalty, judge refusing to grant precept. If any judge shall refuse to grant the precept provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Code, s. 1641; 1870-1, c. 221, s. 3.

1839. Penalty, judge conniving at insufficient return. If any judge shall grant the attachment, or the precept, and shall give the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return

or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Code, s. 1642; 1870-1, c. 221, s. 4.

1840. Power of county to aid service. In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases.

Code, s. 1643; 1868-9, c. 116, s. 18. **"Power of county" means men of county in which writ is to be executed:** Ex parte Moore, 64-811. **As to posse comitatus generally,** see Worth v. Comrs., 118-122.

1841. Obedience to order of discharge, compelled. Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained.

Code, s. 1649; 1868-9, c. 116, s. 24.

1842. Not liable civilly for obedience. No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus.

Code, s. 1650; 1868-9, c. 116, s. 25.

VI. Proceedings and Judgment.

1843. Notice to interested parties. When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it shall appear that the person so interested, or his attorney, if he have one, shall have had reasonable notice of the time and place at which such writ is returnable.

Code, s. 1634; 1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1.

1844. Notice to solicitor. When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which

the writ shall have been returned, or shall be made returnable, be given to the solicitor of the county in which the person prosecuting the writ is detained.

Code, s. 1635; 1868-9, c. 116, s. 13. **Where it appears from return on writ of habeas corpus that petitioner detained on criminal charge, court may continue hearing for reasonable time to give solicitor opportunity to examine into case:** State v. Jones, 113-669.

1845. Witnesses subpoenaed. Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpoena, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases.

Code, s. 1659; 1868-9, c. 116, s. 34.

1846. Facts examined into; proofs heard summarily. The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice shall appertain in delivering, bailing or remanding such party.

Code, s. 1644; 1868-9, c. 116, s. 19. **Petition will be dismissed where writ was obtained upon false statements, or by suppression of facts which would prevent its issue:** In re Patterson, 99-407.

As to how decision of judge can be reviewed, see Ledford v. Emerson, 143-535; State v. Herndon, 107-934.

If, upon certiorari, supreme court reserves and sets aside judgment of court below and proceedings are remanded, no procedendo issues to any particular judge, but petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ: State v. Herndon, 107-934.

Presumption of innocence applies only on a trial, and does not avail to furnish presumption that detention of party on regular process, when committing officer has jurisdiction, is illegal: State v. Jones, 113-669—**therefore burden rests on petitioner to show commitment legal,** Ibid.

1847. Party discharged, when. If no legal cause be shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appear on the return to the writ that the party is in custody by virtue of civil process from

any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

3. Where the process is defective in some matter of substance required by law, rendering such process void.

4. Where the process, though in proper form, has been issued in a case not allowed by law.

5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

Code, s. 1645; 1868-9, c. 116, s. 20: **Where it appears from sheriff's return to habeas corpus that petitioner is in custody on mittimus regularly issued for failure to give bond to answer criminal charge of which court had jurisdiction, detention clearly legal:** State v. Jones, 113-669—**and burden on petitioners to show wherein it was illegal, not upon state to show that they were lawfully in custody,** Ibid.

Section merely referred to in Ashby v. Page, 108-8.

1848. Party remanded, when. It shall be the duty of the court or judge forthwith to remand the party, if it appear that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt specially and plainly charged in the commitment by some court, officer or body, having authority to commit for the contempt so charged.

4. That the time during which such party may be legally detained has not expired.

Code, s. 1646; 1868-9, c. 116, s. 21. **See section 1822. Provision of subsection 3 as peremptory as that of subsection 2:** State v. Queen, 91-662. **Section merely referred to** in Ashby v. Page, 108-8.

1849. Party bailed or remanded, when. If it appear that the party has been legally committed for any criminal offense, or if it appear by the testimony offered with the return of the whit, or upon the hearing thereof, that the party is guilty of such an offense,

although the commitment be irregular, the court or judge shall proceed to let such party to bail, if the case be bailable and good bail be offered if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, be legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto.

Code, s. 1647; 1868-9, c. 116, s. 22. **Judge who hears writ judges, in sound discretion, what amount of testimony is proper to be heard, and whether prisoner should be admitted to bail:** State v. Herndon, 107-934. **See annotations** under sections 1846 and 1847.

1850. Party in execution not to be discharged on habeas corpus. When a writ of habeas corpus cum causa shall issue, and the sheriff or other officer to whom it is directed shall return upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail, but shall be presently remanded, where he shall remain until discharged in due course of law.

Code, s. 937; R. C., c. 31, s. 111; 2 Hen. V., c. 2. **See** Ledford v. Emerson, 143-527; State v. Herndon, 107-937.

1851. Determined in absence of parties, when. Whenever, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person can not, without danger, be brought before the court or judge, where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge be satisfied of the truth of the allegation and the return be otherwise sufficient the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced.

Code, s. 1648; 1868-9, c. 116, s. 23.

1852. Penalty for committing for same cause. No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby.

Code, s. 1651; 1868-9, c. 116, s. 26. **See also, sections 3581, 3582, 3583. Where defendant was not originally liable to arrest and had been discharged upon habeas corpus, he can not be held upon surrender by his sureties:** Ledford v. Emerson, 143-527. **Party set at large by writ of habeas corpus upon ground that judgment of imprisonment void for want of jurisdiction in court, may be again arrested for same cause upon legal process of court having jurisdiction:** Barbee v. Weatherspoon, 88-19.

VII. Custody of Children.

1853. Awarded by judge; modification of order. When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same.

153-312

Code, s. 1661; 1858-9, c. 53; 1868-9, c. 116, s. 36. **For consequence of divorce on right to custody of children, see section 1570. For effect of abandonment, see section 180.**

Except as between parents, under this section right of custody of child can not be determined by writ of habeas corpus: In re Parker, 144-170.

Where it appears that both father and mother are of good character and able to support and educate child, but that mother had married again and that new husband was a man of dissipated habits, proper to award custody of child to father: In re D'Anna, 117-462.

Where under invalid divorce in favor of wife in another state in which custody of child was awarded to wife, it is sought by habeas corpus to obtain custody of child domiciled with father in this state, proceedings will be regarded as under section: Harris v. Harris, 115-587—**and custody awarded within judge's discretion,** Ibid.

Court will not award custody of child to nonresident mother if it does not appear that child desires to go to her: Ibid.—**or that husband not proper party to have it,** Ibid—**or that child will be benefited by change,** Ibid.

Section confers upon court very large powers to "promote interest and welfare of children:" Jones v. Cotten, 108-458.

Section is express that custody shall be given either to father or mother: Thompson v. Thompson, 72-33.

Where no abandonment of child proven, court must still find facts entitling plaintiff to child's restoration: Newsome v. Bunch, 142-19. **Section referred to** in Latham v. Ellis, 116-33; Musgrove v. Kornegay, 52-72.

1854. Appeal to supreme court. In all cases of habeas corpus, where a contest shall arise in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment.

153-181

Code, s. 1662; 1858-9, c. 53, s. 2. **In all cases of habeas corpus before any judge or court where contest is in respect to the custody of minor children, either party may appeal:** Musgrove v. Kornegay, 52-71: State v. Miller, 97-454. **Supreme court may review upon appeal facts found by**

judge below in awarding custody of infant child: Harris v. Harris, 115-587.

Section referred to in Jones v. Cotten, 108-457; Brown v. Rainor, 108-204.

VIII. Ad Testificandum.

1855. Courts of record may issue. Every court of record shall have power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the state, for any cause, except such prisoner be under sentence for a capital felony, to be examined as a witness in such suit or proceeding, in behalf of the party making the application.

Code, s. 1663; 1868-9, c. 116, s. 37. **Section applies only to parties strictly so called and not to state:** Ex parte Harris, 73-65; State v. Adair, 68-68—**therefore it is error in court below to refuse petition of solicitor for habeas corpus ad testificandum to bring prisoner under death sentence that he might testify in trial then pending,** Ex parte Harris, 73-65; State v. Adair, 68-68. **Parties litigant have no right to writ of habeas corpus ad testificandum under section for witness under sentence for (capital) felony:** State v. Adair, 68-70.

1856. Issued by justices and clerks, when. Such writ of habeas corpus may be issued by any justice of the peace or clerk of the superior court upon application as provided in the preceding section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk. And in cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person be confined in a county in which such justice or clerk does not reside, application for habeas corpus to testify may be made to any judge of the supreme or superior court.

Code, s. 1664; 1868-9, c. 116, s. 38.

1857. Application, what to contain. The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes.

Code, s. 1665; 1868-9, c. 116, s. 39.

1858. How and by whom served. The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus cum causa.

Code, s. 1666; 1868-9, c. 116, s. 40.

1859. Applicant to pay expenses and give bond. The service of the writ shall not be complete, however, unless the applicant for the fees and expenses allowed by law for bringing such prisoner, may be, if such person be a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he shall also give bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner.

Code, s. 1667; 1868-9, c. 116, s. 41.

1860. Duty of officer; penalty. It shall be the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same shall have been issued the sum of five hundred dollars.

Code, s. 1668; 1868-9, c. 116, s. 42.

1861. Prisoner remanded. After having testified the prisoner shall be remanded to the prison from which he was taken.

Code, s. 1669; 1868-9, c. 116, s. 43.

CHAPTER 40.

HUNTING.

I. Audubon Society.

1862. Incorporated. J. Y. Joyner, T. Gilbert Pearson, R. H. Lewis, A. H. Boyden, H. H. Brimley, P. D. Gold, Jr., J. F. Jordan and R. N. Wilson are hereby created a body politic and corporate under the name and style of the Audubon Society of North Carolina, and by that name and style they and their associates and successors shall have perpetual succession, with power to take and hold either by gift, grant, purchase, devise, bequest or otherwise, any real or personal estate, not exceeding fifty thousand dollars in value,

for the general use and advancement of the purposes of the said corporation, or for any special purpose, consistent with the charter; and such property shall be exempt from taxation; to make rules and by-laws; to have and to use a common seal, and to change the same at pleasure; and to do and perform all such acts and things as are or may become necessary for the advancement and furtherance of the corporation.

1903 (Pr.), c. 337.

1863. Officers of. The officers of said corporation shall be a president, vice-president, secretary and treasurer, and such other officers as may be fixed by the by-laws.

1903 (Pr.), c. 337, s. 2.

1864. Objects for which created. The objects for which the corporation is formed are to promote among the citizens of North Carolina a better appreciation of the value of song and insectivorous birds to man and the state; to encourage parents and teachers to give instruction to children on the subject; to stimulate public sentiment against the destruction of wild birds and their eggs; to secure the enactment and enforcement of proper and necessary laws for the protection and preservation of birds and game of the state; to provide for the naming of special officers and investing them with necessary power, who shall work under the direction and control of the Audubon Society of North Carolina, looking to the rigid enforcement of the game and bird protective laws of the state; to distribute literature bearing on these topics among the members of the society and other persons, and to raise and provide funds for defraying the necessary expenses of the society in the accomplishment of the purposes herein named.

1903 (Pr.), c. 337, s. 3.

1865. Hunters' license; form of, prescribed by. The Audubon Society of North Carolina shall prescribe the form of license for nonresident hunters, and shall furnish to the clerks of the superior courts all licenses and other blanks required under the game laws, and shall also furnish to the clerks of the superior courts a bound book, for the purpose of keeping a record of all hunters' licenses that may be issued.

1093 (Pr.) c. 337, s. 10. **As to power of legislature to restrict privilege of hunting,** see State v. Gallop, 126-979.

1866. Grants certificates to take birds or eggs. The Audubon Society of North Carolina may issue a certificate to any properly accredited persons of the age of twelve years and upward, permitting the holder thereof to collect birds, their nests or eggs for strictly

scientific purposes; said certificate shall be in force only during the calendar year in which issued, and shall not be transferable. In order to obtain such certificates the applicant for same must present to the persons having authority to grant such certificates written testimonials from two well-known scientific men, certifying to the good character and fitness of said applicant to be intrusted with such privilege, and must pay the said society one dollar to defray the necessary expenses attending the granting of such certificate. On satisfactory proof that the holder of such certificate has killed any bird or taken the nests or eggs of any birds other than for scientific purposes, his certificate shall become void, and he shall be further subject for each offense to the penalty provided for such violation of the law.

1903, (Pr.), c. 337, s. 5.

1867. Governor appoints treasurer of society and game wardens. The governor, upon the recommendation of the Audubon Society of North Carolina, shall from time to time appoint bird and game wardens, and the treasurer of the society, whose terms of office, unless otherwise provided for, shall be during good behavior or until their successors are appointed. The governor shall issue to the treasurer of the Audubon Society, and to each person appointed as warden, a commission, and shall transmit such commission to the clerk's office of the superior court for the county from which the prospective treasurer or bird and game warden is appointed; and no tax or fee shall be charged or collected for said commission. Any of the said wardens may be removed by the governor upon proof satisfactory to him that they are not fit persons for said position. The compensation of said wardens shall be fixed and paid by the said society.

1903 (Pr.), c. 337, s. 12.

II. Game Wardens.

1868. Oath of; bond; badge; act as constables. Every person appointed as warden shall, before entering upon the duties of his office, take and subscribe before the clerks of the superior courts of the county in which he resides an oath to perform the duties of said office, together with the other oaths prescribed for police officers, and execute a bond in the sum of one hundred dollars for the faithful discharge of his duties, and the said oath and bond shall be recorded by the clerk in his office, and the wardens so qualified shall possess and exercise all the powers and authority held and exercised by the constable at common law and under statutes of this state. The clerk shall not charge more than fifty cents for taking and

recording said oath. The bird and game wardens, when acting in their official capacity, shall wear in plain view a metallic shield with the words " Bird and Game Warden " inscribed thereon.

1903 (Pr.), c. 337, s. 15.

1869. Powers. Duly appointed and qualified game and bird wardens shall, upon making an affidavit before a justice of the peace or any court of the state that there exists reasonable grounds to believe that any game or birds are in the possession of any common carrier in violation of the law, be entitled to a search warrant and to open, enter and examine all cars, warehouses and receptacles of common carriers in this state, where they have reason to believe any game or birds that have been taken or are held in violation of the law are to be found, and to seize such game or birds. It shall be the duty of said game and bird wardens to prosecute all persons or corporations having in their possession any bird or game contrary to the bird and game laws of this state. It shall be their duty to see that the bird and game laws are enforced and to obtain information as to all violation of said bird and game laws: Provided, that in Currituck county it shall be the duty of said wardens to also see to the enforcement of all laws relating to fishing in said county.

1903 (Pr.), c. 337, s. 13.

1870 Birds seized by, sold. Any bird or animal caught, taken, killed, shipped, or received for shipment, and in possession or under control of any person or corporation contrary to the provisions of law, which may come into the possession of the bird and game warden, shall be sold at auction, and the bird and game warden disposing of the same shall issue a certificate to the purchaser certifying that the said birds or animals were legally obtained or possessed, and any one so acquiring said birds or animals can have the right to use them as if the same had been sold, killed or possessed in accordance with the law. The money received from the sale of such confiscated birds or game shall be forwarded by the game warden to the treasurer of the state and be placed to the account of the Bird and Game Fund.

1903 (Pr), c. 337, s. 14.

III. Bird and Game Fund.

1871. How paid out. The funds received by the treasurer of the state from the license tax on nonresident hunters shall constitute a fund known as the Bird and Game Fund, which fund shall be paid out by the treasurer of the state on the order of the treasurer of the Audubon Society of North Carolina, who shall make an

annual report to the governor of the receipts and expenditures of the society for the year.

1903 (Pr.), c. 337, s. 10.

IV. Nonresident Hunters.

1872. Procure license, effect of. Any nonresident who desires to hunt birds or animals in any part of the state shall make application to the clerk of the superior court of any county, who shall issue such license upon the payment of a tax of ten dollars and the clerk's fee. The license shall expire on the termination of the hunting season as fixed for the several counties. The license shall be of such form as the Audubon Society of North Carolina may prescribe, and shall entitle the owner to hunt anywhere in the state except upon private property, which he shall not do without the written consent of the owner. The license may be revoked by the Audubon Society upon proof that the holder has hunted in violation of the law. No license shall be granted to any person whose license has been revoked, for a period of one year thereafter. Such license shall not authorize the holder to hunt in any county at any time or in any manner other than is provided by law for hunting in such county.

1903 (Pr.), c. 337, ss. 10, 17. **The ownership of game is in the people of the State and the right to hunt and kill game may be granted, withheld, or restricted by the legislature:** State v. Gallop, 126-979—**and nonresident hunters may be excluded altogether,** Ibid. **No one has property in game until it is reduced to possession:** Ibid; State v. House, 65-315.

1873. May take quail out of state. Any person holding a hunter's license to hunt in North Carolina shall be permitted to take out of the state fifty partridges or quail, fifty beach birds or snipe, twelve grouse, or two wild turkeys in a season.

1903 (Pr.), c. 337, s. 11. **The legislature can forbid anyone having game, dead or alive, in possession:** State v. Gallop, 126-983.

1874. License, issued by clerk. The clerk of the superior court shall issue hunters' licenses as provided for by law and shall keep in a bound book a record of each license issued, and shall make a report on the first day of December of each year and at the close of the hunting season for their respective counties to the Audubon Society, on forms provided by said society, and shall at the same time transmit all funds received for such license to the treasurer of the state.

1903 (Pr.), c. 337, s. 10. **For form of license, see section 1865.**

V. Game Birds.

1875. What are. Under the laws of this state, the following only shall be considered game birds: Loons, and grebes, swans, geese,

brant; river, fish and sea ducks, rails, coots, marsh-hens and gallinules, plovers, shore and surf birds, snipe, woodcock, sandpipers, yellow legs, chewink or tohee and curlews, and the wild turkey, grouse, partridge, pheasant, quail, dove, robin and meadow lark.

1903 (Pr.), c. 337, s. 4. **Game is not the subject of private ownership except when some express statute confers it:** State v. Gallop, 126-983.

1876. Birds kept as pets, or for breeding. It shall be lawful to keep any wild bird in a cage as a domestic pet, or for the purposes of breeding, raising and domesticating.

1903 (Pr.), c. 337, ss. 6, 7.

1877. License tax on clubhouses, Dare county. Every clubhouse, shooting lodge, or other place of resort for sportsmen, situated in that part of Dare county lying south of a line passing east and west, through the extreme northern end of Roanoke island, shall pay a license tax of twenty-five dollars a year, which said license shall entitle the members and guests of each club, lodge or resort to shoot wild fowl afloat within four miles of said clubhouse or lodge without further taxation.

1899, c. 133, s. 2. **See** State v. Gallop, 126-983.

1878. Nonresidents shooting from blinds or batteries in Dare county, south of Roanoke island. Nonresidents not exceeding two at the same time may shoot wild fowl in the waters of that part of Dare county lying south of a line passing east and west through the extreme northern end of Roanoke island, from a blind, battery, box or float, where such blind, battery, box, or float is the property of a resident of Dare county and a license tax of five dollars per annum has been paid on that blind, battery, box or float.

1899, c. 133, s. 3; 1901, c. 157.

1879. License tax on nonresidents in Dare county. Every nonresident of this state shall, before shooting any wild fowl in the waters of that part of Dare county lying north of a line passing east and west through the northern end of Roanoke island, from any blind, battery, box, float or raft pay a license tax of twenty-five dollars a year.

1897, c. 415; 1899, c. 133. **See** State v. Gallop, 126-983.

1880. License taxes for hunting wild fowl in Dare county. All license taxes imposed for hunting wild fowl in Dare county, or for lodges, clubhouses or resorts for sportsmen, or upon boxes, batteries, or floats shall be paid to the clerk of the superior court, who shall issue the license. All such license taxes shall be by the clerk of the superior court paid over to the treasurer of the county for the benefit of the school fund.

1897, c. 415; 1899, c. 133.

VI. Close Season.

1881. Deer. The close season of each year during which deer shall not be hunted with gun, chased with dogs, killed, trapped or destroyed shall, as to the several counties or parts of counties, be as follows:

Ashe, Chatham, Davidson, Guilford, Forsyth, Montgomery, Moore, Randolph, Rockingham, Scotland, Stokes, Surry, Watauga, Wilkes and Yadkin, on or before the first day of November, one thousand nine hundred and ten; thereafter from the fifteenth day of November to the first day of November: Provided, that this shall not prevent the owner and keeper of an inclosed game preserve who raises deer for use and sale from killing, selling and using those raised or kept in said inclosure.

Beaufort, between the first day of February and the fifteenth day of August.

Bertie, between the first day of February and the first day of October.

Bladen, in Carver's and White Creek townships, from the thirtieth day of November to the first day of November.

Brunswick, from the first day of February to the first day of September.

Burke, between the first day of January and the first day of October.

Carteret and Jones, between the first day of February and the first day of August.

Caswell, until the twenty-third day of February, one thousand nine hundred and eleven, and thereafter between the first day of February and the first day of October.

Cherokee, until February twenty-eighth, one thousand nine hundred and seventeen; then from first day of January to first day of October. No hunting or killing except with gun.

Columbus, between the first day of January and the first day of October, or at any time in any lake or stream or pond that is fifty yards or more in width, measured from water's edge to water's edge.

Craven, from the first day of January to the first day of September.

Currituck, on the north side of Poplar Branch township, between the first day of March and the twentieth day of September.

Dare, between the first day of March and the fifteenth day of October.

Hertford, from the first day of February to the first day of October.

McDowell, until the first day of February, one thousand nine hundred and seventeen, and thereafter between the first day of February and the first day of October.

Mitchell, between the first day of November and the fifteenth day of October. No deer shall be killed during the hunting season except and unless the same shall have antlers or horns.

Nash, from the first day of November to the first day of September.

New Hanover, between the first day of January and the first day of September.

Northampton, between the first day of February and the fifteenth day of August.

Onslow, in waters of New river or within one hundred yards thereof, all the year.

Person, Granville and Vance, between the fifteenth day of January and the first day of September, except that any person may kill them on his own premises at any season of the year when found destroying his crops.

Pamlico, between the first day of February and the fifteenth day of July.

Pender and all counties lying wholly west of the Wilmington and Weldon Railroad, except as hereinafter specifically provided, between the first day of February and the first day of October.

Richmond, between the first day of April and the first day of September.

Robeson, between the first day of January and the first day of November.

Stanly, until the first day of October, one thousand nine hundred and eleven, and thereafter between the first day of February and the first day of October.

Transylvania and Jackson, between the fifteenth day of December and the fifteenth day of October.

Tyrrell, between the first day of February and the fifteenth day of October: Provided, that deer may be hunted with gun, chased with dogs, killed, trapped or destroyed in the following portions of Tyrrell County during the period beginning August first and ending February fifteenth of each year, to-wit: Beginning at the Fairfield Canal where it enters into the Alligator river, and running with the said river to the northwest fork, thence with the fork to the county line, thence with the county line to the Alligator river, thence with the river to the place of beginning.

Yancey, from the thirtieth day of November to the first day of October.

Code, s. 2832; 1885, cc. 21, 48; 1887, c. 75; 1889, cc. 5, 149, 210, 345, 489, 531, 538; 1891, c. 234; 1893, cc. 107, 232, 352. 358, 470, 442, s. 2; 1895, c. 62; 1897, cc. 59, 81, 82, 283, 404; 1899, 121; 1901, cc. 65, 125, 153, 372, 573, 601; 1903, cc. 128, 196, 303, 694; 1905, cc. 4, 39, 47, 99, 101, 137, 270, 387, 405. 409; 1907, cc. 45, 108, 109, 242, 319, 321, 358, 384, 423, 447; 450, 505, 602, 622, 698, 842; 1908, cc. 1, 265. **Power of legislature to regu-**

late hunting, see State v. Gallop, 126-979. **License to hunt is not an immunity or privilege of the people of this state:** Brooks v. Tripp, 135-161; Daniels v. Homer, 139-222.

1882. Squirrel. The close season, or time in each year during which no squirrel shall be hunted, killed, or in any way captured, shall be, as to the counties hereinafter stated, as follows:

Beaufort, Chowan, Cleveland, Dare, Gates, Hertford, Lenoir, Mecklenburg, Perquimans and Pitt, from the first day of March to the first day of November.

Bertie, Carteret, Craven, Jones, Martin, Pamlico, Pasquotank, and Tyrrell, from the first day of March to the first day of October.

Edgecombe, from the first day of November to the fifteenth day of January.

Franklin, from the first day of March to the first day of September.

Greene, from the first day of February to the first day of October.

Mitchell, as to gray squirrel, between the fifteenth day of February and the first day of October.

Montgomery, from the first day of April to the first day of September.

Pender, from the first day of April to the first day of October.

Richmond, from April first to September first.

Transylvania, between the first day of April and the first day of September.

1895, c. 443; 1897, c. 454; 1889, c. 343; 1901, c. 676; 1903, cc. 103, 118, 196, 440, 542; 1905, cc. 4, 101, 130, 137, 143, 99, 77, 158, 284, 393; 1907, cc. 50, 104, 111, 283, 423, 494, 596, 598, 842, 895. **See** State v. Gallop, 126-979; Brooks v. Tripp, 135-161; Daniels v. Homer, 139-222.

1883. Opossum. The close season, or time in each year during which no opossum shall be shot, killed, hunted, or in any way captured, shall be, as to the counties of Alamance, Caswell, Chatham, Durham, Franklin, Graham, Greene, Guilford, Halifax, Mecklenburg, Moore, Orange, Pamlico, Wake and Warren, from the first day of February to the first day of October.

Clay, between April the first and November the first.

Lincoln and Harnett, between the first day of January and the first day of October.

McDowell, between the first day of March and the fifteenth day of October.

Mitchell, between the fifteenth day of February and the first day of October.

1891, c. 542; 1893, cc. 21, 59, 160; 1893, c. 371; 1895, c. 84; 1901, c. 676; 1891, c. 545; 1903, c. 542; 1905, cc. 315, 393; 1907, cc. 494, 597, 598.

1883a. Raccoon. The close season, or time in each year during which no raccoon shall be killed, shall be:

Clay, between the first day of April and the first day of November.

McDowell, between the first day of March and the fifteenth day of October.

Mitchell, between the fifteenth day of February and the first day of October.

Richmond, from April first to September first.

1907, cc. 494, 597, 886.

1883b. Fox. The close season, or time in each year during which no fox shall be shot, killed, hunted, or in any way captured, shall be as follows:

Burke, south of Catawba river, and Cleveland, between the first day of March and the first day of December, unless such fox may be depredating among domestic fowls or destroying something of value.

Montgomery, from the fifteenth day of February to the first day of September.

1907, cc. 388, 638.

1883c. Fur-bearing animals. The close season, or time in each year during which no fur-bearing animals may be trapped, shall be as follows:

Columbus, between the first day of April and January of each year.

Clay (otter, raccoon and opossum), between the first day of April and first day of November.

1907, cc. 597, 505.

1883d. Ground-hog. The close season, or time in each year during which no ground-hog shall be hunted, killed or in any way captured, shall be as follows:

Mitchell, between the fifteenth day of February and the first day of October.

1907, c. 494.

1404 115

1884. Quail or partridges. The close season, or time in each year during which quail and partridges shall not be shot, killed, wounded, or in any manner hunted, taken or captured, shall be from the first day of March to the first day of November, except as to those counties for which a different time is hereinafter stated, as follows:

Alexander, from the fifteenth day of January to the first day of December.

Anson, Lanesboro township, from the twentieth day January to the twentieth day of November.

Buncombe, from the first day of February to the fourteenth day of November.

Burke, from the fifteenth day of February to the fifteenth day of November.

Cabarrus, Camden, Clay, Currituck, Davie, Pasquotank, Perquimans and Rowan, from the first day of March to the first day of December.

Cherokee, Davidson, Duplin, Franklin, Montgomery, Randolph (except in Franklinville and Columbia townships, where close season is from fifteenth day of January to fifteenth day of November), and Wilson, from the first day of March to the fifteenth day of November.

Cleveland, Lincoln (except Northbrook township, in which hunting shall not be allowed until March seventh, one thousand nine hundred and ten) Surry, Yadkin and Stokes, from the first day of February to the first day of December.

Columbus, between the first day of April and the first day of November.

Dare, Tyrrell and Vance, from the first day of March to the fifteenth day of October.

Durham, from the first day of February to the fifteenth day of November.

Forsyth and Catawba, from the fifteenth day of February to the fifteenth day of November.

Gaston, from the fifteenth day of January to the last Thursday in November.

Greene, between the first day of February and the first day of December until the first day of December in the year one thousand nine hundred and eleven, at which time the law existing prior to February first, one thousand nine hundred and eight shall again become and remain operative and in full force.

Guilford, on and after the first day of March to the fifteenth day of November.

Henderson, from the first day of April to the fifteenth day of November.

Hyde, from the twentieth day of March to the fifteenth day of October.

Iredell, as to quail, from the first day of March to the first day of December.

Madison, from the first day of February to the fifteenth day of November.

Mecklenburg, between the tenth day of January and the first day of December.

Mitchell, as to partridges, between the fifteenth day of February and the first day of October.

Nash and Edgecombe, between the fifteenth day of February and the fifteenth day of November.

Northampton, from the fifteenth day of February to the first day of November.

Richmond, from the first day of April to the first day of November.

Swain, from the first day of March to the fifteenth day of November.

Union, from the fifteenth day of January to the fifteenth day of December.

Watauga, from the first day of March to the first day of September.

Graham, Jones and Onslow counties have no close season.

Code, s. 2834; 1885, cc. 204, 395; 1891, cc. 79, 294; 1893, cc. 19, 118, 339, 361; 1895, cc. 109, 209; 1897, cc. 74, 146, 266, 282, 283, 293, 423; 1899,c. 157; 1901, cc. 344, 355, 359, 415, 437, 679; 1903, cc. 147, 255, 281, 304; 1905, cc. 4, 77, 24, 50, 137, 99. 252, 272, 305, 322, 343, 313, 309, 200, 377, 379, 385, 409, 413, 185; 1907, cc. 54, 104, 319, 345, 417, 447, 449, 494, 592, 607, 610, 652, 699, 733, 765. 823, 851, 877, 986; 1908, cc. 23. **The new Richmond county law, chapter 1, of 1908, does not repeal provision as to that county as to close season for quail. As to power of legislature to regulate hunting,** see State v. Gallop, 126-979; Daniels v. Homer, 139-222; Brooks v. Tripp, 135-161.

1885. Wild turkey. The close season, or time in each year during which no wild turkey shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be from the first day of March to the first day of November, except as to those counties as to which a different time is hereinafter stated, as follows:

Cabarrus, from the first day of March to the first day of December.

Cherokee, Davidson, Guilford and Wilson, from the first day of March to the fifteenth day of November.

Clay, Randolph, Rowan and Stokes, from the first day of February to the first day of December.

Davie, until the first day of March, one thousand nine hundred and eight, and thereafter from the first day of February to the first day of December.

Henderson, from the first day of April to the fifteenth day of November.

Madison, from the first day of February to the fifteenth day of November.

Mitchell, between the fifteenth day of February and the first day of October.

Columbus, between the first day of April and the first day of November.

Burke, between the fifteenth day of February and the fifteenth day of November.

Northampton, from the fifteenth day of February to the first day of November.

Edgecombe and Nash, from the fifteenth day of February to the fifteenth day of November.

Pamlico, from the first day of March to the first day of October.

Pender, from the first day of February to the first day of October,

Richmond, from the first day of January to the first day of October.

Union, from the fifteenth day of January to the fifteenth day of December.

Buncombe, from the first day of February to the fourteenth day of November.

Lanesboro township, Anson county, from the twentieth day of January to the twentieth day of November.

Carteret, Dare, Graham, Jones, Onslow, Stanly, Swain and Tyrrell have no close season for wild turkeys.

Code, s. 2834; 1885, cc. 204, 395, 396, 398, 399; 1887, c. 82; 1891, cc. 79, 294; 1893, cc. 118, 373; 1895, cc. 109, 442; 1897, cc. 74, 85, 146, 266, 284, 558; 1899, c. 152; 1901, cc. 133, 344, 355, 359, 361, 383, 415, 437, 469, 551, 676; 1903, cc. 94, 147, 255, 280, 281, 286, 304, 345, 363, 463, 659; 1905, cc. 4, 77, 101, 137, 193, 402; 1907, c. 104, 345, 494, 505, 610, 652, 703, 823, 877.

The new Richmond county law, chap. 1 of 1908, does not seem to repeal provision as to that county herein.

1886. Dove, robin and lark. The close season, or time in each year during which no dove, robin or lark shall be shot, killed, wounded or in any manner hunted, taken or captured, shall be from the first day of March to the first day of November, except as to those counties as to which a different time is hereinafter stated, as follows:

Anson, in Lanesboro township, as to doves, from the twentieth day of January to the twentieth day of November.

Burke, between the fifteenth day of February and the fifteenth day of November.

Buncombe, as to doves, from the first day of February to the fourteenth day of November.

Cabarrus, Cherokee and Guilford, from the first day of March to the fifteenth day of November.

Columbus, as to doves, between the first day of April and the first day of November.

Davidson and Richmond, from the first day of April to the fifteenth day of October.

Davie, from the first day of March to the first day of December.

Edgecombe, as to robins and larks, from the first day of March to the fifteenth day of November; as to doves, between the first day of October and the first day of August of the following year.

Halifax and Warren, as to doves, from the first day of February to the first day of August.

Henderson, from the first day of April to the fifteenth day of November.

Madison, as to doves, from the first day of February to the fifteenth day of November.

Mecklenburg, from the first day of February to the fifteenth day of November.

Mitchell, between the fifteenth day of February and the first day of October.

Northampton, from the fifteenth day of February to the first day of November.

Rowan, from the first day of March to the first day of December.

Stokes, between the first day of February and the first day of December.

Union, as to larks and doves, from the fifteenth day of January to the fifteenth day of December.

Vance, from the fifteenth day of March to the fifteenth day of October.

Carteret, Duplin, Graham, Onslow, Moore, Swain and Wilson have no close season.

Code, s. 2834; 1885, cc. 201, 204, 395; 1889, c. 32; 1891, cc. 79, 232, 294; 1893, cc. 118, 239; 1895, c. 109; 1897, cc. 146, 284; 1901, cc. 133, 344, 355, 359, 415, 437; 1903, cc 147, 255, 280, 304; 1905, cc. 4, 77, 313, 343; 1907, c. 104, 345, 505, 610, 877.

1887. Pheasant. The close season, or time in each year during which no pheasant shall be shot, killed, wounded or in any manner captured or taken, shall be as follows:

Anson, for five years from the twenty-ninth day of January, one thousand nine hundred and seven.

Ashe, Chatham, Davidson, Guilford, Forsyth, Montgomery, Moore, Randolph, Rockingham, Scotland, Stanly, Stokes, Surry, Wilkes and Yadkin, until the first day of November, one thousand nine hundred and ten; Provided, it shall be thereafter lawful to hunt, chase, shoot or kill deer, pheasant or grouse, from the first day of November until the fifteenth day of November of each year, and at no other time, except in Stokes county, where no game bird can be shot, killed, trapped, netted or hunted between the first day of February and the first day of December.

Buncombe, from the first day of February to fourteenth day of November.

Burke, between the fifteenth day of February and fifteenth day of November.

Cherokee, until March first, one thousand nine hundred and twelve; then from the first day of March to the fifteenth day of November.

Clay, from the first day of March to the first day of December.

Henderson, from the first day of April to the first day of November.

Macon county, from the first day of March to the first day of November.

Madison, from the first day of February to the fifteenth day of November.

Mitchell, between the fifteenth day of February and the first day of October.

Richmond, from April first to September first.

Rowan from the first day of February to the first day of December.

Rutherford, as to English and Mongolian pheasants, for six years from the eighth day of March, one thousand nine hundred and seven.

Swain, from the first day of January to the twentieth day of November.

Transylvania, as to American pheasants or ruffed grouse, from the first day of March to the first day of November. It shall be unlawful for any person to shoot, trap, net or otherwise take or destroy the English, Mongolian or California pheasant at any time between March the first, one thousand nine hundred and seven, and November the first, one thousand nine hundred and ten, and that after said date (November the first, one thousand nine hundred and ten) it shall be unlawful to shoot, trap, net or otherwise take or destroy said birds or fowls between the first day of March and the first day of November in each and every year: Provided, that this shall not prevent the netting or trapping of said birds or fowls for the purpose of transferring them from one section of the county to another for propagation.

Watauga, to shoot, trap or in any way intentionally kill or have in possession any pheasant or grouse within four years from January first, one thousand nine hundred and seven.

1901, c. 437; 1903, cc. 281, 304, 353, 463; 9105, cc. 173, 271, 313, 711; 1907, cc. 58, 101, 104, 358, 452, 610, 652, 825, 851, 877; 1908, cc. 1, 2.

1888. Woodcock. The close season, or time in each year during which no woodcock shall be hunted, killed or in any way taken or captured, shall be as follows:

Craven and Jones, from the first day of February to the first day of November.

Edgecombe, from the first day of March to the first day of November.

Brunswick and New Hanover, from the first day of January to the first day of September.

Cherokee, from the first day of March to the first day of November.

Henderson, all the year.

Mitchell, between the fifteenth day of February and the first day of October.

Randolph, from the first day of March to the first day of November.

Rowan and Stokes, from the first day of February to the first day of December.

1901, c. 437; 1903, cc. 304, 353; 1897, c. 146; 1905, cc. 77, 183, 313, 409; 1907, c. 610.

1889. Snipe and other game or shore birds. The close season, or time in each year during which no snipe, marsh hen, curlew and other shore birds and game birds shall be hunted, killed or in any way taken, shall be as follows:

Anson, in Lanesboro township, as to snipe and other game birds, from the twentieth day of January to the twentieth day of November.

Beaufort, summer duck, between the first day of February and the fifteenth day of September.

Brunswick and New Hanover, snipe and wild ducks of all kinds, from the first day of March to the first day of September.

Buncombe, as to grouse, from the first day of February to the first day of December.

Carteret, as to marsh hens, from the first day of April to the fifteenth day of August; as to wild fowl, from the first day of April to the twenty-fifth day of November; also Sundays and Mondays all the year, and from 6 p. m. to 6 a. m. other days.

Craven and Jones, as to wild duck and other water fowl, from the first day of March to the first day of November.

Currituck, as to wild fowl, between the thirty-first day of March and the first day of November; also Wednesdays, Saturdays and Sundays all the year. Skiff or ring shooting boobies or ruddy duck, between the first day of November and the fifteenth day of February.

Cherokee, from the first day of March to the fifteenth day of November.

Dare, New Hanover and Brunswick, as to wild fowl, between the tenth day of March and the tenth day of November.

Edgecombe, any game bird not otherwise regulated, from the first day of March to the fifteenth day of November.

Granville, any game bird, from the first day of March to the first day of November.

Guilford, as to wild duck, on and after the first day of March until the fifteenth day of November.

Halifax and Warren, as to snipe, between the first day of May and the first day of February.

Henderson, all the year, except snipe, as to which there is no close season.

Madison, as to grouse, from the first day of February to the fifteenth day of November.

Mitchell, as to snipe, between the fifteenth day of February and the first day of October.

Richmond, from April first to September first.

Stokes, between the first day of February and the first day of December.

1887, c. 82; 1901, c. 437; 1903, cc. 174, 353; 1905, cc. 183, 313, 409, 413, 77; 1907, cc. 101, 104, 345, 384, 610; 1908, c. 1.

CHAPTER 41.

IDIOTS, INEBRIATES AND LUNATICS.

I. Guardian of.

1890. Inquisition; guardian appointed. Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic or incompetent person by inquisition of a jury, as in cases of orphans.

Code s. 1670; C. C. P., s. 473. **See section 1768. While not required by section that idiot should be brought before clerk or jury in person, it is prudent to have such idiot personally before court, or at least to give such notice as will give information of proposed action in ample time for him to be present:** In re Propst, 144-566; Dowell v. Jacks, 53-389. 150-423

Where jury finds defendant to be of unsound mind and incompetent to

manage his own affairs, but not an idiot or lunatic, court should appoint guardian: In re Anderson, 132-243.

Section embraces four classes of persons for whom guardians may be appointed, namely, idiots, lunatics, inebriates and those who are incompetent from want of understanding to manage their own affairs by reason of excessive use of intoxicating liquors or other cause: In re Anderson, 132-246.

Words "idiot," "lunatic," inebriate," "incompetent to manage affairs" interpreted: Ibid.

Appointment of guardian for lunatic valid until proceedings and orders under inquisition reversed: Sims v. Sims, 121-297. Report of jury in inquisition of lunacy need not be formally confirmed by clerk of court, section only requiring it to be filed and recorded: Sims v. Sims, 121-297.

Inquisition of lunacy not conclusive against person dealing with supposed lunatic: Parker v. Davis, 53-460—but he may show that at time of contract supposed lunatic had sufficient capacity to make same, Ibid.

Inquisition which merely states that person is "of unsound mind" does not show, even prima facie, that he is an idiot: Christmas v. Mitchell, 38-535. Ancient presumption of law that one born deaf and dumb is an idiot does not now exist: Ibid. While it is proper that inquisition should distinctly find party to be lunatic or idiot, sufficient if equivalent description be used, as that "he is of insane mind:" Armstrong v. Short, 8-11. Moral debasement not necessarily and of itself insanity: Mayo v. Jones, 78-402. Insanity can not be proven by general reputation: State v. Coley, 114-879. Feebleness of health, with occasional fits, is no evidence of insanity: Chamblee v. Broughton, 120-170.

Case under former enactment somewhat similar to above: Bethea v. McLennon, 23-523. Section referred to in Price v. Price, 133-510; Smith v. Smith, 106-502.

1891. Guardian appointed on certificate from hospital for insane. If any person be confined in any hospital for insane persons, in any state, territorial or governmental asylum or hospital, in this state or any other state of territory, or in the District of Columbia, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the superior court, or any notary public, or the clerk of any court of record of the county in which such hospital is situated, and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person.

Code, s. 1673; 1860-1, c. 22; 1907, c. 232.

Section referred to in Somers v. Comrs., 123-584; In re Hybart, 119-365.

1892. Inebriates defined. Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupefy his mind

and to render him incompetent to transact ordinary business with safety to his estate, or who shall render himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who shall, by the frequent use of liquor, narcotics or drugs, render himself cruel and intolerable to his family, or shall fail from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use shall have been at the time of inquisition of at least one year's standing.

Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; 1879, c. 329. **For rules for admission into hospitals, see Hospitals for Insane. See** In re Anderson, 132-246.

1893. Reformation and restoration to sanity or sobriety. Whenever an insane person or inebriate shall become of sound mind and memory, or shall become competent to manage his property, he shall be authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence, setting forth the facts duly verified by the oath of the petitioner, whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the said alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person shall be authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate.

Code, s. 1672; 1901, c. 191; 1903, c. 80; 1879, c. 324, s. 4. **When insanity once shown to exist, there is presumption that it continues; open to be rebutted by testamentary showing restoration of mental soundness:** Beard v. R. R., 143-136. **Appointment of guardian for lunatic continues until declared sane:** Sims v. Sims, 121-297.

1894. Estates without guardian managed by clerk. Whenever any person is declared to be of nonsane mind or inebriate, and for whom no suitable person will act as guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed.

Code, s. 1676; R. C., c. 57, s. 6; 1846, c. 43, s. 1. **See section 1812. Under section, appointment of receiver for insane persons' estate should**

be made only on motion of solicitor, after wife and one or more adult children, if there are such, or some near relative or friend have been brought before judge at chambers or in term: In re Hybart, 119-359.

1895. Allowance to abandoned feme covert lunatic. Whenever any feme covert lunatic shall be abandoned by her husband she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband.

Code, s. 1686; 1858-9, c. 52, s. 1. **Solvent insane not entitled to free admission to asylum:** Hospital v. Fountain, 128-23.

II. Sales of Estates.

1896. Clerk may order sale or renting. Whenever it shall appear to any clerk of the superior court by report of the guardian of any idiot, inebriate or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, and shall be entered at length on the records of the court; and all sales and rentings made under this section shall be valid to convey the interest and estate directed to be sold, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose.

Code, s. 1674; R. C., c. 57, 4; 1801, c. 589. **See, as to sales of ward's lands by general guardian, sections 1798 to 1801.**

Section merely referred to in Adams v. Thomas, 81-297; Howard v. Thompson, 30-369.

1897. How and for what purpose sold; parties; disposition of proceeds. Whenever it shall appear to the clerk, upon the petition of the guardian of any idiot, inebriate or lunatic, that the sale of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or whenever the clerk shall be satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale of any part of such estate; or whenever any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge: Provided, that the clerk, if

it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person or inebriate. And if on the hearing the clerk shall order such sale, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian.

Code, s. 1675; R. C., c. 57, s. 5. **See, as to sales of ward's estates generally, sections 1798 to 1801.**

Subject to reasonable maintenance of lunatic and his minor children, residue of his property is liable to pay his debts anterior to lunacy: Adams v. Thomas, 83-521.

Property of lunatic can not be applied to debts unless sufficient part thereof has been retained for support of wife and infant children: McLean v. Breese, 109-564; Adams v. Thomas, 81-296; Ex parte Latham, 41-408; In re Latham, 39-231.

Court of probate (now clerk superior court) has no power to provide for payment of debts of lunatic contracted prior to lunacy: Smith v. Pipkin, 79-569; Blake v. Respass, 77-193—**but such jurisdiction vested in superior court,** Blake v. Respass.

Superior courts have concurrent jurisdiction with clerk over lunatics and their estates: Smith v. Pipkin, 79-569.

Where land of lunatic sold on petition of guardian, proceeds are under direction of court, and no creditor can claim priority: Ex parte Latham, 41-406—**no creditor can seize same under execution, teste of which subsequent to date of decree:** Latham v. Wiswall, 37-294—**for such decree is one substantially in rem, and subjects property to control of court,** Ibid.

Jurisdiction in lunacy strictly territorial, and court in this state can neither charge land of lunatic in another state nor its proceeds in hands of heir here, for his support: Allison v. Campbell, 21-152.

1898. Land of wife of lunatic, how sold. Where the wife of a lunatic owns real estate in her own right the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition by the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic.

Code, s. 1687; 1881, c. 361.

III. Surplus Income.

1899. Of mother used for children's support. When a father dies leaving his surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance and education of such minor children, and the mother shall be or become insane and be so declared according to

law, and such insanity shall continue for twelve months thereafter, and she shall have an estate which shall be placed in the hands of a guardian or other person, as provided by law, the estate of such insane mother shall in such cases as are provided for in the succeeding section be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder.

1905, c. 546.

1900. When advanced to next of kin. Whenever any nonsane person, of full age, and not having made a valid will, shall have children or grandchildren (such grandchildren being the issue of a deceased child), and shall be possessed of an estate, real or personal, whose annual income shall be more than sufficient abundantly and amply to support himself and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it may be lawful for the clerk of the superior court for the county in which such person shall have his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person.

Code, s. 1677; R. C., c. 57, s. 9.

1901. For what purpose and to whom advanced. Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement; and in case the child, or grandchild, be a feme covert, the sum advanced shall be paid or secured to her for her sole and separate use.

Code, s. 1678; R. C., c. 57, s. 10.

1902. Distributees, parties. In every application for such advancements, the guardian of the nonsane person, and all such other persons, shall be parties, as would at that time be entitled to a distributive share of his estate, if he were then dead.

Code, s. 1679; R. C., c. 57, s. 11.

1903. Advancements, equal; accounted for, when. The clerk, in ordering such advancements, shall, as far as practicable, so order the same, as that, on the death of the nonsane person, his estate

shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death, every sum advanced to a child, or grandchild, shall be an advancement and shall bear interest from the time it may be received.

Code, s. 1680, R. C., c. 57, s. 12.

1904. Clerk may select those to advance. When the surplus aforesaid shall not be sufficient to make distribution among all the parties, the clerk may select and decree advancements to such of them as may most need the same, and may apportion the sum decreed in such amounts as shall be expedient and proper.

Code, s. 1681; R. C., c. 57, s. 13.

1905. Secured against waste. It shall be the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same when they may have families, that it may be applied to their support and comfort, but any sum so advanced shall be regarded as an advancement to such person.

Code, s. 1682 R. C., c. 57, s. 14.

1906. Appeal; removal to superior court. Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court.

Code, s. 1683; R. C., c. 57, s. 15.

1907. Advancements only when insanity permanent. No such application shall be allowed under this chapter but in cases of such permanent and continued insanity, as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion.

Code, s. 1684; R. C., c. 57, s. 16.

1908. Decree suspended when sane. Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same.

Code, s. 1685; R. C., c. 57, s. 17.

CHAPTER 42.

INNKEEPERS.

1909. Must furnish accommodations. Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel.

146-366

1903, c. 563. **An inn or hotel is a public house of entertainment for all who choose to visit it:** Holstein v. Phillips, 146-366.

A guest's right of occupancy of an inn is dependent upon proper behavior, decent conduct and obedience to reasonable rules and regulations: Hutchins v. Durham, 118-457—**and if wrongly evicted, can only sue for damages,** Ibid.

As to right of innkeeper to expel from inn persons who are not guests, see State v. Steele, 106-766. **As to right to put out persons, or refuse lodging to persons, who apply to become guests who are considered objectionable on account of character or color,** see Ibid. **As to rights of hotel to arrange for a livery business connected therewith or to grant a monopoly of soliciting the livery business to a party,** see Ibid.

One who occasionally entertains strangers, receiving compensation therefor, is not an innkeeper: State v. Mathews, 19-424.

1910. Liability for loss of baggage. Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property, and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of said baggage and property to an amount not exceeding one hundred dollars: Provided, however, any guest may at any time before a loss, damage or destruction of his property notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same: Provided further, that proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper.

1903, c. 563, s. 2. **A boarder, as distinguished from a guest, is one who abides at a place:** Holstein v. Phillips, 146-366.

152-339

Facts in this case held to show that there was a relation of innkeeper and guest between parties, and hotel was liable as insurer for loss of

money of guest as at common law, hotel having failed to comply with provisions of section 1913 of Revisal: Ibid.

Common law liability of innkeeper for loss of goods of a guest, also liability of boarding-house keeper for loss of goods of a boarder, stated: Ibid.

A guest in hotel who holds position of regular boarder or lodger can only hold proprietor to the exercise of ordinary care on the part of himself and employees as to goods and money of guests: Ibid.

1911. Safe-keeping of valuables. It shall be the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars; and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars: Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited.

1903, c. 563, s. 3. **See annotations under section 1910.**

1912. Loss by fire. No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control: Provided, that nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in the preceding sections.

1903, c. 563, s. 4.

1913. Copies of this chapter posted. Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this chapter and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted.

1903, c. 563, ss. 5, 6. **Facts held to show that there was relation of innkeeper and guest between the parties, and the hotel was liable as insurer for loss of money of guest as at common law, hotel having failed to comply with this section:** Holstein v. Phillips, 146-366.

1914. Negligence of guest. Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn.

1903, c. 563, s. 7. **For lien of innkeepers on baggage and other property, see section 2037.**

CHAPTER 43.

INSOLVENT DEBTORS.

I. Criminal Actions.

1915. Who may be discharged from prison. The following persons may be discharged from imprisonment upon complying with this chapter:

1. Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance.

2. Every person committed for the fine and costs of any criminal prosecution.

Code, s. 2967; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26. **This section does not repeal sections 1352 and 1355, but latter sections modify it:** State v. Morgan, 141-729—**and all three sections must be construed together,** Ibid.

Where there are three indictments against prisoner, to one of which he pleaded guilty and judgment was suspended upon payment of costs, and he was found guilty on other two, on one of which he was sentenced to imprisonment for ten days, after remaining in jail for such time and twenty days additional, and taking statutory oath, held that he was entitled to discharge in all three cases: State v. McNeely, 92-829.

Prisoner entitled to be discharged from imprisonment for non-payment of fine and costs upon complying with statutory provisions: State v. Williams, 97-414—**and this is so although workhouse has been established by county commissioners in accordance with provisions of section 1360,** Ibid.

One committed for fine and costs of criminal prosecution, after remaining in jail for twenty days, may be discharged upon taking oath prescribed by section 1918a: State v. Davis, 82-610.

Imprisonment of putative father for failure to obey order of maintenance, or to give bond, is a matter of legislative discretion and is not imprisonment for debt: State v. Morgan, 141-726.

Defendant convicted of bastardy may be discharged from imprisonment by complying with provisions of section: State v. White, 125-674; State v Parsons, 115-730.

Placing one in custody of sheriff until fine, costs and allowance in bastardy are paid is by implication an order to imprison upon failure to pay, and prisoner can be discharged hereunder: State v. Burton, 113-655.

1916. When petition filed, on whom served. Every such person, having remained in prison for twenty days, may apply by petition to the court, where the judgment against him was entered, praying to be brought before such court at a time and place to be named

in the petition, and to be discharged upon taking the oath hereinafter prescribed. The applicant shall cause ten days' notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner.

Code, ss. 2968, 2969; 1891, c. 195; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 28; 1874-5, c. 11; 1868-9, c. 162, s. 27; 1873-4, c. 90. **Application of insolvent, confined for nonpayment of costs, is a proceeding in the cause in which he was convicted, and should be made by petition to court wherein judgment against him was entered:** State v. Miller, 97-451—**but if clerk should refuse to allow prisoner to take oath remedy is by appeal to judge holding courts of that district, and it is intimated that it is irregular for judge of adjoining district to release prisoner on writ of habeas corpus,** Ibid.

Neither judge nor solicitor has right to allow defendant in bastardy proceedings to take insolvent debtor's oath and obtain discharge without remaining in prison for twenty days: State v. Bryan, 83-611.

Section merely referred to in State v. White, 125-677; Fertilizer Co. v. Grubbs, 114-470; State v. Burton, 113-657.

1917. Warrant issued for prisoner. The clerk of the superior court, or justice of the peace before whom such petition is presented, shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey.

Code, s. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29.

1918. Proceeding on application. At the hearing of the petition, if the prisoner have no visible estate, and take and subscribe the oath or affirmation prescribed in the succeeding section, the clerk of the superior court, or justice of the peace before whom he is brought, shall administer said oath or affirmation to him, and discharge him from imprisonment; of which an entry shall be made in the docket of the court, and where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed.

Code, s. 2971; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 30. **Where debtor arrested and imprisoned for fraud did not tender oath required by section 1918a, nor surrender exemptions, nor file petition or give notice required by section 1915, he was improp-**

erly discharged upon affidavit that he had made an assignment for benefit of creditors, and that he was insolvent and not worth more than exemptions allowed by law: Fertilizer Co. v. Grubbs, 114-470.

Prisoner entitled to be discharged from imprisonment for nonpayment of fine and costs upon complying with statutory provisions: State v. Williams, 97-414; State v. Davis, 82-610—**and this is so, although workhouse has been established by county commissioners under provisions of section 1360:** State v. Williams, 97-414.

One who has been found to be father of bastard child, and committed for nonpayment of fines, costs and allowance is entitled to be discharged from prison upon filing petition and complying with statutory requirements: State v. Parsons, 115-730.

Section merely referred to in State v. Burton, 113-658; State v. Bryan, 83-612.

1918a. Oath to be taken. The oath referred to in the preceding section shall be as follows:

I, ..., do solemnly swear (or affirm) that I have not the worth of fifty dollars in any worldly substance, in debts, money or other wise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit or to defraud any of my creditors; so help me, God.

Code, s. 2972; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 31; 1881, c. 76. **This does not contravene constitutional provision in regard to homestead and personal property exemptions:** State v. Williams, 97-415—**as prisoner has election to discharge himself by complying with julgment of court or by complying with statutory provisions and taking oath prescribed,** Ibid.

Section merely referred to in State v. Morgan, 141-728; State v. White, 125-678; State v. Parsons, 115-735; Fertilizer Co. v. Grubbs, 114-470; State v. Burton, 113-655; State v. Bryan, 83-612; State v. Davis, 82-610.

1919. Who may suggest fraud. The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the oath prescribed in the preceding section, and file particulars of the suggestion in writing, in the court where the same shall stand for trial as prescribed in this chapter in other cases of fraud or concealment.

Code, s. 2973; 1868-9, c. 162, s. 32.

II. Civil Actions—Under Arrest.

1920. Who entitled. The following persons are entitled to the benefit of this chapter:

1. Every person taken or charged on any order of arrest for default of bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever.

Code, s. 2951; 1868-9, c. 162, s. 10. **Benefits of statute not confined to residents of this State, but nonresidents can not take benefits of homestead and personal property exemptions, nor are they entitled here to any exemptions given by laws of their own state:** Burgwyn v. Hall, 108-489.

Every person taken or charged on any order of arrest for default of bail, or on surrender of bail in any action, and every person taken or charged in execution or arrest for any debt or damage rendered in any action whatsoever, is entitled to the benefits hereunder: Ibid.

Defendant held to arrest and bail may be discharged by payment or giving notice and surrendering all property in excess of fifty dollars: Fertilizer Co. v. Grubbs, 114-470—**and petitioner held in arrest and bail can be discharged before judgment in cases when he could be discharged after judgment,** Ibid.

Defendants, who were nonresidents, arrested in action for damages for false arrest, entitled to benefits of chapter: Burgwyn v. Hall, 108-489.

Benefits of section extend as well to those arrested for torts as for debt: Ibid.

Defendant in arrest for fraud may be discharged either by giving bail or surrendering property for benefit of creditors as provided by statute: Ibid.

1921. When petition may be filed. Every person taken or charged as in the preceding section specified, may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter.

Code, s. 2952; R. C., c. 59, s. 3; 1868-9, c. 162, s. 11. **Section embraces every person taken or charged as in preceding section specified:** Burgwyn v. Hall, 108-493.

1922. The petition; verification. The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it an oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I, ..., the within named petitioner, do swear (or affirm) that the within petition and account of my estate, and of the charges thereon,

are, in all respects, just and true; and that I have not at any time or in any manner disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors; so help me, God.

Code, ss. 2953, 2954; R. C., c. 59, s. 3; 1868-9, c. 162, ss. 12, 13. **Section merely referred to** in Purvis v. Robinson, 49-96.

150-712

1923. What notice given, and to whom. Twenty days' notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys; and if the person to be notified reside out of the state, and have no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state.

Code, s. 2955; R. C., c. 59, ss. 3, 20; 1773, c. 100, s. 8; 1868-9, c. 162, s. 14. **Party arrested and seeking relief must notify creditor or plaintiff at whose suit arrested** Burgwyn v. Hall, 108-492—**but may or may not notify other creditors of his application to surrender his property and be discharged from arrest. Only such creditors as may be so notified will be affected by his discharge,** Ibid.

1924. Who may suggest fraud. Every creditor upon whom the notice directed in the preceding section is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases.

Code, s. 2956; R. C., c. 59, s. 13; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 15. **Petitioner entitled to insist that suggestions of fraud, made by creditor, should be verified by oath of creditor and tried by jury:** Purvis v. Robinson, 49-96—**and it is error for judge to decide upon such suggestions without submitting them in an issue to jury,** Ibid.

1925. When no fraud suggested, debtor discharged. If no creditor suggest fraud or oppose the discharge of the debtor, the justice of the peace or the clerk of the superior court before whom the petition is heard, shall forthwith discharge the debtor, and, if he surrender any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed.

Code, s. 2957; R. C., c. 59, s. 1; 1773, c. 100; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 16. **Proper remedy of party seeking to establish and secure damages for tort is to have trustee appointed under section:** Burgwyn v. Hall, 108-489.

1926. Cause continued, when. Whenever it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime his bond shall be discharged.

Code, s. 2959; R. C., c. 59, s. 10; 1822, c. 1131, s. 1; 1868-9, c. 162, s. 18. **Extreme sickness of principal in bond would excuse nonappearance and entitled him and surety to continuance if same made to appear to court:** Bupis v. Arnold, 53-234.

Sickness of surety no excuse for default of principal under section: Speight v. Wooten, 14-327.

Defendant in bond given under section bound to attend at every term until cause finally disposed of: Cowles v. Oaks, 14-95.

As to amount of bond, see Williams v. Yarborough, 13-12.

1927. Issue of fraud, how debtor discharged. After an issue of fraud or concealment is made up the debtor shall not discharge himself as to creditors in that issue, except by trial and verdict in the same, or by a discharge by consent.

Code, s. 2962; R. C., c. 59, s. 17; 1868-9, c. 162, s. 21. **Section only applicable to cases where defendant is in lawful custody and by virtue of an authority competent to order it:** Houston v. Walsh, 79-36.

1928. Fraud found; imprisoned how. If, on the trial, the jury find that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until a full and fair disclosure and account of all his money, property or effects be made by the debtor.

Code, s. 2961; R. C., c. 59, s. 14; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 20. **Where insolvent debtor only surrenders interest in certain property conveyed by deed in trust and jury find deed fraudulent, he must be imprisoned until he surrenders whole property conveyed:** Hutton v. Self, 28-285.

For case prior to amendment of section, see Bunting v. Wright, 61-296.

1929. Effect of order of discharge. The order of discharge under this chapter, whether granted upon a nonsuggestion of fraud, upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in section one thousand nine hundred and thirty-three; except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor, and as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk.

Code, s. 2960; R. C., c. 59, s. 11; 1822, c. 1131, s. 4; 1835, c. 12;

1868-9, c. 162, s. 19. **Discharge of debtor is not discharge of debt:** Norment v. Alexander, 32-71. **As to effect of discharge,** see Rountree v. Waddill, 52-312; Norment v. Alexander, 32-71; Williams v. Floyd, 27-649; Crain v. Long, 14-371.

III. Civil Actions—Not Under Arrest.

1930. May file petition; what to contain; how verified. Every insolvent debtor may present a petition in the superior court praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment, on account of any judgment previously rendered, or of any debts previously contracted. On presenting such petition, every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which said inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account or otherwise.

2. A full and true inventory of his estate, real and personal, with the incumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale under execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of superior court, and must be certified by such officer.

I, ..., do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should abstain or desist from opposing my discharge; so help me, God.

180-712

Code, ss. 2942, 2943, 2944; 1868-9, c. 162, ss. 1, 2, 3. **Section merely referred to** in Preiss v. Cohen, 117-60; State v. Parsons, 115-730; Burgwyn v. Hall, 108-491; Wingo v. Hooper, 98-485. **For case prior to enactment of section,** see Ballard v. Waller, 52-84.

1931. Duty of clerk on receiving petition. On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within thirty days after publication of the order, why the prayer of the petitioner should not be granted, and shall post a notice of the contents of the order at the courthouse

door and three other public places in the county where the application is made for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county.

Code, ss. 2945, 2946; 1868-9, c. 162, ss. 4, 5.

1932. Discharged, when. If no creditor oppose the discharge of the insolvent, the clerk of the superior court before whom the hearing of the petition is had shall enter an order of discharge and appoint a trustee of all the estate of such insolvent.

Code, s. 2947; 1868-9, c. 162, s. 6. **Section merely referred to** in State v. Parsons, 115-733.

1933. Order of discharge, terms and effect. The order of discharge shall declare that the person of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner affected by such discharge.

Code, s. 2950; 1868-9, c. 162, s. 9. **Debtor who has surrendered property is protected from future arrest or imprisonment on account of any judgment previously rendered or any debts previously contracted, though after-acquired property may be subject to execution and sale in proper cases:** Burgwyn v. Hall, 108-489; see also Brown v. Long, 22-138.

For case prior to enactment of section, see Griffin v. Simmons, 50-145.

1934. Creditor may suggest fraud. Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath; but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases.

Code, s. 2948; 1868-9, c. 162, s. 7. **Mother of bastard child, to whom allowance directed to be paid becomes creditor of defendant, and can suggest fraud under section and contest defendant's right to a discharge, as insolvent, from its payment:** State v. Ostwalt, 118-1210; Church v. Parsons, 115-730—**but mother has right to suggest fraud only as to allowance,** State v. Parsons, 115-730—**for only the state can suggest fraud as to fine and costs,** Ibid. 50-713

Where debtor arrested under different ca. sa.'s at instance of several creditors, and fraud suggested by creditors, he may require that all credi-

tors he may notify shall join in trial of the one issue: Williams v. Floyd, 27-649—but debtor may waive privilege by joining issue with each creditor in which case verdict in his favor in one action will not discharge him from responsibility in case of another creditor, Ibid.

IV. General Provisions.

1935. Issue of fraud made up, cause docketed for trial. In every case under this chapter where an issue of fraud is made up, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding be against the petitioner he shall be committed to jail until he make full disclosure.

Code, s. 2949; 1868-9, c. 162, s. 8. **Upon suggestion of fraud, issue is raised which should be entered upon trial docket of superior court, and stand for trial as other causes:** State v. Parsons, 115-730.

Where debtor sets out in schedule that he has made deed in trust of certain property, and surrenders all his interest in such property, still competent for creditor to have issue made up as to whether deed not fraudulent: Adams v. Alexander, 23-501; Hutton v. Self, 28-285—**and, if found fraudulent by a jury, to cause debtor to be imprisoned until he surrenders property itself,** Ibid.

See, as bearing upon section, Adams v. Beaman, 48-140.

1936. Debtor may give bond. Every debtor entitled to the provisions of this chapter may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court, where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody.

Code, s. 2958; R. C., c. 59, s. 27; 1868-9, c. 162, s. 17. **Bond given for appearance of insolvent at court is good if it is for double the original debt, exclusive of interest and costs:** Williams v. Yarborough, 13-12.

Condition in bond "to appear and claim benefit of act, etc., and not depart without leave" is substantial compliance with section: Mooring v. James, 13-254.

Defendant in bond bound to attend at every term until cause finally disposed of: Arrington v. Bass, 14-95.

Debtor who has given bond for his appearance can not object to informality of same, and pray discharge on account thereof: Page v. Winningham, 18-113.

Where bond states date at which court is to be held, which date is er-

roneous and court held at a different place, there is no default of appearance according to bond: Winslow v. Anderson, 20-1.

Quaere: Whether duty of officer or the defendant to prepare bond to be given for debtor's appearence: Ibid. Return day in bond must be certain: Ibid.

For old cases under section prior to amendment, see Wall v. Jarrott, 25-42; Williams v. Bryan, 33-613.

1937. Surety may surrender principal. The surety in any bond conditioned for the appearance of any person under this chapter, may surrender the principal, or such principal may surrender himself, in discharge of the bond, to the sheriff or other officer of any court where such principal is bound to appear, in the manner provided in the chapter entitled Civil Procedure, subchapter Arrest and Bail.

Code, s. 2963; R. C., c. 59, s. 23; 1793, c. 100, s. 7; 1793, c. 380, s. 1; 1822, c. 1131, s. 3; 1868-9, c. 162, s. 22. Where principal obligor in bond was regularly called and failed to appear and judgment was rendered against him and his surety, surety has no right, ex debito justitae, to have judgment set aside to allow him to make surrender of principal: Reynolds v. Boyd, 23-106.

Person surrenderd in discharge of bail entitled to benefit of chapter: Smallwood v. Wood, 19-356.

To protect sureties they must surrender principal in court to which ca. sa. returnable, or to the sheriff of that county, and, where writ issues to another county, a surrender to sheriff of that county is a nullity: Mooring v. James, 13-254.

1938. When creditor liable for jail fees. When any debtor is actually confined within the walls of a prison, on an order of arrest in default of bail or otherwise, the jailer must furnish him with necessary food during his confinement, if the prisoner require it, for which the jailer shall have the same fees as for keeping other prisoners. If the debtor be unable to discharge such fees, the jailer may recover them from the party at whose instance the debtor was confined. And at any time after the arrest, the sheriff or jailer may give notice thereof to the plaintiff, his agent or attorney, and demand security of him for the prison fees that accrue after such notice, and if the plaintiff fail to give such security then the sheriff may discharge the debtor out of custody.

Code, s. 2965; R. C., c. 69, s. 5; 1773, c. 100, ss. 8, 9; 1821, c. 1103; 1868-9, c. 162, s. 24. Where debtor has given bond for appearance and case continued from court to court, sureties surrendering him from time to time, and issue decided against him and he committed to prison in all cases, at instance of creditor, such creditor responsible to jailer for fees or allowance for food furnished to prisoner during whole time confined in jail: Veal v. Flake, 32-417.

When debtor committed to prison and permitted to take prison bounds,

jailer under no obligation, while he continues in bounds, to furnish him with provisions for his support: Phillips v. Allen, 35-10—nor can creditor, at whose suit he is confined, be compelled to reimburse jailer for any sum so expended, Ibid.

Where debtor, imprisoned at instance of creditor, has no property in this state out of which prison fees, provisions and support can be satisfied, jailer may recover amount from creditor, notwithstanding debtor may have sufficient property in another state: Faucett v. Adams, 35-235.

Action against creditor for jail fees of insolvent debtor, given by section to jailer, can not be maintained by sheriff as jailer's principal: Bunting v. McIlhenny, 61-579.

1939. Persons removing debtors to defraud creditors, liable as debtor. If any person shall remove or shall aid and assist in removing any debtor out of any county in which he shall have resided for the space of six months or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by a civil action.

Code, s. 1551; R. C., c. 50, s. 14; 1820, c. 1063. Where debtor removes out of county, with intent to defraud his creditors, person who, knowing of such intent, helps him by carrying him or his property part of way in order to help him get out of county, becomes bound for his debts: Godsey v. Bason, 30-260—though he did not convey debtor or his goods entirely out of one county into another. Where such person is sued by creditor, not necessary to show that he had knowledge of any particular debt due by debtor, but it is sufficient if circumstances of case induce jury to believe that removal made with view to defraud creditors, Ibid—and measure of damages is the amount of the debt due by debtor to plaintiff, Ibid.

Bail of person arrested under capias ad respondendum may maintain action against one for fraudulently aiding and assisting principal to remove from county, in consequence whereof he had debt sued on to pay: March v. Wilson, 44-143.

Surety on constable's bond upon which there has been a breach, but no judgment or payment by him, is not a creditor so as to entitle him to recover against one for fraudulently removing his principal: Booe v. Wilson, 46-192.

Simply advising debtor to run away, though advice be given to delay creditor, is not equivalent to aiding and assisting, and will not sustain action under section: Wiley v. McRee, 47-349.

Where person persuades debtor, temporarily absent from county of residence, not to go back to that county but to go to distant parts, promising to send his property to him, which he afterwards does, and aids him with money to abscond from place where he then is and goes part of way with him for purpose of defrauding creditors, he is liable under section: Moore v. Rogers, 48-91.

For one to go with absconding debtor to depot where debtor gets on train, and to take his horse back home, knowing of debtor's fraudulent intention to abscond, is such aiding and assisting as will make party liable: Moss v. Peoples, 51-140.

Where agent, who had money of principal, gave it to principal's son to help him abscond from debtors, and principal afterwards allowed it in settlement with agent, this does not make principal liable: Moore v. Rogers, 51-297.

Where party carried debtor to railroad station with his own horse and buggy, and there procured money for him to leave the state with intent to assist him to avoid his cerditors, he is liable under section: Moffitt v. Burgess, 53-342.

Section merely referred to in Baker v. Harris, 60-274. **For case prior to enactment of section,** see Gardiner v. Sherrod, 9-173.

1940. False swearing; penalty. If any insolvent or imprisoned debtor take any oath prescribed in this chapter falsely and corruptly, and upon indictment for perjury be convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged.

Code, s. 2694; R. C., c. 59, s. 25; 1793, c. 100, s. 10; 1868-9, c. 162, s. 23. **For additional penalty, see section 3615.**

1941. General power of trustees. Any trustee appointed under this chapter, in the several cases therein contemplated, is hereby declared a trustee of the estate of the debtor, in respect to whose property such trustee is appointed for the benefit of creditors, and is invested from the time of appointment with all the powers and authorities, and subject to the control, obligations and responsibilities prescribed by law in relation to personal representatives over the estates of deceased persons; but all debts shall be paid by the trustees pro rata.

Code, s. 2977; R. C., c. 59, ss. 21, 22; 1773, c. 100, ss. 5, 6; 1827, c. 44; 1830, c. 26, s. 2; 1868-9, c. 162, s. 44. **Section merely referred to in** Burgwyn v. Hall, 108-489.

1942. Who may take jail bounds. Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.

2. Any debtor who, for other cause, is adjudged to be imprisoned until he make a full and fair disclosure or account of his property.

Code, s. 2966; R. C., c. 59, s. 27; 1818, c. 964; 1868-9, c. 162, s. 25.

V. Under Sentence.

1943. Confined in jail or penitentiary, who may apply for trustee. Whenever any debtor is imprisoned in the penitentiary for any term whatever or in a county jail or any term more than twelve months, application by petition may be made by any creditor, the debtor or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor.

Code, s. 2974; 1868-9, c. 162, s. 40. **Section merely referred to** in State v. Burton, 113-657.

1944. To whom application made when trustee appointed. The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned under such sentence, and is indebted in any sum whatever, the clerk of the court or the judge thereof may immediately appoint a trustee of the estate of such debtor.

Code, s. 2975; 1868-9, c. 162, ss. 41, 42.

1945. Duty of trustee. Every trustee is required to pay the debts of the imprisoned debtor in the manner directed in section numbered one thousand nine hundred and forty-one; and after paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of such debtor, under the direction of the superior court; and whenever such imprisoned debtor is lawfully discharged from his imprisonment, the trustee so appointed shall deliver up to him all the estate, real and personal, of such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor.

Code, s. 2976; 1868-9, c. 162, s. 43.

1946. Trustee to make returns. Such trustee shall make his returns and have his accounts audited and settled by the clerk of the superior court of the county where the proceeding was had, in like manner as provided for personal representatives.

Code, s. 2978; 1868-9, c. 162, s. 45.

1947. Oath of trustee. Before proceeding to the discharge of his duty such trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding; which oath must be filed with the clerk of the superior court.

Code, s. 2979; 1868-9, c.162, s. 46.

1948. May appoint several trustees. The court shall have power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law.

Code, s. 2980; 1868-9, c. 162, s. 47. **Section merely referred to** in Burgwyn v. Hall, 108-497.

1949. Court may remove trustee and appoint successor. In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance.

Code, s. 2981; 1868-9, c. 162, s. 48. **Section merely referred to** in Burgwyn v. Hall, 108-489.

CHAPTER 44.

INTEREST.

1950. Rate of, six per cent. The legal rate of interest shall be six per centum per annum for such time as interest may accrue, and no more.

Code, s. 3835; 1895, c. 69; 1876-7, c. 91. **"Interest" defined:** Burwell v. Burgwyn, 100-392; Bledsoe v. Nixon, 69-91. **Legal rate of interest is six per cent:** Topping v. Windley, 99-10—**and no more can be allowed,** Ibid.

State not bound to pay interest unless it specially contracts to do so: Attorney General v. Navigation Co., 37-444.

How interest counted in case of partial payments stated in Reade v. Street, 122-301; Bunn v. Moore, 2-279.

Where contract made in one county to be performed in another, rate of interest will be according to law of latter: Roberts v. McNeely, 52-506—but where money loaned in Virginia on real estate in this state contract is governed by rate of interest in this state, Faison v. Grandy, 128-438—however, it is held that parties may stipulate otherwise, Arrington v. Gee, 27-590. Where contract for loan of money made in another state, it will bear rate of interest of such state, though note for amount loaned be executed in this state: Davis v. Coleman, 29-424.

Where interest payable at specific time, action lies for failure to pay, before maturity of obligation: Scott v. Fisher, 110-311.

On suit to enforce option, six per cent. being legal rate of interest properly allowed from time obligation matured, in absence of express stipulation in instrument for lower rate: Alston v. Connell, 145-1.

Under act authorizing collection of delinquent taxes, interest and penalties, no rate of interest being fixed therein, only six per cent. can be recovered: Wilmington v. Stolter, 122-395; Wilmington v. Cronly, 122-388.

For cases under section prior to amendment of same, see Trimble v. Hunter, 104-138; Hughes v. Boone, 102-137; Burwell v. Burgwyn, 100-392; Wilson v. Lineberger, 88-427.

Section merely referred to in Fisher v. Brown, 135-198; Faison v. Grandy, 126-829.

1951. Penalty for usury; corporate bonds sold below par. The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid, in an action in the nature of action for debt: Provided, that in any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it shall be lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to-wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest: Provided, further, that nothing contained in the foregoing section shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor for selling such bonds for less than the par value thereof. This section shall not apply to contracts executed prior to February twenty-first, one thousand eight hundred and ninety-five.

152-366

Code, s. 3836; 1895, c. 69; 1903, c. 154; 1876-7, c. 91. For limitation of actions, see section 396. For damages against officers for money unlawfully detained, see section 284. For special usury statute of New Hanover and Guilford counties, see 1905, c. 819.

Interest is a creature of statute, and usury has been unlawful from the days of Moses: Hughes v. Boone, 102-137. Section prohibits anyone, without exception, from exacting more than six per cent. for the loan of money: Meroney v. Loan Asso., 116-882. Purpose and effect of section is to make void, ipso facto, all agreements for usurious interest: Ward v. Sugg, 113-489; Bank v. Lineberger, 83-458. Where consideration for forbearance between creditor and principal debtor is usurious, such contract being void, agreement will not discharge surety or indorsee: Bank v. Lineberger, 83-454. Custom of merchants will not be permitted to modify usury laws: Gore v. Lewis, 109-539. Section not applicable to contracts entered into before its passage: Grant v. Morris, 81-150.

A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of the law: Faison v.

Grandy, 126-827, and cases cited—therefore a note embracing usurious stipulation is void as against maker, in hands of purchaser before maturity for value and without notice, to extent to which contract usurious: Ward v. Sugg, 113-489, overruling Coor v. Spicer, 65-401; Collier v. Nevill, 14-30.

As to jurisdiction of state courts over actions to recover penalty for taking usurious interest under statutes of United States, see Morgan v. Bank, 93-352; Bank v. Ireland, 122-576.

Where mortgage executed to secure usurious note, usury only affects interest and does not impair validity of mortgage: Spivey v. Grant, 96-214.

Provision in charter allowing corporation to lend money at usurious rate of interest does not confer power upon it to do so: Bank v. Manufacturing Co., 96-298—but provision to borrow money at such rate not liable to any objection, Ibid.

Contract not affected by usurious element if it is incorporated by mistake: Webb v. Bishop, 101-99.

Where usurious interest is reduced to and included in judgment, judgment can not be impeached as to that part, but is valid as to whole: Burwell v. Burgwyn, 105-498.

Section does not apply to contracts antedating its ratification: Roberts v. Life Ins. Co., 118-429—and right of plaintiff to recover on contract made prior to that time governed by section 3836 of the Code of 1883, Ibid.

A promise to pay usurious interest is void and can not be enforced: Erwin v. Morris, 137-48; see Banking Co. v. Tate, 122-317—and it makes no difference that principal stipulated for in one instrument and interest in another, Glisson v. Newton, 2-336.

History of usury laws discussed by Clark, C. J., in Tayloe v. Parker, 137-420.

For cases prior to amendment of section, see Elliott v. Sugg, 115-236; Moore v. Beaman, 111-328; Rogers v. Bank, 108-574; Cook v. Patterson, 103-127; Hughes v. Boone, 102-137; Webb v. Bishop, 101-99; Moore v. Cameron, 93-51; Dail v. Harper, 83-4; Grant v. Morris, 81-150; Bank v. Lutterloh, 81-143; Kidder v. McIlhenny, 81-123; Comrs. v. R. R., 77-289; Latham v. Bldg. and Loan Asso., 77-145; Coble v. Shoffner, 75-42; Simonston v. Lanier, 71-498; Pond v. Horne, 65-84.

WHEN CONTRACT USURIOUS. What constitutes usury is a question of law to be determined by court when facts not in dispute: Grant v. Morris, 81-150. Whether contract is usurious is a question to be determined by the laws of the state where the contract is made: Copeland v. Collins, 122-619; but see Hilliard v. Outlaw, 92-266.

Nature and terms of contract determine its character and purpose and if it be usurious in itself, it must be taken to have been so intended, and parties can not be heard to contrary: Burwell v. Burgwyn, 100-389.

In order to establish usury, jury must be satisfied by clear preponderance of proof not only that debtor has paid more than legal rate of interest, but that creditor at time he received same knew that it was usury, and that there was in mind of lender a wrongful intent and purpose to take more than lawful rate for use of money: Bennett v. Best, 142-168; Miller v. Ins. Co., 118-612; Yarborough v. Hughes, 139-199.

Agreement that person was to have one and one-half per cent. per

month (or 18% per annum) upon overdrawn sums is usurious as to excess for charge for overdrafts above legal rate of interest: Burwell v. Burgwyn, 100-389.

If security, founded upon antecedent lawful consideration, is tainted with usury, original demand will be revived and may be enforced: Rountree v. Brinson, 98-107.

Stipulation in note or mortgage for payment by mortgagor, or out of proceeds of sale, of attorney's fee in addition to principal and interest of note is evidence of usurious nature of transaction: Williams v. Rich, 117-235; Brisco v. Norris, 112-671; Tinsley v. Hoskins, 111-340.

Acceptance of any consideration, as here notes on other parties in payment of usurious interest, is in violation of section and will subject payee to penalty: Pritchard v. Meekins, 98-244.

If it is the intent or purpose of lender of money to get more than legal rate of interest for loan, and if there be a provision, condition or contingency in or connected with contract by which he may do so, transaction is usurious: Miller v. Ins. Co., 118-612; Yarborough v. Hughes, 139-199.

Where life insurance company loaned borrower money at full legal rate of interest, repayment being secured by mortgage on realty, and in addition required him to take from and reassign to it an endowment policy for sum equal to loan, upon which premiums should be paid for a term of years, or until his death, payment of premiums being also secured by mortgage, such transaction usurious: Miller v. Ins. Co., 118-612; Carter v. Ins. Co., 122-338.

Transaction between quasi-building and loan association and its borrowing stockholder is simply a loan, and is usurious where he is liable under certain circumstances to pay more than amount loaned and legal rate of interest: Meroney v. Loan Asso., 116-882.

Where person takes negotiable security and advances thereon, after deducting interest in advance up to date of maturity, a less sum than value, yet holding person advanced for full amount, the loan is usurious: Ballinger v. Edwards, 39-449; but see Bennett v. Best, 142-168.

Any charges made by building and loan associations against borrowing member in excess of legal rate of interest, whether such charges are called fines, dues or interest, are usurious: Hallowell v. B. & L. Asso., 120-286.

Fact that principal contracted for in one instrument and usury in another does not make any difference: Glisson v. Newton, 2-336.

Stipulation in mortgage that mortgagee should retain from proceeds of sale costs and charges, including commissions of five per cent. for making sale in addition to principal and interest due on debt, is not usurious in absence of proof of usurious interest, as provision is not part of consideration of loan: Howell v. Pool, 92-450.

Agreement entered into with full knowledge and with intent to pay and receive greater rate of interest than allowed by law, whereby it is stipulated that lender shall receive commission as consideration therefor, in addition to legal interest, is usurious: Arrington v. Goodrich, 95-462.

Mistake in construction of law, if it results in taking more than legal rate of interest, will render contract usurious: Collier v. Nevill, 14-30—

but error in fact by which more than legal rate is reserved will not vitiate, Ibid.

Wherever debtor by terms of contract can avoid payment of larger by payment of smaller sum at earlier day, contract not usurious: Moore v. Hylton, 16-429—for to constitute usury, obligation to pay more than legal interest must be absolute, Ibid.

Building and loan association calling borrower ''a partner'' or substituting ''redeeming'' for ''lending,'' or ''premium'' for ''bonus'' for an amount they profess to have advanced and yet withhold, or ''dues'' for ''interest,'' or any like subterfuge, will not avail to avoid usury laws: Mills v. B. & L. Asso., 75-292.

Usury consists in unlawful gain, beyond rate of six per cent. taken or reserved by lender, and not in actual or contingent loss sustained by borrower: Ehringhaus v. Ford, 25-522—and the proper subject of inquiry is what borrower is to pay for forbearance, Ibid.

Presumed that person taking bond embracing usurious interest knew what he was about, that there was no mistake, and that he did it knowingly and therefore corruptly: Dawson v. Taylor, 28-225.

Agreement to pay interest on note ''at rate of six per cent. per annum, to be compounded annually'' renders contract usurious: Cox v. Brookshire, 76-314.

Mere entry on account and subsequent presentation of usurious claim is not ''charging'' within the meaning of section: Grant v. Morris, 81-150.

Where payee of note, which is good as it originated, makes special contract for usurious interest afterwards, to forbear enforcing payment, it is special contract of forbearance which is usurious while original note remains untainted: Cobb v. Morgan, 83-211.

Transfer of money by debtor to creditor under contract for usurious interest can not be treated by courts as payment on principal debt, when it was not so intended by parties at time: Ibid.

Not usury for indorsee of note to take new note from maker at end of six months, payable immediately, including accrued interest: Holland v. Mosteller, 51-582. Negotiable instrument sold for cash at greater discount than six per cent. per annum is usurious: Bynum v. Rogers, 49-399. Taking interest by a bank upon discounting negotiable security, though payable directly to the bank, is not usurious: State Bank v. Hunter, 12-100.

Every attempt by bank to put upon borrower bank bills not its own and below par at that time and place is usurious, unless bank by contract of loan engage to make notes as good as cash: Bank of State v. Ford, 27-692.

Pure contract of indemnity against doubtful claim is not within section: Dowell v. Vannoy, 14-43.

''Time'' price charge of ten per cent. on cash price for supplies furnished under agricultural lien, being usual rate of advance, is not usurious: Churchill v. Turnage, 122-426.

To render person liable to penalty for usury it is not necessary to show that principal money has been paid: Seawell v. Shomberger, 6-200—for

offense complete when anything received for forbearance over and above rate of six per cent. per year, Ibid.

Where, upon usurious contract, lender receives from debtor in payment of principal and usurious interest note of third person, he renders himself liable to penalty for usury in same manner as if he had received payment in money: Cavaness v. Troy, 32-315.

Where charter of corporation allowed it to borrow money upon such terms as directors might determine upon, and to issue bonds or other evidences of indebtedness, it may sell bonds below face value and the loan is not usurious: Bank v. Mfg. Co., 96-298.

Provision in contract for payment of penalty for failure of borrower to ship certain cotton as agreed will not be adjudged usurious upon the face of the contract, but only upon proof aliunde of intent to make penalty a device for securing more than legal rate of interest: Elliott v. Sugg, 115-236.

Contract payable in another state to avoid usury law is usurious. Meroney v. Loan Asso., 112-842.

Interest upon interest due at specified time and not paid, is not usury: Scott v. Fisher, 110-311. Money loaned at interest to be paid in cotton, two and one-half per cent. commission allowed for selling, is not usurious: Elliott v. Sugg, 115-236.

BUILDING AND LOAN ASSOCIATIONS NOT EXEMPT. State usury laws apply to loans by foreign building and loan associations at home office: Rowland v. Building Asso., 115-825; Meroney v. Loan Asso., 116-882. Law will not aid defendant building and loan association or its individual corporators in effort to effect settlement of illegal transactions (here usurious): Dickerson v. Bldg. Asso., 89-37. There is no device or cover by which building and loan associations can take from those who borrow money more than legal rate of interest without incurring penalties of usury laws: Mills v. B. & L. Asso., 75-292; Hallowell v. B. & L. Asso., 120-286. In absence of special legislation, corporations are affected by usury law to same extent as natural persons: Comrs. v. R. R., 77-289. Inasmuch as general law fixes rate of interest at six per cent. per annum, no special act of legislature can be allowed to alter or change general law in this respect: Rowland v. Loan Asso., 116-877—hence chapter 444, acts of 1895, has not the effect of allowing charge by building and loan associations of greater rate than six per cent. per annum on loans, Ibid.

Building and loan associations calling borrower "a partner" or substituting "redeeming" for "lending," or "premium" for "bonus" for an amount they profess to have advanced and yet withhold, or "dues" for "interest," or any like subterfuge, will not avail to avoid usury laws: Mills v. B. & L. Asso., 75-292; Hallowell v. B. & L. Asso., 120-286.

Transaction between quasi-building and loan association and its borrowing stockholder is simply a loan, and is usurious where he is liable under certain circumstances to pay more than amount loaned and legal interest: Meroney v. Loan Asso., 116-882.

In accounting in action to foreclose mortgage given to secure loan by building and loan association, borrower should be charged with principal of loan, with legal interest, and credited with payments made on

account of principal, interest, fines and penalties: Rowland v. Loan Asso., 118-173—and be charged his pro rata part of expense account of association, Williams v. Maxwell, 123-586.

Where usury exacted and taken, all interest is thereby forfeited, and debtor becomes only liable for the principal: Cheek v. B. & L. Asso., 126-242; Smith v. B. & L. Asso., 119-249. Borrowing member of building and loan association who has paid usurious interest can recover twice the amount of usurious interest, so paid: Cheek v. B. & L. Asso., 126-242; Hallowell v. B. & L. Asso., 120-286—for in such case legal consequences follow irrespective of question of intent, Cheek v. B. & L. Asso., 126-242—and this though borrower is in pari delicto in transaction, Hallowell v. B. & L. Asso., 120-286.

Effect of contract where usury charged is simply a loan without interest; all payments made must be credited on principal, and, in addition, borrower entitled to recover, or have credited on debt, double the amount of payments made as interest within two years prior to action brought, Smith v. B. & L. Asso., 119-249.

LEX LOCI CONTRACTUS AS AFFECTING USURY. Where contract made in one state to be performed in another rate of interest will be governed by law of latter state: Roberts v. McNeely, 52-506—unless parties stipulate otherwise, Arrington v. Gee, 27-590. Where money loaned in Virginia upon land in this state, contract is governed by rate of interest in this state: Faison v. Grandy, 128-438. Where contract for loan of money made in another state, it will bear rate of interest of such state, though note for amount loaned be executed in this state: Davis v. Coleman, 29-424.

Contract made in another state stipulating for rate of interest legal in that state is not unlawful here: Houston v. Potts, 64-33; but see Morris v. Hockaday, 94-286—for whether contract usurious is question to be determined by laws of state where contract made, Copeland v. Collins, 122-619—though some cases hold that it is determined by laws of state where it is to be performed, Hilliard v. Outlaw, 92-266.

Where bond dated in this state, but had not specified place of payment, it is governed by the usury laws of this state: Morris v. Hockaday, 94-286—though if it appear that bond given for goods purchased in another state, rule would be different, Ibid.

In enforcement of mortgage on land, usury law of state in which land is will govern, security having been given for money to be used in state, though payment of loan in another state provided: Meroney v. Loan Asso., 116-882.

PENALTY FOR USURY. Forfeiture of interest is the decree of law but the forfeiture of interest only: Faison v. Grandy, 126-830. Section gives action to recover double amount of interest: Bank v. Ireland, 122-576; Cheek v. B. & L. Asso., 126-242.

In action to recover for overpayment of interest made by mistake, recovery can not be had for forfeiture of double the interest as penalty for usury: Gilliam v. Ins. Co., 121-369—since upon allegation of such overpayment by mistake, no legal implication arises that plaintiff is suing for forfeiture, Ibid.

In action to recover twice amount of interest paid, plaintiff entitled to recover back double entire interest paid at time of usurious transaction, and not merely double usurious excess, provided it occurred within two years before action brought: Tayloe v. Parker, 137-418.

Court of equity will not permit enforcement of usurious contract: Beard v. Bingham, 76-285.

PLEADING AND PRACTICE HEREUNDER. Payer of usurious interest may recover same in action for money had and received to his use: Cobb v. Morgan, 83-211—or by way of counterclaim when action brought for balance due on usurious contract, Ibid.

Plea of usury can be taken advantage of only by borrower or debtor, or other person directly connected with transaction upon whom burden of usury falls: Faison v. Grandy, 128-438.

In action to foreclose mortgage, in order to establish defense of usury it is competent for defendant to prove any declarations made by plaintiff, who is personal representative of deceased creditor, tending to prove that usurious interest paid: Bennett v. Best, 142-168.

For complaints held to be sufficient under section, see Smith v. B. & L. Asso., 119-249; Churchill v. Turnage, 122-426; Morgan v. Bank, 93-352. If usury pleaded, the facts which it is alleged constitute it must be specifically set forth so that court may see that, if true, transaction illegal: Rountree v. Brinson, 98-107. In action to recover usurious interest, it is immaterial whether debtor solicited extension of time upon his own suggestion of bonus, or whether creditor suggested usury: Tayloe v. Parker, 137-418.

In action to foreclose mortgage, mortgagor may show that consideration of bond secured by mortgage is tainted with usury: Arrington v. Goodrich, 95-462; Moore v. Beaman, 111-328; Gore v. Lewis, 109-539.

Where in action by borrower to restrain sale under mortgage, debt found to be usurious, lender still entitled to judgment for amount due on mortgage debt with legal interest and costs: Cook v. Patterson, 103-127.

In action to recover usurious interest paid by plaintiff to defendant, not necessary for plaintiff to account to defendant for legal rate of interest: Cheek v. B. & L. Asso., 127-121.

As to costs in action under section to recover double amount of interest paid, see Smith v. B. & L. Asso., 119-249.

Wife who is surety for husband, for money borrowed, can not sue lender or recover by way of counterclaim for usurious interest not paid by her: Meares v. Butler, 123-206.

To avoid bond on ground of usury, it must be shown to have been illegal ab initio: Wharton v. Eborn, 88-344—for, if good in its creation, can not be avoided by any subsequent usurious agreement, Ibid.

If usurious character of transaction not manifest upon face, but depends on facts and circumstances connected with transaction, as part of res gestae, it is question of fact as well as law, and should be submitted to jury: Miller v. Ins. Co., 118-612.

In an accounting in foreclsoure of mortgage given to secure usurious loan by building and loan association, borrower should be charged with principal of loan with legal interest, and credited with payments made on

account of principal, interest, fines and penalties: Rowland v. Loan Asso., 118-173.

In an accounting before referee in action by borrower against a bank, lender, where it appeared that bank charged usury for its various loans to plaintiff and such usury was paid by separate check at different times: Held, that it was not part of the account so as to be credited to plaintiff, but a separate matter which plaintiff could have recovered penalty for if suit brought in two years: Rogers v. Bank, 108-574.

In action of claim and delivery for certain property conveyed by chattel mortgage, defendant can set up defense of usury upon allegation that sole consideration of bond sued on was usurious interest, which had accrued upon certain other bonds executed by defendant to plaintiff: Moore v. Woodward, 83-531.

In proving usury, it is competent to prove facts and circumstances connected with the matter, amount actually paid, amounts actually due, and calculations made: Bennett v. Best, 142-168—but mere fact that amount received by debtor is less than apparent principal of debt, and treating amount thus received as true principal would render transaction usurious, will not alone constitute proof of usury, Ibid.

Where note and mortgage were admitted to be in consideration of debt due on prior mortgage, and it appeared that new mortgage debt exceeded old debt by several hundred dollars for which no consideration was proved, difference between true amount of old debt and amount of new mortgage usurious: Churchill v. Turnage, 122-426.

Usury must be paid in money or money's worth before an action can be maintained therefor: Rushing v. Bivens, 132-273; Stedman v. Bland, 26-296—and renewal of note given for usury does not amount to payment, Rushing v. Bivens, 132-273.

For time in which action against foreign corporation to recover usury must be brought, see Williams v. B. & L. Asso., 131-267, and cases cited: Roberts v. Ins. Co., 118-429.

Debtor seeking aid of court of equity will have usurious element eliminated from debt only upon his paying principal and legal rate of interest: Churchill v. Turnage, 122-426; Gore v. Lewis, 109-539; Carver v. Brady, 104-219; Cook v. Patterson, 103-127; Manning v. Elliott, 92-48; Purnell v. Vaughan, 82-134; Kidder v. McIlhenny, 81-123; Beard v. Bingham, 76-285; Ballinger v. Edwards, 39-449; McBrayer v. Roberts, 17-75—the only forfeiture enforced against creditor being excess of legal rate, Churchill v. Turnage, 122-426—but this rule not applicable when creditor comes into court, asking enforcement of usurious claim, Manning v. Elliott Bros., 92-48.

Where A. executed mortgage to B. to secure indebtedness of firm at and after certain time, and before that time there was other indebtedness due by firm to B. upon all of which usurious interest had been charged, A. can not be allowed rebate for usury so charged before she executed mortgage: Burwell v. Burgwyn, 105-498—she could only be affected by usurious interest charged after she became liable for debts of firm and then only to extent of her liability, Ibid—but where usurious interest reduced to and included in judgment, judgment can not be impeached as

to that part, but is valid as a whole, Ibid—and proceeds of sale of A's mortgaged land must be applied to discharge of mortgage debt rendered to judgment without regard to fact that part of it usurious, Ibid.

1952. Time from which it runs. Interest is due and payable on instruments, as follows:

1. Where the instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

2. All bonds, bills, notes, bills of exchange, liquidated and settled accounts, shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it be specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

3. All bills, bonds, or notes payable on demand, shall be held and deemed to be due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

4. All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

5. Bills of exchange which shall be drawn or indorsed in the state, and have been protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned.

Code, ss. 44, 45, 46, 47; 1899, c. 733, s. 17, sub-s. 2; R. C., c. 13; 1786, c. 248; 1828, c. 2. **Coupons, when detached from bond to which they were annexed, bear interest from time they were due and payable:** Burroughs v. Comrs., 65-234. **An order upon a county treasurer, signed by chairman of board of commissioners, bears interest fom time of demand of payment:** Yellowly v. Comrs., 73-164. **A note payable "with legal interest," bears interest from its date:** Gholson v. King, 79-162. **A bond or contract due at a certain time, "without interest" bears interest from maturity:** Dowd v. R. R., 70-468.

Method of computing interest in case of partial payments stated in Reade v. Street, 122-301; Aiken v. Cantrell, 127-416; Bunn v. Moore, 2 279.

1953. Guardian notes bear compound. Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian, shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him.

Code, s. 1592; R. C., c. 54, s. 23; 1762, c. 69; 1816, c. 925; 1868-9, c. 201, s. 29. **For additional annotations as to investment of ward's money and liability of guardian for compound interest, see under sections 1792 and 1808.**

GUARDIAN'S INVESTMENT OF WARD'S MONEY. Policy of section is to require investment by guardian to be secured by bond or note of some person in addition to borrower: Watson v. Holton, 115-36. Where guardian loaned ward's money to one member of firm for private purposes of latter, taking his bond, with borrower's partner as surety, both of whom solvent at that time but afterwards became insolvent, guardian not liable for loss, for in addition to borrower there was a person responsible for loan who might have remained solvent despite the insolvency of his partner, the borrower, Ibid. Guardian not bound to have money ready to pay ward when he comes of age, but ward bound to take bond in discharge of guardian which latter properly took and has not made his own by fraud or laches: Goodson v. Goodson, 41-238—for such a bond in truth belongs to ward, just as much as specific chattel, Ibid. As to assignment by guardian to third persons of bonds of ward, see Newsom v. Newsom, 40-122; Exum v. Bowden, 39-281; Fox v. Alexander, 36-340; Lockhart v. Phillips, 36-342; Powell v. Jones, 36-337.

Guardian having personal security for debt due ward may exchange such personal for real security, and if he does so bona fide he is not responsible to ward: Christmas v. Wright, 38-549.

Investments of ward's money are in guardian's discretion, as they are upon his responsibility: Gary v. Cannon, 38-64—and courts will never undertake to dictate to guardian of ward to whom he shall loan money, or how long he shall lend money to any particular person, Ibid..

For case under section dealing with losses caused by result of civil war, see Whitford v. Foy, 65-265.

If bond with two obligors, of whom principal solvent and surety doubtful, be accepted by guardian, he is liable if money lost: Hurdle v. Leath, 63-597.

Words "bond with sufficient security" defined: Hurdle v. Leath, 63-600.

GUARDIAN CHARGEABLE WITH COMPOUND INTEREST. In settlement of guardian's accounts he should be charged with compound interest on all moneys collected, or which he might have collected, for his ward: Latham v. Wilcox, 99-367. Interest not compounded against guardian for time when funds of ward remain in his hands after relation has ceased: Mitchell v. Robards, 17-478. Simple interest is to be computed against guardian in favor of ward from death of former, unless compound interest received: Ryan v. Blount, 16-382. Ordinarily guardian is to be charged with compound interest, but he may be exempted from it by proving that after suitable exertions he was unable to realize it: Ibid.

Guardian can only be charged with compound interest to death of his ward: Carr v. Askew, 94-194; Whitford v. Foy, 65-273—or marriage, Whitford v. Foy, 65-273—and from that time only bears simple interest, though if guardian received more he would be liable to pay it, Ibid.

Where same person executor of will and guardian of minor children, he is chargeable with compound interest from time administration of estate was, or might have been, concluded: Hodge v. Hawkins, 21-564—unless he can show special equitable circumstances to discharge him of such accountability, Ibid.

Guardians of lunatics are responsible for compound interest in same manner and to the same extent as guardians of infants: Spack v. Long, 36-426—and bonds, etc., payable to them as guardians, bear compound interest in same manner as bonds payable to guardians of infants, Ibid.

Upon marriage of feme ward, compound interest ceases and she has no right to demand same in settlement with guardian: Winstead v. Stanfield, 68-40; Whitford v. Foy, 65-273.

Guardian's primary duty is to invest trust fund, and he will be chargeable with interest in absence of proof that it remained in his hands unemployed without his fault: Wilson v. Lineberger, 88-416.

Rule for compounding interest upon notes due guardians is to make "annual rests," making aggregate of principal and interest due at end of particular year a capital sum bearing six per cent. interest, thence forward for another year, and so on: Little v. Anderson, 71-190; Ford v. Vandyke, 33-227.

Section merely referred to in Rowland v. Thompson, 73-517; Smith v. Gilmer, 64-548; Williamson v. Williams. 59-65. For old case under section, see Wood v. Brownrigg, 14-430.

1954. Contracts, except penal bonds and judgments to bear; jury to distinguish principal from. All sums of money due by contract of any kind whatsoever, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it be paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section.

Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 314, s. 4; 1807, c. 721. Upon money contract in this state plaintiff entitled to have six per cent. by way of interest, to be ascertained either by jury or clerk, as mere matter of calculation: Houston v. Potts, 65-41.

When verdict gives interest from maturity, judgment can fix date from admitted contract sued on: Penniman v. Alexander, 112-778.

Interest is chargeable from time of subscription to stock of corporation until paid: Cotton Mills v. Burns, 114-353.

Judgment bears interest from time of rendition till paid: McNeil v. R. R., 138-1; Stephens v. Koonce, 103-266; Deloach v. Worke, 10-36.

Where bond on other investment for payment of money does not specify on face that interest is to be paid, interest is in nature of damages, and payment of principal money will bar action for interest: King v. Phillips, 95-245—but where interest stipulated for in contract itself, it becomes part of debt, and may be recovered, though principal sum has been paid, Ibid.

Where definite amount ascertained to be due distributee upon settlement

of estate, and ordered to be paid, no demand necessary before suit brought to entitle him to interest on amount from date of decree: McRae v. Malloy, 87-196.

Where person orders another, who is indebted to him, to pay balance to third person, interest should be computed on such balance from day order presented: Brem v. Covington, 104-589.

Although allowance of interest in action for damages for conversion of property is discretionary with jury: Stephens v. Koonce, 103-266—yet, after verdict judgment for damages assessed bears interest by virtue of section, Ibid—and this is so though verdict for certain sum "without interest," Ibid.

Judgment for taxes should include interest on amount due: Wilmington v. McDonald, 133-548; see also Wilmington v. Cronly, 122-388; Wilmington v. Stolter, 122-395.

Recovery upon penal bond can not exceed penalty named therein, though excess is for interest on amount of defalcation after breach of bond: Sewing Machine Co. v. Seago, 128-158.

Where judgment by default and inquiry, and on inquiry jury responded to issue that certain amount due, it was error to add interest to amount so found for time elapsed prior to inquiry: Williams v. Lumber Co., 118-928—as such interest presumed to have been included in verdict as rendered, Ibid.

As law implies contract on part of tenant in common in possession and in sole enjoyment of common property to account with co-tenants for rents and profits, he is chargeable with interest from date of demand or suit brought: Jolly v. Bryan, 86-462.

Interest is not allowed as a matter of law in action of claim and delivery, as section does not embrace such cases: Patapsco v. Magee, 86-350—but jury may, in discretion and as damages, allow interest upon value of property from time it was taken, Ibid.

Widow entitled to interest upon judgment against personal representative of deceased husband for amount covering deficiency of personal estate so as to make up total sum allowed her as year's support: Long v. Long, 85-415.

Where in action to recover value of tract of land, amount of damages bears interest from time it fell due by contract of sale: Farmer v. Willard, 75-401.

Judge has no right to leave it to jury to give plaintiff interest or not, as they should think proper: Barlow v. Norfleet, 72-535—but should instruct them that if they found that defendant owed the principal money demanded, plaintiff was entitled to interest from time it was due, Ibid.

As to proper judgment upon penal bond, see Wall v. Covington, 83-144; Trice v. Turrentine, 35-212.

Design of section to allow plaintiff interest on principal sum recovered from time judgment rendered: Deloach v. Worke, 10-36—and jury must distinguish between principal and interest where whole sum assessed in damages, but where principal and interest are discriminated on record, or by inspection of record it can be collected what principal is, interest shall be calculated on that, Ibid.

Amount of judgment should be calculated up to first day of term at which rendered and principal thereof should bear interest from such time until paid: Reade v. Street, 122-301.

In actions for money loaned, or money paid or had and received or due on account stated, jury should be instructed to allow interest, promise to pay being implied from nature of transaction: Devereux v. Burgwin, 33-490—and in trover and trespass de bonis asportatis jury may, in their discretion, allow interest upon value from time of conversion or seizure, Ibid.

In action for breach of warranty, plaintiff not entitled to interest upon amount recovered: Lewis v. Rountree, 79-122; but see Kester v. Miller, Bros., 119-475.

Interest is allowed upon items of independent account when used as set-off or counterclaim to extinguish or reduce debt: Overby v. B. & L. Asso., 81-56—but not upon payments as such, whose effect is to reduce pro tanto sum due, interest being first discharged, Ibid.

Where property destroyed by wilful act of another, jury may give interest on value of property destroyed fom time of its destruction: Rippey v. Miller, 46-479.

Penalty imposed upon sheriffs and tax collectors for failure to settle with county treasurer does not bear interest: Davenport v. McKee, 98-500.

General rule for interest on accounts in ordinary dealings is that it is chargeable only after account has been rendered: Holden v. Peace, 39-223—unless otherwise agreed, or course of business shows it to be otherwise understood, Ibid.

Verdict allowing "interest to date" in a case where proof is that principal sum was due in April, 1876, is sufficiently definite as to time for which computation is to be made: Greenleaf v. R. R., 91-33.

Where compromise judgment was entered whereby legatees named in will were to receive certain amounts in settlement of their legacies which were ordered to be paid by administrator c. t. a. thereafter to be appointed, judgment was not such as would, under section, draw interest from date: Moore v. Pullen, 116-284.

Interest is not allowed when not in contemplation of parties: Vick v. Vick, 126-127. Interest may be allowed as equitable set-off against use, under parol of land: Pass v. Brooks, 125-129. Interest must not be calculated on interest: Aiken v. Cantrell, 127-416. Interest can not be added to penalty of bond: Machine Co. v. Seago, 128-158. Under section interest can not be charged sureties on penalty of administrator's bond: Moseley v. Johnson, 144-274. Administrator who did not use funds is not chargeable with interest: Coggins v. Flythe, 113-102. Assignee should collect interest on debts over one year old: Weisel v. Cobb, 118-11. Interest is offset by rents in action for quiet enjoyment: Wyche v. Ross, 119-174. On false warranty as to quality, interest is chargeable from date of delivery: Kester v. Miller Bros., 119-475. How interest computed in case of partial payments stated in Reade v. Street, 122-301; Aiken v. Cantrell, 127-416; Bunn v. Moore, 2-279.

In action by shipper to recover from carrier money wrongfully received

by reason of illegal freight charge, amount of overcharge draws interest Lumber Co. v. R. R., 141-171.

In action for damages for conversion jury may allow interest on amount of damages from time of conversion: Lance v. Butler, 135-419—but verdict being for value of property at time of conversion, interest can only begin from time of judgment, Ibid.

1955. After verdict or report, computed by clerk. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

Code, s. 529.

1956. Judgment by default final, clerk ascertains. Whenever a suit shall be instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant shall not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by section one thousand nine hundred and fifty-four.

Code, s. 531; R. C., c. 31, s. 91; 1797, c. 475. **As to power of court to correct mistake of clerk in calculation of interest under section,** see Griffin v. Hinson, 51-154.

Section merely referred to in Rogers v. Moore, 86-86; Parker v. Smith, 64-291; Hartsfield v. Jones, 49-312.

CHAPTER 45.

JURORS.

I. How Selected.

1957. List made by county commissioners. The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence.

A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such.

149-519

1899, c. 729; Code, ss. 1722, 1723; 1897, cc. 117, 539; 1889, c. 559; 1806, c. 694. **For special act relative to Johnston County, see 1907, c. 209.**

Provisions of section as to revision of jury list directory only: State v. Teachey, 138-587; State v. Daniels, 134-648; State v. Dixon, 131-810; Moore v. Guano Co., 130-235; State v. Perry, 122-1018; State v. Smarr, 121-669; State v. Stanton, 118-1182; State v. Hensley, 94-1027; State v. Martin, 82-672; State v. Griffice, 74-319; State v. Haywood, 73-437; State v. Seaborn, 15-310—**as are provisions as to making up jury list,** State v. Daniels, 134-648; State v. Fertilizer Co., 111-660—**also regulations as to time, place and manner of drawing jury,** Moore v. Guano Co., 130-235; State v. Smarr, 121-669—**and failure to observe same does not vitiate venire in absence of bad faith or corruption on part of commissioners,** State v. Dixon, 131-810; State v. Perry, 122-1018; State v. Smarr, 121-669; State v. Stanton, 118-1182; State v. Fertilizer Co., 111-658; State v. Martin, 82-672.

Irregularity of commissioners failing to make prepayment of taxes a qualification for persons on jury list is not ground for quashing indictment found by grand jury drawn therefrom: State v. Daniels, 134-641; State v. Fertilizer Co., 111-659—**and merely purging jury list of names of those who have not paid taxes, without adding any new names thereto, does not vitiate venire in absence of fraud or corruption on part of commissioners,** State v. Dixon, 131-808—**moreover where commissioners laid aside names of several persons otherwise qualified because they did not know whether they were residents of county, and list completed by names of other qualified persons, held, that if there was irregularity, it did not affect action of jurors drawn and summoned,** State v. Wilcox, 104-847.

Only qualifications for jury service are payment of taxes for preceding year, good moral character and sufficient intelligence: State v. Peoples, 131-788; State v. Sherman, 115-774; State v. Edens, 85-524—**and, if on original panel, juror not required to be freeholder,** Hall v. Whitehead, 115-29; State v. Freeman, 100-432; State v. Mills, 91-593; State v. Wincroft, 76-38.

Juror must be twenty-one years of age, State v. Griffice, 74-316—**and must have paid taxes for fiscal year next preceding time when name placed on jury lists:** State v. Sherman, 115-773; State v. Davis, 109-780; State v. Gardner, 104-739; State v. Hargrave, 100-484; Sellers v. Sellers, 98-13; State v. Haywood, 94-847; State v. Carland, 90-673—**though where sheriff enjoined from collection of tax, failure to pay same no disqualification,** State v. Heaton, 77-505. **Juror of original panel is not disqualified though he has served on jury in same court within two years,** State v. Brittain, 89-481. **No objection to tales juror that name does not appear on jury list:** Lee v. Lee, 71-139. **Ground for objection to indictment that grand jurors who found bill had not paid taxes for preceding year:** State v. Watson, 86-624; State v. Griffice, 74-316—**though indictment will not be quashed because jury list from which grand jury drawn**

failed to contain names of all persons in county qualified to act as jurors, State v. Haywood, 73-437.

Competency of grand juror depends upon competency at time of service, not at time when name put on list: State v. Perry, 122-1018; State v. Wilcox, 104-847.

Findings of court as to whether challenged juror had paid taxes is final and not reviewable: State v. Carland, 90-668; State v. Wincroft, 76-38.

Only exemptions from jury service are those prescribed by section 1980: State v. Cantwell, 142-604.

Section merely referred to in State v. Vick, 132-996; State v. Sharp, 110-607; Boyer v. Teague, 106-619.

1958. Names put in boxes. The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

Code, s. 1726; 1868-9, c. 9, s. 5. For manner of drawing jury in Guilford, see 1905, c. 613; in Johnston county, see 1907, c. 205. Partitions of jury box marked "jurors drawn" and "jurors not drawn" instead of "No. 1" and "No. 2" and only one key which unlocked both partitions, and same in custody of register: Held, special venire drawn therefrom was legal: State v. Potts, 100-457—and failure of sheriff, chairman and clerk of commissioners to keep box locked is not grounds for challenge to array, State v. Hensley, 94-1021.

Section merely referred to in State v. Peoples, 131-784.

1959. Drawn from box, how. At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1 by a child not more than ten years of age, thirty-six scrolls (in Cumberland county the commissioners may, in their discretion, cause to be drawn from the jury box an additional twelve scrolls), except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls, and the persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn, and the scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the

second week (except in the counties of Iredell and Rowan, where twenty-four jurors shall be drawn, and except in Hertford county, where fifteen extra jurors shall be drawn), and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service; and the trial jury which has served during each week, shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined. hTe said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned.

Code, ss. 1727, 1731; 1889, c. 559; 1897, c. 117, 1868-9, c. 175; 1868-9 c. 9, s. 6; 1806, c. 694; 1901, c. 636; 1901, c. 28, s. 3; 1903, c. 11; 1905, cc. 38, 76, s. 4; 1905, c. 285. For special act for Buncombe county, see 1907, c. 239. Provision of section requiring persons named on scrolls drawn from jury box to constitute jury is mandatory: Moore v. Guano Co., 130-229—but provision fixing number of jurors to be drawn is directory, State v. Watson, 104-735—and indictment will not be quashed for failure to observe them where it does not appear that there was cor rupt motive, Ibid.

Where sheriff, who was defendant in action to be tried, received scrolls as drawn, called names and passed same into locked box, without submitting scrolls to the inspection of commissioners: Held, drawing irregular and array set aside, Boyer v. Teague, 106-576—though where commissioners, while drawing jurors, laid aside several names, otherwise qualified, because they did know whether they were residents of county, and jury list completed by names of other qualified persons: Held, same did not affect action of jurors so drawn and summoned, State v. Wilcox, 104-847.

No constitutional limitation upon powers of legislature to prescribe method by which jurors are to be selected and summoned: State v. Brittain, 143-668.

Grand juries are essential constitutional constituents appertaining to system of superior courts and may not be discontinued by county commissioners under legislative enactment of 1899, chapter 371: Mott v. Comrs., 126-866.

Mandamus is proper remedy to force county commissioners to draw jury for the term, and solicitor is proper party to apply for same: Ibid.

Drawn by commissioners instead of by boy under ten, challenge to array sustained: Moore v. Guano Co., 130-229.

Section merely referred to in State v. Peoples, 131-785; Leach v. Linde, 108-550; State v. Gardner, 104-742; Sellers v. Sellers, 98-17—and, as incidentally bearing upon section, see State v. Teachey, 138-587.

1960. Jurors with suits pending. If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls

with their names must be returned into partition No. 1 of the jury box.

Code, s. 1728; 1868-9, c. 9, s. 7; 1806, c. 694. Where juror has suit pending and at issue in court it is fundamental objection to him whenever made to appear: Hodges v. Lassiter, 96-351—and is cause of challenge, though commissioners allowed name to go on venire, Ibid—but fact that juror has suit pending but not at issue at term at which drawn to serve is not disqualification, State v. Smarr, 121-669. 109-549

Grand juror not disqualified because he has civil action pending in another court of county, State v. Edens, 85-525—though fact that grand juror had suit pending and at issue in same court is ground for motion to quash indictment, State v. Gardner, 104-739; State v. Smith, 80-410; State v. Liles, 77-496.

In order to disqualify juror, suit must be at issue, Hodges v. Lassiter, 96-351—and where indictment against juror pending to which he had never pleaded, held not disqualified by section even if same applicable: Hodges v. Lassiter, 96-351. Where judgment rendered in action to which juror was party at same term, from which appeal taken, though same not perfected, held same was suit pending and at issue, Wilson v. Hughes, 94-182. Juror not disqualified by fact that he has suit pending and at issue in court unless it is to be tried at same term at which he is drawn to serve: State v. Spivey, 132-989. Juror is not party to action pending and at issue in court, though interested as creditor in fund for which receiver has brought suit: Vickers v. Leigh, 104-260—though on prosecution bond of another plaintiff in another action, though against same defendant on similar cause of action, Jenkins v. R. R., 110-438—though prosecutor in criminal action, State v. Brady, 107-827.

Quaere whether section applicable to indictments: Hodges v. Lassiter, 96-351.,

Regulations of section as to revision of jury list directory only: State v. Dixon, 131-810; State v. Perry, 122-1018—and failure to observe same does not vitiate venire in absence of bad faith or corruption on part of commissioners, Ibid.

Section merely referred to in State v. Sharp, 110-607; State v. Parish, 104-687.

1961. When disqualified persons are drawn. If any of the persons drawn to serve as jurors be dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; 1806, c. 694.

1962. How drawing to continue. The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

Code, s. 1730; 1868-9, c. 9, s. 9; 1806, c. 6, s. 94. **Where, in drawing grand jury, names of some drawn and put back in box and others drawn instead to equalize number among townships, held not grounds for challenge to array, as section merely directory:** State v. Martin, 82-672. **There is no restriction upon powers of legislature to regulate manner in which jurors shall be selected and summoned:** State v. Brittain, 143-668.

Section merely referred to in State v. Peoples, 131-785; Boyer v. Teague, 106-619.

1963. When commissioners fail to draw jury. If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners in the presence of, and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed; and if a special term shall continue for more than two weeks, then for the weeks exceeding the two, a jury or juries may be drawn as in this section provided.

Code, s. 1732; 1868-9, c. 9, s. 11. **Where commissioners fail to draw jury for third week of court, and court orders same drawn as prescribed by section, such jury is legal:** Leach v. Linde, 108-547—**though sheriff not required to act unless commissioners neglect to draw jury,** Boyer v. Teague, 108-619—**and then duty devolves upon him, clerk of commissioners and two justices of the peace,** Ibid.

II. Petit Jurors and Talesmen.

1964. Peremptory challenges. The clerk, before a jury shall be impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily four jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court.

Code, s. 406; R. C., c. 31, s. 35; 1796, c. 452, s. 2; 1812, c. 833. **Party has right to reject jurors but not to select them:** State v. Sultan, 142-574; State v. Register, 133-750; Dunn v. Railroad, 131-447; State v. McDowell, 123-764; State v. Jacobs, 106-695; State v. Jones, 97-469; State v. Hensley, 94-1021; State v. Gooch, 94-987; State v. Smith, 24-402; State v. Arthur, 13-217—**and to secure fair and impartial jury to try cause,** State v. Jones, 97-469; State v. Hensley, 94-1021; State v. Gooch, 94-987. **Exception of party to eligibility of juror can not be sustained where he has not exhausted his peremptory challenges:** Hodgin v. R. R., 143-93; State v. Sultan, 142-569; State v. Bohanon, 142-695; Ives v. R. R., 142-131; State v. Teachey, 138-587; State v. Register, 133-750; State v. Kinsauls, 126-1095; State v. Brogden, 111-657; State v. Pritchett, 106-667; State v. Potts, 100-457; State v. Freeman, 100-429; State v. Jones, 97-469; State v. Hensley, 94-1021; State v. Gooch, 94-987; State v. Brit-

tain, 89-504; Caperhart v. Stewart, 20-101; Whitaker v. Carter, 26-461; State v. Arthur, 13-217.

Party's reason for peremptorily challenging juror can not be inquired into: Dupree v. Ins. Co., 92-417—as law gives litigant right to object to limited number of jurors without assigning cause, Ibid. **Where jury has been accepted by parties, it is error to allow peremptory challenges to be made:** Dunn v. R. R., 131-446.

Challenge must be made before empaneled: Baxter v. Wilson, 95-137; State v. Williams, 66-126.

Whether there are one or more plaintiffs or defendants, only four peremptory challenges on each side allowed: Bryan v. Harrison, 76-360; but see section 1965.

No peremptory challenge allowed after juror has been passed and accepted: Dunn v. R. R., 131-447; State v. Fuller, 114-885.

For peremptory challenges in criminal cases, see section 3263 and 3264.

1965. Peremptory challenges apportioned between defendants. When there are two or more defendants in a civil action the judge presiding at the trial, if it appears to the court that there are divers and antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law to defendants, or he may increase the number of challenges to not exceeding four to each defendant or class of defendants representing the same interest: Provided, in either event the same number of challenges shall be allowed each defendant or class of defendants representing the same interest: Provided further, that the decision of the judge as to the nature of the interests and number of challenges shall be final.

1905, c. 357. **See also section 3264.**

1966. Sworn; judge decides competency. The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be sworn; and the petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths: Provided, that nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror shall be withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors, and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions.

Code, s. 405; R. C., c. 31, s. 34; 1790, c. 321; 1822, c. 1133, s. 1. **Objection to manner of summoning jury should be taken by challenge to array:** State v. Douglass, 63-500. **Tales jurors must be taken from bystanders qualified to act as jurors:** Hale v. Whitehead, 115-29—**but per-**

sons not bystanders in court may be summoned as talesmen, for when they come in they are bystanders, State v. McDowell, 123-764; State v. Lamon, 10-175. It is duty of court to see that jurors are competent, fair and impartial: State v. Boon, 80-461.

In criminal case, solicitor for state said: "If any member of jury has formed and expressed an opinion that prisoner is not guilty, let it be known." No juror answering thereto, prisoner thereupon admits the cause as a challenge to the array: Held, not a challenge to the array: State v. Walker, 145-567.

CHALLENGES FOR CAUSE. Judge determines facts as well as legal sufficiency of challenge based upon them: State v. Kilgore, 93-533. Rulings of law by court on challenge for cause are subject to review, State v. Vick, 132-995—though findings are conclusive, State v. Vick, 132-997—as are also findings of fact and law on challenges to the favor, Ibid; State v. Green, 95-611. Finding of judge that juror is indifferent is not reviewable: State v. Register, 133-746; State v. Kinsauls, 126-1095; State v. Potts, 100-457.

Challenge for cause must be made in apt time: State v. Lambert, 93-618; State v. Boon, 80-461. Too late for challenge where juror accepted by prisoner and served on trial: State v. Lambert, 93-618. Discretionary with court to permit juror to be challenged for cause after being tendered to defendant and before jury empaneled: State v. Green, 95-611; see Dunn v. R. R., 131-449. Court may excuse juror, before empaneled, though solicitor has passed him to prisoner, and has not challenged him for cause: State v. Vick, 132-995.

Where general question was asked if any juror had formed and expressed an opinion that plaintiff ought not to recover, and one juror responded that he had, but added, on being questioned, that "notwithstanding such expression of opinion I can try case impartially according to evidence and charge of court:" Held, his honor properly found him to be a competent juror: Dunn v. R. R., 131-446; State v. Bohanon, 142-695; State v. Potts, 100-457; State v. Efler, 85-585; State v. Collins, 70-241.

A tales juror called on a trial in April, 1894, is not disqualified because he had not paid his taxes for 1893, he having paid them for 1892: State v. Sherman, 115-773—but where he has not paid his taxes for fiscal year preceding first Monday in September next before time he is called on to serve, he may be excluded on being challenged: State v. Hargrave, 100-484.

Discretionary power of judge as to challenge is limited to "challenges for cause," and he can not extend time for peremptory challenges: State v. Fuller, 114-885; Dunn v. R. R., 131-446.

A tales juror must have same qualifications as regular juror with the additional one of being a freeholder: Hale v. Whitehead, 115-29; State v. Hargrave, 100-485; State v. Sherman, 115-773—and the finding by trial judge that juror is not a freeholder is conclusive on appeal, State v. Register, 133-746.

Tenant by courtesy initiate is a freeholder: Hodgin v. R. R., 143-93; Thompson v. Wiggins, 109-508; State v. Mills, 91-581—as is mortgagor in possession of freeholder, State v. Ragland, 75-12—but one who holds

license to lay off oyster and clam bed in waters of state is not a freeholder, State v. Young, 138-571.

1967. Tales jurors summoned; qualifications. That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. It shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of the court.

Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 156, s. 69. **Tales juror must have same qualifications as regular juror with additional one of being a freeholder:** Hale v. Whitehead, 115-29; State v. Sherman, 115-773; State v. Hargrave, 100-485; State v. Carland, 90-668; State v. Whitley, 88-691—**and must own real estate in county where court sits,** State v. Cooper, 83-671—**but tenant by courtesy initiate is freeholder,** Hodgin v. R. R., 143-93; Thompson v. Wiggins, 109-508; State v. Mills, 91-581—**as is mortgagor in possession of freehold,** State v. Ragland, 75-12—**though juror who holds license to lay off oyster and clam bed in waters of state is not freeholder,** State v. Young, 138-571. **Freeholder defined in** State v. Ragland, 75-12; see also State v. Hensley, 94-1021.

Tales juror must have paid taxes for preceding year: State v. Hargrave, 100-484.

Only tales jurors come within provisions of section disqualifying jurors who have acted in same court within two years: Hale v. Whitehead, 115-29; State v. Whitfield, 92-831; State v. Brittain, 89-481. **To disqualify them it must appear that they were not only summoned but acted as jurors in same court within two years,** State v. Whitfield, 92-831; State v. Outerbridge, 82-617; State v. Howard, 82-623; State v. Thorne, 81-555—**but juror of original panel can not be challenged upon such grounds,** State v. Brittain, 89-481.

Persons not bystanders in court may be summoned as talesmen, for when they come in they are bystanders: State v. McDowell, 123-764; State v. Lamon, 10-175. **No objection to tales juror that name does not appear on list made out by county commissioners,** Lee v. Lee, 71-139.

Exemption of members of fire company from jury service in general does not discharge them from service as talesmen: State v. Willard, 79-660, **and, as bearing upon question of exemption releasing from service as tales jurors, see** State v. Williams, 18-372; State v. Hogg, 6-319.

Court may order any number of talesmen necessary: State v. Lamon, 10-175.

Section merely referred to in State v. Sharp, 110-607; Boyer v. Teague, 106-621; State v. Wincroft, 76-39; State v. Benton, 19-201.

1968. Judge to appoint one to summon tales jurors, sheriff interested. In the trial of any action before a jury where the sheriff

of the county in which the case is to be tried is a party to or has any interest in the action, or where the presiding judge shall find upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff.

1889, c. 441. **Court has power to appoint suitable person to summon jury from bystanders, where array set aside for iregularity of sheriff in drawing jury, sheriff being party to action:** Boyer v. Teague, 106-576.

III. Grand Jurors.

1969. How drawn. The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

Code, s. 404; R. C., c. 31, s. 33; 1779, c. 157, s. 11. For special terms, see section 1515.

146-604

1970. Exceptions to, when taken. All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken the same shall be deemed to have been waived.

Code, s. 1741. **Motion to quash allowed where persons of negro race excluded from grand jury solely on account of color, and defendant is a colored man:** State v. Peoples, 131-785—**where grand juror failed to pay taxes for preceding year,** State v. Fertilizer Co., 111-659; State v. Griffice, 74-316—**where one of grand jurors who found bill at time a suit pending and at issue in same court,** State v. Gardner, 104-739; State v. Smith, 80-140—**where one of grand jurors under age of twenty-one years at time of finding bill,** State v. Griffice, 74-321.

Motion to quash not allowed on ground that prepayment of taxes was not made qualification for persons on jury list from which grand jury found: State v. Daniels, 134-641; State v. Fertilizer Co., 111-658—**that son of prosecutor was member of grand jury and actively participated in finding bill,** State v. Sharp, 110-604—**that it appeared that jury list from which grand jury drawn did not contain names of all persons in county qualified to act as jurors,** State v. Haywood, 73-437.

Motion to quash must be made in apt time: State v. Gardner, 104-739; State v. Haywood, 94-847; State v. Griffice, 74-316; State v. Seaborn, 15-305—**which is before plea,** State v. Watson, 86-624; State v.

Baldwin, 80-390; State v. Griffice, 74-316—and if motion made before plea, defendant has right to have same granted, State v. Gardner, 104-739; State v. DeGraff, 113-688—if made after plea but before jury empaneled, it may be granted in sound discretion of court, Ibid—but if motion not made till after jury sworn, objection deemed to be waived: State v. Gardner, 104-739.

When motion to quash for disqualification of grand juror is made after plea and declined without assignment of reason, it is presumed it was declined in the discretion of the court, hence no appeal will lie: State v. DeGraff, 113-688.

Regular way of making objection where facts appear on face of record is by motion to quash: State v. Haywood, 94-847—but where same do not appear on record, objection should be taken by plea in abatement, Ibid—though distinction not held to be important now, and motion to quash permitted in either case, Ibid.

Plea in abatement filed before pleading generally to indictment, is proper way to raise question of qualification of an individual grand juror: State v. Sharp, 110-604; but see State v. Haywood, 94-847—though such plea will not be sustained, unless shows want of some positive qualification prescribed by law, State v. Sharp, 110-604—and all other objections to competency of grand jurors must be taken by challenge in apt time, Ibid.

Plea in abatement, on grounds of incompetency of one of grand jurors, put in after pleading to indictment, is not in apt time: State v. Potts, 100-457.

An act of legislature making concurrence of nine members of grand jury sufficient, is unconstitutional: State v. Barker, 107-913.

Defendant is not required to show affirmatively that grand juror, who was disqualified by having suit on docket, was actually present and participated in deliberations of grand jury when bill found: State v. Smith, 80-410. No evidence of disqualification is necessary when court refuses motion to quash solely on ground that it is too late: State v. Haywood, 94-847. Juror not disqualified for nonpayment of tax for preceding year where he was not liable to tax: State v. Perry, 122-1018. No disqualification for grand juror that he is not a freeholder: Ibid. Burden of showing disqualification of juror is upon the defendant, Ibid. Fact that grand juror was a minor when his name put upon jury list is immaterial if he was of age at time he served: Ibid.

Omission of foreman to mark on indictment names of witnesses sworn and examined is no ground for quashing bill: State v. Hines, 84-810.

If a minor serves on grand jury, a plea in abatement would lie as to all bills in whose finding he took part: State v. Perry, 122-1021.

Certificate on back of bill of indictment not appearing to have been signed by foreman is not ground for motion to quash: State v. Long, 143-670.

1971. Foreman may administer oaths. The foreman of every grand jury duly sworn and impaneled in any of the courts shall have power to administer oaths and affirmations to persons to be

examined before it as witnesses: Provided, that the said foreman shall not administer such oath or affirmation to any person except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court: Provided further, that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury.

Code, s. 1742; 1879, c. 12. Authority of foreman to swear witness to be examined before grand jury does not oust such power of clerk of court: State v. White, 88-698; State v. Allen, 83-680. Judge has no power to require grand jury to have state's witnesses examined publicly, State v. Branch, 68-186.

Record stated that persons impaneled as grand jurors, among whom was the one appointed foreman, were "duly drawn, sworn and court, having appointed J. P. foreman, are charged:" Held, that it is sufficiently appeared that foreman had been properly drawn and sworn, State v. Weaver, 104-758.

Recital that "jurors upon their oath present, etc.," raises presumption, when accompanied by indorsement "a true bill," signed by foreman, that it was duly returned and presented in open court: State v. Weaver, 104-758.

The indorsement "a true bill" raises presumption that every member of grand jury concurred in finding it: State v. McNeill, 93-552.

One defendant can not be examined against his co-defendant for purpose of obtaining true bill against both: State v. Krider, 78-481.

A presentment need not be signed by anyone; it is the returning of indictment in open court and it's being there recorded that makes it effectual: State v. Cox, 28-440.

Not ground to quash indictment that blank space after "thus" in certificate "witnesses whose names are marked thus, were sworn and examined" was not filled in with cross-mark or check: State v. Sultan, 142-569; State v. Sheppard, 97-401—as requirement that foreman shall mark on bill names of witnesses sworn and examined is merely directory, State v. Hollingsworth, 100-535; State v. Hines, 84-810—and indorsement upon back of indictment forms no part of record, State v. Sheppard, 97-401.

Where it does not appear by indorsement on bill that witnesses were sworn and examined, it is no ground for motion to quash indictment where proof is that witnesses were sworn: State v. Hollingsworth, 100-535; State v. Sheppard, 97-401; State v. Hines, 84-810—or for motion in arrest of judgment after verdict, State v. Sheppard, 97-401—and motion in arrest of judgment will not be sustained where it does not appear from indorsement on indictment that witnesses were sworn before sent to grand jury, State v. Roberts, 19-540.

Not necessary that it should appear that state's witnesses sent before jury by solicitor: State v. Frizell, 111-722.

No indorsement on bill of indictment by grand jury necessary: State v. Long, 143-676; State v. Sultan, 142-569, overruling State v. McBroom,

127-528—and record that it was presented by grand jury is sufficient in absence of evidence to impeach it, State v. Sultan, 142-569; State v. Guilford, 49-83; State v. Cox, 28-440; State v. Calhoon, 18-376; and as bearing upon same, see State v. Harwood, 60-226; State v. Roberts, 19-540. Indictment need not necessarily be signed by anyone, State v. Mace, 86-668; State v. Cox, 28-440; State v. Calhoon, 18-374.

The foreman can excuse a grand juror for the term: State v. Perry, 122-1022.

Section merely referred to in State v. Ivey, 100-540.

1972. Must visit jail and county home. Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3.

IV. Special Venire.

1973. Ordered; summoned. Whenever a judge of the superior court shall deem it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be, a special writ of venire facias commanding him to summon such number of the freeholders of said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when the same shall be returnable, with the names of the jurors summoned.

Code, s. 1738; R. C., c. 35, s. 30; 1830, c. 27. Discretionary with judge to order special venire in capital cases: State v. Brogden, 111-656. Special venire ordered hereunder only where person charged with capital offense: State v. Bullock, 63-570. Where on trial for murder, solicitor states he will only ask for verdict of manslaughter, no special venire necessary: State v. Hunt, 128-584. Discretionary with judge whether he will order venire under this section or section 1974: State v. Smarr, 121-669—though practice of drawing jury under section 1974 commended, State v. Brogden, 111-656.

Judge may determine number of special venire: Ibid—which he may likewise change by another order, Ibid. Order for special venire sufficient if made at term at which trial had: State v. Murph, 60-129—but not necessary that record should show that writ of venire facias issued by clerk where shown that order obtained and jurors attended, State v. Perry, 44-330.

Objection to manner of summoning special venire should be taken

by challenge to array: State v. Douglass, 63-500—**but it is no cause of challenge to array by negro accused of crime that special venire is composed entirely of white men, there being no charge of corruption or unfairness against sheriff,** State v. Sloan, 97-499.

Juror summoned on special venire is qualified to serve, if freeholder of county where trial had: State v. Powell, 94-965; State v. Kilgore, 93-533; State v. Carland, 90-668.

It is no cause of challenge that a special venireman had served on the jury within the past two years, State v. Starnes, 94-973; State v. Kilgore, 93-533; State v. Whitfield, 92-831; but see State v. Cody, 119-909—**or had not paid taxes for preceding year,** State v. Kilgore, 93-533; but see State v. Cody, 119-909—**or that has suit pending and at issue in court,** State v. Starnes, 94-973; but see State v. Cody, 119-909—**but that juror is nonresident of county where trial had is cause of challenge,** State v. Bullock, 63-570.

Special venire is in aid of original panel, and only such jurors are taken from it as required to form jury after original exhausted: State v. Washington, 90-664—**and jurors of regular panel should be drawn from box before special venire summoned and drawn,** State v. Benton, 19-196.

Person exempted by law from jury service not bound to serve on special venire: State v. Whitford, 34-99.

Prisoner has right to have jurors stood aside by state in capital case tendered to him or challenged by state before another venire resorted to: State v. Hensley, 94-1021; State v. Washington, 90-664; State v. Shaw, 25-532.

An alien is not entitled to a jury de mediatate linguae in this state: State v. Antonio, 11-200.

Not error for judge, in ordering special venire, to direct sheriff to summon only freeholders who have paid taxes for preceding year, who have not served on jury within last two years, who have no suits pending and at issue in court, and not under indictment: State v. Cody, 119-908; but see State v. Starnes, 94-973; State v. Kilgore, 93-533.

For who are freeholders, see under section 1967.

1974. Drawn from box, when. Whenever a judge shall deem a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box No. 1 by a child under ten years of age. And the names so drawn (being freeholders) shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the said sheriff. If the special venire is exhausted before the jury is chosen, the judge in his discretion may order another special venire to be drawn and summoned in like manner as the first, until the jury has been chosen. The scrolls, containing the names of the persons drawn as jurors from box No. 1 shall,

after the jury is chosen, be placed in box No. 2; and if box No. 1 is exhausted before the jury is chosen, the drawing shall be completed from box No. 2, after the same shall have been well shaken. In the counties of Durham and Rockingham whenever a special venire is ordered, the jurors shall be drawn as herein provided.

Code, s. 1739; 1897, c. 364. **Statute must be strictly observed:** State v. Parker, 132-1015. **Immaterial that error in middle letter of name of juror entered on scroll:** State v. Mills, 91-581—**or that Christian name only indicated by initial letters,** State v. Simmons, 51-309.

It is no cause for challenge to array that sheriff failed to summon several of special venire drawn from jury box: State v. Stanton, 118-1182—**or that jury box not revised by county commissioners in absence of allegation that sheriff acted corruptly or with partiality in summoning venire, or that something was done which affected the integrity and fairness of entire panel.** Ibid.

Action of judge in determining qualifications of juryman when his name drawn from the box, is ground for challenge to array by motion to quash and set aside entire panel: State v. Moore, 120-570—**and in absence of such challenge defendant can not take advantage of alleged error after trial and judgment,** Ibid.

Integrity and fairness of special venire not affected by fact that one man named in writ had removed from county, and another was dead when jury list revised by commissioners: State v. Whitt, 113-716; State v. Hansley, 94-1021—**nor by fact that one named in writ is not summoned,** State v. Whitt, 113-716—**nor by fact that sheriff, in copying list of venire, omitted by mistake the name of one person, and such person in consequence was not summoned,** Ibid.

Not grounds for challenge to array that sheriff returned on writ that he had not summoned one juror because dead, and had not summoned three others because they could not be found: State v. Speaks, 94-865.

Where special venire drawn by boy over ten years of age, and several of venire served as jurors, such facts should be taken advantage of by challenge to array: State v. Parker, 132-1014—**or by motion to quash panel before jury sworn, and not by motion in arrest of judgment,** Ibid.

Practice of drawing jurors from box under this section commended: State v. Brogden, 111-656; State v. Whitson, 111-695—**though section not mandatory,** State v. Whitson, 111-695—**but discretionary with court whether it will summon venire under this section,** State v. Smarr, 121-669.

Where special venire exhausted without completing jury, court may order further venire to be summoned from bystanders, State v. Stanton, 118-1182. **Only freeholders can be summoned,** State v. Moore, 120-566—**and findings of judge that persons drawn on special venire were not freeholders is conclusive on appeal,** State v. Register, 133-746. **As to who are freeholders, see under section 1967.**

Where partitions of jury box marked "jurors drawn" and "jurors not drawn" instead of "No. 1" and "No. 2" and only one key which unlocked both partitions, same being in possession of register, special venire drawn therefrom under directions of presiding judge, was legal: State v. Potts, 100-457.

Quaere, whether juror who holds bond to make title to tract of land, on which portion of purchase money still due, is freeholder capable of serving upon special venire: State v. Hensley, 94-1021.

Court at term to which writ of special venire returnable may permit amendment of return to writ by sheriff showing list of names of veniremen, those summoned and those not summoned, together with reason why not summoned: State v. Whitt, 113-716.

It is not error, after special venire is exhausted, to have names of special veniremen who were stood aside put in the hat and drawn again instead of having them called in order in which they were stood aside: State v. Utley, 132-1022.

Section referred to in State v. Jones, 97-470; State v. Gooch, 94-1006.

1975. Penalty on sheriff not executing; on jurors not attending. If any sheriff shall fail duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars; and all jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors.

Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2. Where a sheriff, in making his return on a writ and list of special venire, endorsed thereon: "Received October 25, 1893; executed October 30, 1893, by summoning one hundred and fifty men" it was within discretion of court to which writ returnable to permit amendment of return so as to show those actually summoned and those not, with reasons why they were not: State v. Whitt, 113-716.

V. General Provisions.

1976. Summoned and must attend until discharged. The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of the jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court, which summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned; and jurors shall appear and give their attendance until duly discharged.

Code, s. 1733; 1868-9, c. 9, s. 12; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6. Section referred to in Boyer v. Teague, 106-621.

1977. Penalty for nonattendance, regular and tales. Every person on the original venire summoned to appear as a juror, who shall fail to give his attendance until duly discharged, shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court: Provided, that each delinquent juryman shall have until the next succeeding term to make his excuse for his nonattendance, and, if he shall render an excuse deemed sufficient by

the court, he shall be discharged without costs. And every person summoned of the bystanders, who shall not appear and serve during the day as a juror, shall be fined the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs.

Code, ss. 1734, 405; R. C., c. 31, s. 30; 1779, c. 157, s. 4; 1783, c. 189; 1806, c. 694. **Section referred to** in State v. Jones, 67-285.

1978. Furnished with accommodations. When any jury impaneled to try any cause, shall be put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of said court.

Code, s. 1736; 1876-7, c. 173; 1889, c. 44. **Verdict of jury can not be impeached because sheriff declined to give them refreshments except water until they agreed on verdict or until judge directed him to take them to dinner:** Gaither v. Generator Co., 121-384. **County not liable for board of jury in capital case during pendency of trial:** Young v. Comrs., 76-316.

1979. Exempt from civil arrest. No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to or returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged.

Code, s. 1735; R. C., c. 31, s. 31; 1779, c. 157, s. 10. **Exemption of jurors from civil arrest does not apply to parties arrested in criminal proceedings:** White v. Underwood, 125-25—**and section does not repeal by implication the common law exemption of nonresidents from service of civil process while attending litigation in courts of state:** Cooper v Wyman, 122-784.

Section merely referred to in Greenleaf v Bank, 133-296.

1980. Exemptions from jury duty. No practicing physician, licensed druggist, telegraph operator who is in the regular employ of any telegraph company or railroad company, train dispatcher who has the actual handling of either freight or passenger trains, regularly licensed pilot, regular minister of the gospel, officer or employee of a state hospital for the insane, member of North Carolina National Guard holding certificate required by section four thousand nine hundred and thirteen or section four thousand nine hundred and fifteen, or active member of a fire company, shall be required to serve as a juror.

Code, ss. 1723, 2269; 1901, c. 118; 1897, c. 32; 1889, c. 255; 1885, c. 289; 1907, c. 316. **Exemption from jury service is a mere privilege, not a contract, and may be revoked by legislature at any time:** State v.

Cantwell, 142-604. **Exemption from jury service in general does not release from service as talesman:** State v. Willard, 79-660; State v. Williams, 18-372; State v. Hogg, 6-319—**but he is not bound to serve on special venire,** State v. Whitford, 34-99.

Section referred to in State v. Peoples, 131-785; State v. Haywood, 94-850.

1981. Clerk to keep record of jurors. The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talesmen who shall serve in his court, with the term at which they serve.

1893, c. 52, s. 3. **See Clerk Superior Court.**

For compensation of jurors, see section 2798. For list of guardians furnished grand jury, see section 1810. For arguments to jury, see section 216. For jurors in justices' courts, see section 1428, et seq. For province of, in divorce, see section 1564. For right of trial by jury, see sections 527, 533, 2005. For waiver of trial by jury, see section 540. For verdicts by jurors, see sections 550, 553.

CHAPTER 45a.

LABOR

I. Children in Factories.

1981a. No child under twelve shall be employed. From and after the first day of January, one thousand nine hundred and eight, no child under twelve years of age shall be employed or worked in any factory or manufacturing establishment within this state.

1907, c. 463, ss. 1, 5. **Employer violating section guilty of negligence per se:** Leathers v. Tobacco Co., 144-330, discussing Rolin v. Tobacco Co, 141-300—**as child under twelve years of age presumed incapable of so understanding and appreciating dangers from negligent acts of others as to make him guilty of contributory negligence,** Rolin v. Tobacco Co., 141-300. **See interesting decision prior to this enactment:** Fitzgerald v. Furniture Co., 131-636.

1981b. Children between twelve and thirteen must be apprenticed. After one thousand nine hundred and seven no child between the ages of twelve and thirteen years of age shall be employed or work in a factory except in apprenticeship capacity, and only then after having attended school four months in the preceding twelve months.

1907, c. 463, ss. 1, 5.

1981c. Hours of labor of persons under eighteen years. From and after the first day of January, one thousand nine hundred and eight, not exceeding sixty-six hours shall constitute a week's work in all factories and manufacturing establishments of this state. No person under eighteen years of age shall be required to work in such factories or establishments a longer period than sixty-six hours in one week: Provided, that this section shall not apply to engineers, firemen, machinists, superintendents, overseers, section and yard hands, office men, watchmen or repairers of breakdowns.

1907, c. 463, ss. 2, 5. **Section referred to** in Rolin v. Tobacco Co., 141-303.

1981d. Parents must certify age and school attendance. From and after the first day of January, one thousand nine hundred and eight, all parents or persons standing in relation of parent, upon hiring their children to any factory or manufacturing establishment, shall furnish such establishment a written statement of the age of such child or children being so hired, and certificate as to school attendance.

1907, c. 463, ss. 3, 5. **Where child under twelve years of age is employed in factory and owner does not have certificate of parent as to age, same very strong if not conclusive evidence of negligence in action for injuries to child:** Rolin v. Tobacco Co., 141-300.

Section referred to in Leathers v. Tobacco Co., 144-351.

1981e. No child under fourteen worked certain hours at night. No boy or girl under fourteen years old shall work in a factory between the hours of eight p. m. and five a. m., from and after the first day of January, one thousand nine hundred and eight.

1907, c. 463, ss. 4, 5.

II. Railroad Employees.

1981f. Restrictions as to hours of labor. It shall be unlawful for any railroad company doing business in the state, or for any officer, agent or employee thereof who has the direction of or control over any employee or agent of the classes mentioned below, to cause or knowingly permit or allow any employee belonging to any such class to render any service for such railroad company pertaining to the movement of trains, for a greater number of hours in any twenty-four hours than is hereinafter specified, to-wit:

(a) Any employee doing the work of a train dispatcher (or telegraph operator), having in charge in any degree the direction of the movement of any train or trains in North Carolina, for more than eight hours in any twenty-four hours: Provided, the corporation commission of North Carolina is hereby authorized to permit

any such telegraph operator at any station on any road in this state to work for a longer time, not exceeding twelve hours in any twenty-four hours, where the said corporation commission shall determine that the safety of the travelling public will not be endangered by such extension of hours.

(b) Any conductor, flagman, engineer, brakman, fireman or other member of any train crew, for more than sixteen hours in any twenty-four hours.

1907, c. 456.

CHAPTER 46.

LANDLORD AND TENANT.

I. The Relation.

1982. Lessors and lessees not partners. No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee.

Code, s. 1744; 1868-9, c. 156, s. 3. **Lessor and lessee are not partners;** State v. Keith, 126-1115. **Where one person was to furnish land, farming implements, feed and team, and another person was to do the work, and crops to be equally divided, there was no agricultural partnership:** Lawrence v. Weeks, 107-119; Day v. Stevens, 88-83; **correcting** Curtin v. Cash, 84-41.

Section merely referred to in Belcher v. Grimsley, 88-90.

1983. Forfeiture without demand for rent, when. Whenever any half year's rent or more shall be in arrear from any tenant to his landlord, and the landlord has a subsisting right to re-enter for the nonpayment of such rent, he may bring an action for the recovery of the demised premises, and the service of the summons therein shall be deemed equivalent to a demand of the rent in arrear and a re-entry on the demised premises, and if, on the trial of the cause, it shall appear that the landlord had a right to re-enter the plaintiff shall have judgment to recover the demised premises and his costs.

Code, 1745; 1868-9, c. 156, s. 156.

1984. Length of notice to quit. A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days.

Code, s. 1750; 1891, c. 227; 1868-9, c. 156, s. 9. **Where tenant, under lease for year 1896 at specified price per month, payable in advance, held until June, 1897, and the landlord received rent up to June, 1897, the tenancy was from month to month in 1897:** Simmons v. Jarman, 122-195.

Where tenant from month to month, who has paid his rent to June 1, 1897, received notice from landlord on May 18, 1897, "to get out within thirty days," such notice was invalid as to May, as rent had been paid: Simmons v. Jarman, 122-195—**and invalid as to June because prescribed time for quitting did not end with end of month,** Ibid.

Persons occupying stalls in town market-house do not acquire rights of tenants from year to year by being permitted to hold over after period covered by their license has expired: Hutchins v. Durham, 118-457.

Where person put in possession of land by owner without any agreement for rent and with express provision that he shall leave whenever owner requires him to do so, he is not tenant from year to year: Humphries v. Humphries, 25-362—**and not entitled to statutory notice,** Ibid.

Whenever relation of landlord and tenant exists without any limitation as to time, such tenancy shall be from year to year: Stedman v. McIntosh, 2-6291—**and neither party can put an end to it, except by regular notice,** Ibid.

Where tenant leased premises at stipulated rent per month and held over for several months, paying same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen (now seven) days notice to quit: Branton v. O'Bryant, 93-99.

Where person leased to another, who assigned same to third person, notice to quit given by landlord instead of by immediate lessor is sufficient: Waters v. Roberts, 89-145.

Tenant entitled to written or verbal notice to quit: Vincent v. Corbin, 85-108—**and mere demand for possession is insufficient,** Ibid.

For cases prior to amendment changing law, see Vincent v. Corbin, 85-108; Jones v. Willis, 53-430; Stedman v. McIntosh, 26-291.

1985. Agreement to repair, how construed. An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half its value, by accidental fire not occurring from the want of ordinary diligence on his part.

Code, s. 1752; 1868-9, c. 156, s. 11.

II. The Lessor.

1986. Recovers for use, when. Whenever any person shall occupy land of another by the permission of such other without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such

reservation may be received as evidence of the value of the occupation.

Code, s. 1746; 1868-9, c. 156, s. 5. **Where lease void under statute of frauds, lessor could only recover for time premises were occupied:** Harty v. Harris, 120-411.

1987. Rent apportioned, estate terminated. If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, be determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security shall have been given for such rent it shall be apportioned in like manner.

Code, s. 1747; 1868-9, c. 156, s. 6.

1988. Rents and charges apportioned to successive owners. In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made, payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right shall so terminate during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event.

Code, s. 1748; 1868-9, c. 156, s. 7. **Section merely referred to** in Spruill v. Arrington, 109-195.

1989. Grantees of reversion, same rights and liabilities as grantors. The grantee in every conveyance of reversion of lands, tenements or hereditaments, shall have the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, shall have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs.

Code, s. 1765; 32 Hen. VIII., c. 34; 1868-9, c. 156, s. 18.

III. The Lessee.

1990. Holds to end of farming year. Where any lease for years of any land let for farming on which a rent is reserved shall determine during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor, to the giving up such possession, and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession.

Code, s. 1749; 1868-9, c. 156, s. 8. **Whenever relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year:** Stedman v. McIntosh, 26-291.

Lease of land made by tenant for life terminates at his death, but by this section lease continued to end of current lease year that tenant may gather crops: King v. Foscue, 91-116—**but in such case remainderman entitled to part of rent proportionate to part of year elasping after termination of life estate to surrendering of possession to remainderman,** Ibid.

Section embraces lease for single year, although it provides in terms "for any lease for years:" King v. Foscue, 91-116.

Section merely referred to in Spruill v. Arrington, 109-195; Railroad v. Railroad, 104-671; Dail and Bro. v. Freeman, 92-358.

1991. Not liable for accidental damage. A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract.

Code, s. 1751; 1868-9, c. 156, s. 10.

1992. May surrender, building destroyed or damaged. If a demised house, or other building, be destroyed during the term, or so much damaged that it can not be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage occur without negligence on the part of the lessee or his agents or servants, and there be in the lease no agreement respecting repairs, or providing for such a case, and the use of the house damaged was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage, and by paying or

tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage, proportionate to the time between the last period of payment and the occurrence of he damage, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease.

Code, s. 1753; 1868-9, c. 156, s. 12.

IV. Agricultural Tenancies.

1993. Landlord's lien, crop vested in, to secure, how enforced. When lands shall be rented or leased by agreement written or oral, for agricultural purposes, or shall be cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said land shall be paid and until all the stipulations contained in the lease or agreement shall be performed, or damages in lieu thereof shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advancements made and expenses incurred in making and saving said crops. This lien shall be preferred to all other liens, and the lessor or his assigns shall be entitled, against the lessee or cropper or the assigns of either who shall remove the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Code, s. 1754; 1876-7, c. 283. **Common law remedy of lessor by distress does not obtain in this state:** Howland v. Forlaw, 108-567.

Where A and B, tenants in common, agreed to make partition of lands, and fix boundaries, and A agreed that B should occupy whole and pay to him portion of crop raised thereon, such agreement did not constitute lease, so as to create relation of landlord and tenant between parties: Medlin v. Steele, 75-154.

For contract under which person cultivating land held to be tenant rather than cropper, see Harrison v. Ricks, 71-7. **As to whether parties are tenants or croppers,** see Neal v. Bellamy, 73-384; Hudgins v. Wood, 72-256; Haywood v. Rogers, 73-320; State v. Burwell, 63-661; Denton v. Strickland, 48-62; Harrison v. Ricks, 71-7.

Cropper has no estate in land, and his possession is that of landlord: State v. Austin, 123-749. **Where contract is one of tenancy relation terminates upon division of crops, there being no unsatisfied lien for advances or to secure performance of other stipulations;** Curtis v. Cash, 84-41.

Where it appeared that there had been an adjustment between parties

of conflicting claims to land, and agreement that defendant should remain in possession of and cultivate land upon payment of part of crop as rent, relation of lessor and lessee existed under contract, which is supported by sufficient consideration: Durant v. Taylor, 89-351.

Hay is ordinarily embraced in word "crops" as used in section, but not, it seems, when it is merely a spontaneous growth as crab-grass sprung up after another crop housed: State v. Crook, 132-1053.

For cases under prior enactment, see Durham v. Speeke, 82-87; Foster v. Penny, 76-131; Varney v. Spencer, 72-382; Deaver v. Rice, 20-576.

Tenant can recover damages for failure of landlord to furnish him with fertilizers which he agreed to do: Herring v. Armwood, 130-177.

"ADVANCEMENTS." Where landlord either pays for or becomes responsible for supplies to enable tenant to make a crop, such supplies are advances: Powell v. Perry, 127-22. Supplies necessary to make and save crop are such articles as are in good faith furnished to and received by tenant for that purpose: Ledbetter v. Quick, 90-276—and proper for court to leave it to jury to find whether mule, wagon, etc., were treated as advancements, Ibid. When landlord and tenant undertake by collusion and fraud to create indebtedness to former, under color of advancements, to prejudice of creditors of tenant, such transaction will not be sustained: Ledbetter v. Quick, 90-276. Advancements for which lien is created in favor of landlord by section embraces anything of value supplied by landlord to tenant, or cropper, in good faith, directly or indirectly, for purpose of making and saving crop: Brown v. Brown, 109-124—and where advancements are of such things as in their nature are appropriate and necessary to cultivation of crop, as farming implements and work animals, they will be presumed to create lien, Ibid—but when they are of articles not in themselves so appropriate and necessary, as dry goods and groceries, whether they create a lien depends upon purpose for which they are furnished, and it must affirmatively appear that they were made in aid of crop, Ibid.

Where landlord furnished board to tenant and family while crop was being cultivated, if landlord supplied board so that tenant might make and save crop, nothing to contrary appearing, reasonable value of such board would constitute advancements within meaning of section: Ibid.

Where landlord advanced certain cotton seed, etc., to his tenant in 1884, and in 1885 and 1886 allowed tenant to retain parts of undivided cotton seed and crops as advancements, he had a landlord's lien on such seed and crops: Thigpen v. Maget, 107-39—which took priority over lien of tenant's vendee of crops, who had advanced supplies to tenant, Ibid—division of crop and delivery back to tenant not being necessary to constitute a valid advancement, Ibid.

LANDLORD'S LIEN. Law implies lien by virtue of section when relation of landlord and tenant established: State v. Smith, 106-653. Landlord's right to enforce lien can not be defeated by lessee's claiming crop as part of personal property exemptions: Durham v. Speeke, 82-87. Landlord's lien superior to all other liens: Reynolds v. Taylor, 144-167; Brewer v. Chappell, 101-251; Wooten v. Hill, 98-48; Ledbetter v. Quick, 90-276. When defendant rents store upon plaintiff's lands for mercantile purposes and land for agricultural purposes, under an entire

and indivisible contract to pay stipulated sum and certain portion of crops raised on land as entire rent of store and lands, without apportionment of any distinct part to be paid for store, plaintiff has a landlord's lien on all products grown on land until entire rent paid: Reynolds v. Taylor., 144-165. Lessee who sublets land and furnishes supplies to subtenants, holds prior lien to mortgagor of crops: Perry v. Perry, 127-23. Landlord's lien under section only attaches when lands are rented or leased by contract become landlord of vendee so as to avail himself of landlord's lien on crop can only arise upon absolute and unqualified division to tenant of his share: Jarrell v. Daniel, 114-212—and where landlord and tenant through common agent set apart share of crop which tenant was to have whenever advancements paid on it, and tenant told not to remove such share until lien paid off, there was no such division as to divest lien of landlord, Ibid.

After default by vendee of land to pay purchase money, vendor may by contract become landlord of vendee so as to avail himself of landlord's lien given by section, rent, however, to go as credit upon purchase price agreed to be paid for land: Jones v. Jones, 117-254—and courts will not declare such contract void, Ibid.

Section makes judgment for rent a lien on crop: Hargrove v. Harris, 116-419.

Subrenting does not release landlord's lien upon crops: State v. Crook, 132-1054; Montague v. Mial, 89-137—though subtenant's crop may thereby be subjected to double lien, that of landlord and his immediate lessor, but lien of landlord paramount, Montague v. Mial, 89-137; Moore v. Faison, 97-322.

That lease between lessor and lessee is void does not affect relations existing between lessee and subtenant as to lien for advancements: Perry v. Perry, 127-23.

Tenant being estopped from denying that party from whom he leased is his landlord and entitled to rents can not escape landlord's lien by claiming personal property exemptions out of crop: Hamer v. McCall, 121-196; Durham v. Speeke, 82-87.

Agreement after default between mortgagor and mortgagee that mortgagor was to remain in possession as tenant would confer landlord's lien upon mortgagee: Cooper v. Kimball, 123-120.

Landlord's lien extends to and includes costs of such legal proceedings as are necessary to recover his rents: Slaughter v. Winfrey, 85-159—and as all crops are his until such lien discharged, tenant has no property therein which he can claim as his constitutional exemption as against such costs, Ibid.

Where lessee sublets part of farm, he becomes lessor to his sublessee and he is entitled to same lien on crop which section gives to lessor: Moore v. Faison, 97-322—but original lessor, after his lesssee has paid him in full, has no lien under section on crop of sublessee for advances made by him to sublessee, Ibid.

Landlord's lien may be given up, but contract to give it up, in order to be enforced, must be based upon consideration: Sugg v. Farrar, 107-123. Although lien of landlord for advances is superior to that of third party making advances to tenant, nevertheless, such priority exists

only for advances made, or rents accrued, during year in which crops were made, and not for balance due for antecedent year: Fleming v. Davenport, 116-153; Ballard v. Johnson, 114-141.

Except in case of landlord and tenant, provided for specially by section, lessor has no lien upon products of leased property as rent: Howland v. Forlow, 108-567—it is for all purposes, until division, deemed vested in tenant, and his sale to third persons before rent ascertained and set apart conveys good title, Ibid.

POSSESSION AND TITLE TO CROP. All crops raised on land, whether by tenant or cropper, are deemed to be vested in landlord, in absence of agreement to contrary, until rent and advancements paid: State v. Austin, 123-749; Boone v. Darden, 109-74; Smith v. Tindall, 107-88; State v. Smith, 106-654; Durham v. Speeke, 82-90—and an attempt to appropriate and carry off crop may be repelled by landlord by force provided no more force is used than necessary to protect his possession, State v. Austin, 123-759. Although constructive possession of crop is vested by section in landlord, yet during cultivation, and for all purposes of making and gathering crop, actual possession is in tenant until rent and advances become due, or division can be had: Jordan v. Bryan, 103-59.

For lessor's protection, as between him and tenant, possession of crop deemed vested in lessor: State v. Higgins, 126-1112; State v. Keith, 126-1114; Bridgers v. Dill, 97-222; Kesler v. Cornelison, 98-383—but as between tenant and third parties, tenant entitled to possession and crop, Ibid.

Until division of crop and possession by tenant of his share, tenant can not convey legal title to purchaser: McNeely v. Hart, 32-63.

Section gives landlord title to crop until rent actually paid (whether claim be reduced to judgment or not) and such title not impaired by fact that tenant conveys crop to third person, who takes without notice of landlord's claim: Belcher v. Grimsley, 88-88. Tenant may in good faith, for purpose of preserving crop, sever it from land and remove it to place of security upon land upon which produced, without notice to landlord: State v. Williams, 106-646.

Where occupant of land is vendee or mortgagor in default, though he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under section, is vested in landlord: Taylor v. Taylor, 112-27.

Landlord who has agreed to take portion of crop, or specified sum of money as rental, and has received part of rental in money, is entitled to possession of whole crop until rent satisfied: McGehee v. Breedlove, 122-277.

When cropper abandons before maturity, he forfeits all interest in crop, which becomes fully the property of landlord: Beacom v. Boing, 126-136.

Cropper can not convey legal title to his share of crop to third person before actual division and appropriation: McNeely v. Hart, 32-63.

DIVISION OF CROP. Cropper can not convey legal title to his share of crop to third person before actual division and appropriation: McNeely v. Hart, 32-63. Where in contract between landlord and tenant, no time

was fixed for division of crop, landlord was not obliged to wait until whole crop had been gathered, but had right to bring action for possession of crop before it was fully harvested: Rich v. Hobson, 112-79. Proper course, ordinarily, between landlord and tenant, is to have crops divided as they are gathered, subject to convenience and interest of parties, and as soon as reasonably can be, Smith v. Tindall, 107-88. Landlord was entitled to have his crop, that is, enough for rent and advancements, gathered at time he demands it, and he was not obliged to wait for division until whole crop was gathered: Smith v. Tindall, 107-88.

Where, by agreement between landlord and tenant, advances made by former to latter should be due and demandable "when all crops gathered and divided," but no agreement as to time when they should be divided, landlord's right to demand rent and pay for advances did not accrue until crop gathered and ready for division: Jordan v. Bryan, 103-59—and where he divided corn with tenant, who removed his share thereof, landlord waived and lost his lien on defendant's share, Ibid.

Where landlord and tenant set apart share of crop for tenant to have upon paying advances due upon it, and tenant told not to move such share until lien paid off, there was no such division as to divest lien of landlord: Jarrell v. Daniel, 114-212.

PRIORITY AS BETWEEN LANDLORD AND THIRD PARTY. Landlord's lien for rent and advances is superior to that of third party making advances to tenant: Fleming v. Davenport, 116-153; Ballard v. Johnson, 114-141; Spruill v. Arrington, 109-192; Branch v. Galloway, 105-193—notwithstanding priority of latter in point of time, Spruill v. Arrington, 109-192.

Where it does not appear that mule sold to tenant was part of supplies advanced by landlord, mortgage creditor has prior lien on crop as to it, and landlord could not retain crops for its purchase money: Branch v. Galloway, 105-193—use of mule in cultivation of crops not necessarily making it an advancement, Ibid.

Where landlord, who had lien on certain property, directed purchaser of such property from tenant to pay purchase money to tenant, but revoked order before same paid, there being no consideration for the order, and no change of status of parties, and purchaser afterwards paid money to tenant, landlord entitled to recover value of property from purchaser: Sugg v. Farrar, 107-123.

Landlord liable to account to person advancing supplies to tenant for value of crops in excess of his lien: Crinkley v. Egerton, 113-142.

Landlord's lien for rent takes priority of mortgage for advancements, especially when parties contract that landlord's lien for rent shall be retained: Crinkley v. Egerton, 113-444.

After forfeiture, mortgagee can by contract become landlord of mortgagor so as to avail himself of landlord's lien which, though such contract be oral and unregistered, has priority over supplies furnished by third persons who by registration of mortgage are fixed with notice of mortgagor's default and mortgagee's right of entry: Ford v. Green, 121-70.

REMEDY TO RECOVER POSSESSION. Action will lie, not only

where crop removed from land leased, but also in a case where tenant or cropper or any other person, takes crops into his absolute possession and denies right of landlord thereto: Livingston v. Farish, 89-140. If tenant at any time before satisfying landlord's liens for rent and advances, removes crop or any part of it, he becomes liable civilly and criminally: Jordan v. Bryan, 103-59. Landlord can not bring claim and delivery for crop before time fixed for division, unless tenant about to remove or dispose of crop, or to abandon growing crop: Ibid; see Smith v. Tindall, 107-88.

Landlord may bring claim and delivery to recover possession of crops raised by tenant or cropper, where his right of possession denied: Livingston v. Farish, 89-140—or may resort to any other appropriate remedy to enforce his lien for rent due and advances made, Ibid—and may bring action in nature of trover, Alsbrook v. Shields, 67-333.

Crops produced by tenant being vested in lessor until rents shall be paid, he can maintain an action for recovery of an undivided portion, and it is not necessary that he shall specially designate in his complaint, or affidavit in claim and delivery such undivided part: Boone v. Darden, 109-74.

As to jurisdiction of actions under section, see Durant v. Taylor, 89-351; Montague v. Mial, 89-137; Deloach v. Coman, 90-186; Foster v. Penny, 76-131; State v. Surles, 74-33.

Section merely referred to in Parker v. Brown, 136-280; Perkins v. Brinkley, 133-158; Cooper v. Kimball, 123-124; State v. Ewing, 108-756; Brown v. Miller, 108-395; State v. Turner, 106-694; Rouse v. Wooten, 104-229; State v. Copeland, 86-692.

1994. Rights of tenant. Whenever the lessor or his assigns shall get the actual possession of the crop or any part thereof otherwise than by the mode prescribed in the preceding section, and said lessor or his assigns shall refuse or neglect, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either shall be entitled against the lessor or his assigns to the remedies given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action.

Code, s. 1755; 1876-7, c. 283, s. 2. Where cropper dies before harvesting his crop his personal representatives are entitled to recover his share of the crop: Parker v. Brown, 136-280.

When lessee wrongfully deprived of actual possession of crop by lessor, he is left to his civil remedy for the breach of trust, should lessor refuse to account: State v. Keith, 126-1114—and can resort to claim and de-

livery after five days' notice, State v. Austin, 123-751; Boone v. Darden, 109-78; Wilson v. Respass, 86-112.

Right of cropper to receive his portion of crops is protected by section, which, for certain purposes, creates lien in his favor, and which will be enforced against employer, or landlord, or his assigns: Rouse v. Wooten, 104-229—and which has precedence over agricultural liens made subsequent to contract, but before crop harvested, Ibid.

Where landlord took crop into his sole possession, refusing to divide same when demanded on ground that crop was not in condition for division, but not denying tenant's right to division, and crop destroyed by fire while in his possession, tenant can not maintain action in nature of trover against him: Shearin v. Rigsbee, 97-216.

Lessor has no right, where there is no agreement to that effect, to take actual possession from lessee or cropper, and can never do so, except when he obtains same by action of claim and delivery, upon removal of crop by lessee or cropper: State v. Copeland, 86-694.

1995. Action on the contract; tenant's undertaking. Where any controversy shall arise between the parties, and neither party avails himself of the provisions of this chapter, it shall be competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed be two hundred dollars or less, and in the superior court of the county where the property is situate if the amount so claimed shall be more than two hundred dollars. But in case there shall be a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action.

147-273

Code, s. 1756; 1876-7, c. 283, s. 3. Widow of tenant cultivating land on shares, after crop allotted to her in her year's support, may maintain action for conversion against landlord: Parker v. Brown, 136-280—and not compelled to resort to remedy prescribed by section, Parker v. Brown, 136-287—but may bring civil action to recover value of crops, subject to such deductions as lessor is entitled to by reason of advancements, and such damage as he may have sustained by inability of lessee to perform contract, Ibid.

Damages resulting from failure of landlord to furnish fertilizers to his tenant are not too remote for consideration: Herring v. Armwood, 130-177.

Although action under section is wrongfully brought before clerk of court, yet when it gets into superior court at term, by appeal or otherwise, latter has jurisdiction of whole cause: Elliott v. Tyson, 117-114.

Special jurisdiction of justices of the peace under section does not extend to torts, but is confined to actions for enforcing contracts: Montague v. Mial, 89-137.

Action by landlord against tenant for recovery of rent, sum demanded not exceeding $200, is action upon contract of lease and cognizable in court of justice of the peace: Deloach v. Coman, 90-186.

As bearing upon section, see Durant v. Taylor, 89-351. **Section discussed** in Wilson v. Respass, 86-114. **Section referred to** in Elliott v. Tyson, 116-184; State v. Copeland, 86-694.

1996. Crops delivered to landlord; undertaking. In case the lessee or cropper, or the assigns of either, shall, at the time of the appeal or continuance mentioned in the preceding section, fail to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in the preceding section, conditioned for the forthcoming of such property, or the value thereof, in case judgment shall be pronounced against him.

Code, s. 1757; 1876-7, c. 283, s. 4. **Where lessor solvent and required to give bond of indemnity, court will not restrain him from selling crop:** Wilson v. Respass, 86-112.

Section merely referred to in Rouse v. Wooten, 104-229.

1997. If neither gives undertaking, crops sold. If neither party gives the undertaking described in the two preceding sections, it shall be the duty of the justice of the peace or the clerk of the superior court, to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as shall be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties.

Code, s. 1758; 1876-7, c. 283, s. 5. **Landlord's lien extends to and includes cost of such legal proceedings as are necessary to recover rents:** Slaughter v. Winfrey, 85-159—**and tenant has no property therein which he can claim as his constitutional exemption as against such costs,** Ibid.

1998. Tenant's crop not subject to execution against landlord. Whenever servants and laborers in agriculture shall by their contracts orally or in writing be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated.

Code, s. 1796. **Section merely referred to** in Tedder v. R. R., 124-344.

1999. Turpentine and lightwood leases. This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter.

Code, s. 1762; 1893, c. 517; 1876-7, c. 283, s. 7. **Where A. agrees to allow B. to cultivate pine trees where A. lives for a year to enable him to make and save turpentine, and for compensation B. is to have one-half of turpentine; this is not a lease of land or of trees:** Denton v. Strickland, 48-61.

2000. Mining and timber land leases. If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent shall be reserved, and if it shall be agreed in the lease that the minerals, timber or goods or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter.

Code, s. 1763; 1868-9, c. 156, s. 16.

V. Summary Ejectment.

(1409 61)

2001. Tenant dispossessed, when. Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who shall hold over and continue in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases:

Remedy by summary proceedings in ejectment before justice of peace is restricted to cases where relation between parties is that of landlord and tenant: McDonald v. Ingram, 124-272; Hauser v. Morrison, 146-248; McCombs v. Wallace, 66-481; Hughes v. Mason, 84-472. **Where relation existing between parties is that of vendor and vendee, vendor not entitled to evict vendee by summary proceedings under section:** Johnson v. Hauser, 82-375; Hauser v. Morrison, 146-248; Riley v. Jordan, 75-180; McCombs v. Wallace, 66-481.

Where in action under section it appeared that defendant, a slave, entered into possession of land as tenant of plaintiff, and in 1865 refused to pay further rent and disclaimed being plaintiff's tenant, he has estopped to deny plaintiff's title, and plaintiff was entitled to recover: Wilson v. James, 79-349.

One who enters upon land, under contract of purchase, can not be evicted therefrom by summary proceedings under section: Riley v. Jordan, 75-180—**but if party so entering, unconditionally surrenders his rights under contract of purchase, and enters into contract of lease, he may be evicted hereunder, and it is not necessary that he should actually surrender possession of land and receive it again at hands of lessor,** Ibid.

Section does not apply to mortgagor who is allowed to remain in possession, and on demand after default, refuses to surrender possession: Greer v. Wilbar, 72-592; McMillan v. Love, 72-18.

Section can not be extended by any contrivance of lessor and lessee so as to give to mortgagee benefit of summary proceedings as against lessee for term of years: Greer v. Wilbar, 72-592.

That vendee remained silent when contract of sale of land was mutilated under direction of vendor, is not sufficient evidence of abandonment of rights under contract, nor of change of relations from vendor and vendee to landlord and tenant to give justice of peace jurisdiction of action to summarily eject vendee: Boone v. Drake, 109-79.

Lessee can not resist action by lessor for recovery of land, brought after termination of lease, by showing superior title in third person or in himself acquired before or after contract: Davis v. Davis, 83-71.

Right of tenant to homestead is no defense to action to recover premises brought by landlord: Abbott v. Cromartie, 72-292.

Bargainor in deed of trust, containing stipulations for retention of possession of land conveyed, until sold under terms of trust, and who holds possession after sale of premises by trustee, is not such tenant as comes within section: McCombs v. Wallace, 66-481—hence proceedings can not be taken under section to evict him, Ibid.

Section only intended to apply to case where tenant entered into possession under some contract of lease, either actual or implied, with supposed landlord, or with some person under whom landlord claimed in privity, or where tenant himself is in privity, with some person who had so entered, McCombs v. Wallace, 66-481.

This construction excludes from operation of section vendees in possession under contract for title, and vendors retaining possession after sale, McCombs v. Wallace, 66-481.

Where purchaser of land who gave notes to vendor for price, secured by mortgage, failed to comply with contract and reconveyed to vendor, who leased same to purchaser with option to purchase, and purchaser paid part of price, receipts for which recognized original notes and mortgage as subsisting, vendor can not maintain ejectment proceedings under section against tenant: Hauser v. Morrison, 146-248.

When tenant, sued for possession, denies his tenancy, landlord not required to prove demand for possession, or that term has expired: Springs v. Schenck, 99-551.

Section merely referred to in Featherstone v. Carr, 132-800; Crinkley v. Egerton, 113-450; Cottingham v. McKay, 86-241.

1. Whenever a tenant in possession of real estate holds over after his term has expired.

Summary proceedings in ejectment before justice under subsection can only be had where simple relation of lessor and lessee exists, and there is a holding over after term: McDonald v. Ingram, 124-272; Hughes v. Mason, 84-472—and jurisdiction of justice excluded where relation is that of mortgagor and mortgagee, or vendor and vendee, Ibid; Hauser v. Morrison, 146-248; Riley v. Jordan, 75-180; McCombs v. Wallace, 66-481; Greer v. Wilbar, 72-592; McMillan v. Love, 72-18.

Provisions of section can not be extended by any contrivance of lessor and lessee so as to give to mortgagee benefit of summary proceedings as against lessee for term of years, Ibid.

The issue hereunder is: Was defendant tenant of plaintiff, and does he hold over after expiration of tenancy: McDonald v. Ingram, 124-272.

Effect of acceptance of rental for period beyond term, see Vanderford v. Foreman, 129-217.

Subsection constitutional: Credle v. Gibbes, 65-192. **Subsection referred to** in Parker v. Allen, 84-466; Medlin v. Steele, 75-154.

2. When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

Summary proceeding under section begun during lessee's term can not be maintained where contract of lease contained no condition, breach of which would authorize re-entry by lessor: Meroney v. Wright, 81-390—**and mere failure to pay rent upon "lease at.....dollars a year, payable monthly," does not warrant such re-entry:** Ibid.

Subsection referred to in Parker v. Allen, 84-467.

3. When any tenant or lessee of lands or tenements, being in arrear for rent, or having agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who shall have given to the lessor a lien on such crop as a security for the rent, shall desert the demised premises, and leave them unoccupied and uncultivated.

4. Whenever any tenant or cropper shall enter into a contract for the rental of land for the current or ensuing year, and without just cause wilfully neglects or refuses to perform the terms of his contract, then such tenant or cropper shall forfeit his right of possession to the premises. This subsection shall only apply in the counties of Wake, Hyde, Anson, Hertford, Sampson, Franklin, Union, Wayne, Lenoir, Greene, Johnston, Jones, Onslow, Craven, Cleveland, Sampson, Pitt, Duplin, Gates, Cumberland, Perquimans, Chowan, Robeson, Bladen, Nash, Harnett, Edgecomb, Wilson, Rockingham, Pender, Currituck, Gaston, Northampton, Beaufort, Chatham, Tyrrell, Mecklenburg, Halifax, Caswell, Camden, Cabarrus, Columbus, Martin, Montgomery, Washington, Yadkin, Randolph, Rowan, Burke, Jackson, Swain, and Alleghany.

Code, ss. 1766, 1777; 4 Geo. II., c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820; 1907, cc. 43, 153.

2002. Summons issues by justice on verified complaint. When the lessor or his assigns, or his or their agent or attorney, shall make oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases above described, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and re-

quiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he shall omit to make such claim, he shall not be thereby prejudiced in any other action for their recovery.

Code, s. 1767; 1868-9, c. 156, s. 20; 1869-70, c. 212. **Where defendant denies alleged tenancy, it is the duty of justice to proceed and try issue of tenancy:** Foster v. Penry, 77-160. **Provision for renewal in lease gives an equity which may be set up as a defense in summary proceedings in ejectment:** McAdoo v. Callum, 86-419. **Tenant may set up in answer any equitable defense which he may have to landlord's claim:** Forsythe v. Bullock, 74-135. **Question of jurisdiction is not to be determined by matter set up in answer, but court should hear evidence upon issue of tenancy:** Hahn v. Guilford, 87-172. **Section referred to** in Medlin v. Steele, 75-154.

2003. Service of summons. The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant have no usual place of residence in the county and can not be found therein, by fixing a copy on some conspicuous part of the premises claimed.

Code, s. 1768; 1868-9, c. 156, s. 21.

2004. Judgment by default or confession. The summons shall be returned according to its tenor, and if on its return it shall appear to have been duly served and if the defendant shall fail to appear or shall admit the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be.

Code, s. 1769, c. 156, s. 22.

2005. Trial by justice; jury trial; judgment; execution. If the defendant by his answer shall deny any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party shall

demand a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury shall find that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury and for costs; and shall issue his execution to carry the judgment into effect.

Code, s. 1770; 1868-9, c. 156. s. 23. **Judgment for tenant is not an estoppel on landlord to extent of precluding him from showing in subsequent action advancements made prior to eviction to which he was entitled:** Burwell v. Brodie, 134-540.

2006. Damages assessed to time of trial. On appeal to the superior court, the jury trying the issue joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal.

Code, s. 1775; 1868-9, c. 156, s. 28. **Section merely referred to** in Nesbitt v. Turrentine, 83-538.

2007. Rent and cost tendered by tenant. If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, shall pay or tender the rent due and the costs of the action, all further proceedings in such action shall cease; or if the plaintiff shall further prosecute his action, and the defendant shall pay into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

Code, s. 1773; 4 Geo. II., c. 28, s. 4; 1868-9, c. 156, s. 26. **Tender by tenant of rent accrued after termination of lease does not preclude landlord from recovering possession:** Vanderford v. Foreman, 129-217. **Acceptance by landlord of rent accruing after termination of lease, after suit for possession, does not preclude landlord from recovering:** Ibid.

2008. Appeal; undertaking on; increase of. Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant shall have given an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be ap-

proved by the justice, to be void if the defendant shall pay any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant shall fail to show proper cause and shall not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed.

Code, s. 1772; 1868-9, c. 156, s. 25; 1883, c. 316. **Where enjoined from bringing actions upon each installment of rent as vexatious, such person not precluded thereby from issuing execution on judgment for recovery of property after expiration of lease:** Featherstone v. Carr, 134-66. **As to action against sureties on undertaking,** see Blackmore v. Winders, 144-212. **Should bonds become impaired, or if litigation should become protracted to such an extent as to require additional security to protect plaintiffs in their rents, superior court can require additional security under section:** Featherstone v. Carr, 132-802. **Justice has discretion as to sufficiency of surety upon undertaking, which judge will not review in absence of any suggestion that justice acted dishonestly of capriciously:** Steadman v. Jones, 65-388. **As bearing upon section,** see Rollins v. Henry, 76-269.

2009. Restitution, when. If the proceedings before the justice shall be brought before a superior court and quashed, or judgment be given against the plaintiff, the superior or other court in which final judgment shall be given, shall, if necessary, restore the defendant to the possession, and issue such writs as shall be proper for that purpose.

Code, s. 1774; 1868-9, c. 156, s. 27. **As to writ of restitution generally,** see Railroad v. Railroad, 108-304. **Where party put out of possession of land under judgment which is afterwards reversed or set aside, court will restore party to possession of land:** Lytle v. Lytle, 94-522. **Where in action before justice judgment rendered for plaintiff, who was put into possession, but on appeal to superior court, judgment for defendant, defendant entitled to writ of restitution as part of judgment:** Meroney v. Wright, 84-336. **Whenever party put out of possession by process of law, and proceedings adjudged void, order for writ of restitution is part of judgment, and should be made:** Perry v. Tupper, 70-538.

2010. Damages to tenant for wrongful removal. If, by order of the justice, the plaintiff shall be put in possession, and the pro-

ceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal.

Code, s. 1776; 1868-9, c. 156, s. 30. **Under section, tenant who secures reversal of summary proceedings against him may have damages for eviction assessed in original or in a separate action:** Burwell v. Brodie, 134-540.

As to complaint in action hereunder, see Ibid.

VI. Forms.

2011. Forms sufficient. The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

OATH OF PLAINTIFF.

North Carolina, ... County.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the....day of.....19..... (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims.....dollars for rent of the premises from the.....day of .....19..... to the.....day of.....19....., and also..... dollars for the occupation of the premises since the.....day of.....19..... to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this.....day of.....19.....

J. K., J. P.

SUMMONS.

North Carolina, ... County.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the .....day of....., 19...., at....., then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this.....day of....., 19.....

J. K., J. P. (Seal.)

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them, to the officer, and makes the following entry on his docket, or varies it according to the facts:

DOCKET ENTRIES.

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment for (describe the premises).

Oath of plaintiff (his agent or attorney) filed on the .....day of..... 19.....

Plaintiff claims .....dollars for rent from.....to....., and ..... dollars for occupation from .....to.....

Summons issued the.....day of....., 19....., to..... constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

RETURN OF OFFICER.

On this day I served the within summons on the defendant, C. D., by delivering him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and the oath of A. B. at the usual place of residence of the defendant C. D., with an adult found there) (or the said C. D., not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

The.....day of....., 19.....

RECORD TO BE ENTERED ON DOCKET.

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas, the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant.....dollars for rent from the .....day of .....19....., to the .....day of..... 19....., and dollars for damages for occupation of the premises from the..... day of....., 19....., to this day, and .....dollars for his costs; the .....day of.....19.....

If the defendant admit part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas, the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas, both parties waived a trial by jury, I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so on from the asterisk (*).

If either party shall demand a jury the record will proceed from the asterisk (*), as follows:

And whereas, the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to-wit: (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to-wit: (here state the names of the six jurors impaneled), who find (here state the verdict of jury; of they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5, from asterisk (*).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

RECORD OF APPEAL.

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

EXECUTION ON JUDGMENT FOR PLAINTIFF.

A. B., plaintiff,
against
C. D., defendant. } .....County.

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out the goods and chattels, lands and tenements of said defendant ..... dollars, with interest from the.....day of....., 19.... to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of.....dollars as costs, in such action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal this.....day of.....19.....

.....(Seal.)

BOND TO STAY EXECUTION.

We, the undersigned, ...and....., acknowledge ourselves indebted to .....in the sum of.....dollars:

Witness our hands and seals, this the.....day of.....A. D. 19.....

Whereas, on the .....day of....., A. D. 19...., before..... a justice of the peace for.....county, A. B. recovered a judgment against C. D. for ..... and for .....dollars damages for the detention of said real estate from the.....day of....., A. D. 19...., to the..... day of....., A. D. 19.....; and whereas, the said.....ha..... prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said ..... shall pay any judgment, which, in this or in any other action, the said ..... may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

.....(Seal.)
.....(Seal.)
.....(Seal.)

STAY OF EXECUTION.

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff, v. C. D., defendant, in a summary proceeding in ejectment, signed by ....., a justice of the peace.

The defendant having given bond to me, as required by law, on his appeal to the superior court of.....county, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this.....day of....., 19.....

....., J. P. (Seal.)

CERTIFICATE ON RETURN OF APPEAL.

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant.

....., J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.)
(All the papers must be attached.),
Code, s. 1780.

NOTE. For conveyance of rent without attornment, see section 947.

For penalty for removing crop without payment of rent, see Crimes.

For penalty for unlawful seizure of crops by landlord, see Crimes.

For penalty upon tenant for surrendering possession to one not landlord, see Crimes.

For injury to property by tenant, see Crimes.

For requirement of leases in writing, see section 976.

For proceedings before justices, see Courts—Justices'.

For jury trial in summary ejectment, see Courts—Justices'.

For costs, see Costs.

CHAPTER 47.

LIBEL AND SLANDER.

2012. Notice to newspaper before action. Before any action, either civil or criminal, shall be brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant specifying the article and the statements therein which he alleges to be false and defamatory.

1901, c. 557. **Complaint must allege five days' notice to defendant in writing, specifying article and false statements therein:** Williams v. Smith, 1342-49; Osborn v. Leach, 135-628. **Effect of failure to give notice:** Ibid. **Where newspaper publishes retraction, no notice as required here-**

under need be given: Osborn v. Leach, 135-628. **Failure of complaint to allege the five days' notice is demurrable:** Ibid—**and where demurrer sustained, plaintiff entited to amend,** Ibid; Williams v. Smith, 134-249.

2013. Good faith and correction, actual damages recovered; nominal fine. If it shall appear upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of " guilty " shall be rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more: Provided, that this chapter shall not apply to actions pending on the thirteenth day of March, one thousand nine hundred and one.

1901, c. 557. **Where statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination:** Osborn v. Leach, 135-628.

Provision of section taking away from person right to recover punitive damage is constitutional: Osborn v. Leach, 135-628. **Where paper pleaded retraction of publication, it is necessary for it also to show that publication was made in good faith, and with reasonable ground to believe same to be true, in order to remove it from punitive damages:** Osborn v. Leach, 135-628. **"Actual damages" includes pecuniary loss, physical pain, mental suffering and injury to reputation:** Ibid—**and is property, while punitive damages is not property,** Ibid.

2014. Anonymous communications. The two preceding sections shall not apply to anonymous communications and publications.

1901, c. 557, s. 3. **Article signed "Smith" is not anonymous publication:** Williams v. Smith, 134-249.

2015. Slander of women. Whereas, doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore, any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable.

Code. s. 3763; R. C., c. 106; 1808, c. 478. **As to damages in action hereunder,** see Bowden v. Bailes, 101-612; Sowers v. Sowers, 87-303. **Not necessary to allege that words "wantonly and wilfully" uttered:** Bowden v. Bailes, 101-612. **Words which amount to charge of incontinency must**

import not merely lascivious disposition, but fact of adultery or fornication: McBrayer v. Hill, 26-136; Lucas v. Nichols, 52-35; State v. Moody, 98-671.

"Innocent" woman means one who has never had actual illicit intercourse with a man: State v. Misenheimer, 123-758; State v. Malloy, 115-737; State v. Hinson, 103-374; State v. Brown, 100-519; State v. Davis, 92-764; State v. Grigg, 104-882; State v. Ferguson, 107-849.

Husband is liable for wife's slander: Presnell v. Moore, 120-390. As to action by husband for slander of wife, see Harper v. Pinkston, 112-293.

Words which impute to female wanton and lascivious disposition only are not actionable: Lucas v. Nichols, 52-32.

WHAT AMOUNTS TO CHARGE OF INCONTINENCY. Saying of woman that she had sexual intercourse with a male dog: State v. Hewlin, 128-571—that she is a "d——— whore," State v. Shoemaker, 101-690—that if plaintiff (an unmarried woman) "did not give birth to child she missed a good opportunity of having it," Sowers v. Sowers, 87-303—that she "was kept by a man," McBrayer v. Hill, 26-136. It is not charging incontinency to say that a single woman looked like she had miscarried: State v. Benton, 117-788—or that she is a "damned bitch:" State v. Harwell, 129-550. The words spoken must amount to a charge of actual illicit sexual intercourse: State v. Moody, 98-671; State v. Aldridge, 86-680.

CHAPTER 48.

LIENS.

I. Labor and Materials.

2016. On buildings and other property. Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building may be situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished. This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements.

Code, s. 1781; 1901, c. 617; 1869-70, c. 206, s. 1. As to liens on personalty, see section 2017. /52-600

Word "lien" defined: Frick & Co. v. Hilliard, 95-117. Word "contracted," as used in section, defined: Ball v. Paquin, 140-95. Distinction between laborer's and mechanic's lien pointed out: Broyhill v. Gaither,

119-443. In action to recover for work and labor upon construction of house, court may, in judgment for amount due, decree lien in premises therefor: Oakley v. Van Noppen, 95-60. There must be a debt for the statutory lien to rest upon: Weathers v. Borders, 124-610; Belvin v. Paper Co., 123-147; Baker v. Robbins, 119-289; Boone v. Chatfield, 118-916; Wilkie v. Bray, 71-205—and unless contract, express or implied, is made with owner of land, no lien can attach thereon for work done or materials furnished for erecting or repairing buildings thereon, Nicholson v. Nichols, 115-200—for lessee can not bind lessor by contracting for work on lessor's property, but contractor must look to lessee and can have no lien, Boone v. Chatfield, 118-916.

Mechanic's lien for repairs upon sawmill made for owner is not good as against mortgagee who did not authorize or know of repairs and did not subsequently ratify acts of owner and mechanic: Baker v. Robbins, 119-289—and such lien is only effective against owner's equity of redemption, Ibid. As to waiver of lien, see Kornegay v. Styron. 105-14.

Lien provided for by section arises out of simple relation of debtor and creditor for labor done or materials furnished, and where there is no other security than personal obligation of debtor: Crissom v. Pickett, 98-54.

As bearing upon section, see Pipe and Foundry Co. v. Howland, 111-619; Cheatham v. Rowland, 92-340. Section merely referred to in Cheesborough v. Sanatorium, 134-245; Harvey v. Johnson. 133-358; James v. Lumber Co., 122-160; Cameron v. Lumber Co., 118-267; Paper Co. v. Chronicle, 115-145; Kornegay v. Styron, 105-19; Cook v. Cobb, 101-69; Bank v. Mfg. Co., 96-309; McDougall v. Crapon, 95-294.

LIEN FOR "WORK DONE" WITHIN MEANING OF THIS SECTION. Overseer not entitled to laborer's lien for his wages upon crop or land of his employer over which he has superintendence: Whitaker v. Smith, 81-340. Section does not embrace case where plaintiff who abandoned contract made with defendant to cultivate crop upon shares, and attempt to assert lien for labor bestowed on crop: Crissom v. Pickett, 98-54. Section embraces contractors who do not themselves perform labor or furnish materials used, but procure same done through the agency of others: Lester v. Houston, 101-605. One who, under contract, assists owner of factory in purchasing machinery and superintends erection of same and puts factory in order, but does no manual labor himself, is not entitled to lien under section: Cook v. Ross, 117-193. Where person employed as bookkeeper and "to make himself generally useful" during reconstruction of building, the fact that he occasionally did manual labor during remodeling does not entitle him to mechanic's lien: Nash v. Southwick, 120-459. Contractor for construction of railroad entitled to mechanic's lien against railroad company for work on such construction and for laying cross-ties and rails thereon: Dunavant v. R. R., 122-999.

Legislature has provided lien only when service or labor is for betterment of property on which it is bestowed: Tedder v. R. R., 124-342—leaving laborer in all other cases to secure himself as at common law, Ibid. Plaintiff's services in looking after mining property, paying taxes

and listing it, and keeping trespassers off, constitutes no lien on property which followed it into purchaser's hands: Morrison v. Mining Co., 143-250.

LIEN FOR MATERIAL FURNISHED. Words "material furnished" must be understood such material as enters into and becomes part of property and adds to its value: Coal Co. v. Electric Co., 118-235. Vendor of lumber has no lien on same for purchase money, unless it be furnished with the understanding that it is to be used in building or repairing buildings on purchaser's land: Lanier v. Bell, 81-337. Electric dynamo is not material furnished under certain circumstances: Electric Co. v. Power Co., 122-599—nor is a steam engine and boiler under circumstances stated in James v. Lumber Co., 122-157.

Where contractor undertakes to put up building and complete same, the contract is indivisible and his "mechanic's lien" embraces entire outlay whether in labor or in material: Broyhill v. Gaither, 119-443. Where work done on house and furnishing material were all in same contract, which was entire and indivisible, contractor was entitled to lien for whole amount: Isler v. Dixon, 140-529.

The lien is on the realty and not on the material furnished: Woodworking Co. v. Southwick, 119-611.

As to priority between lien for certain material furnished and mortgage to secure corporate bonds, see Electric Co. v. Power Co., 122-599; James v. Lumber Co., 122-157; Coal Co. v. Electric Co., 118-232 (overruling Paper Co. v. Chronicle, 115-143, and Heath v. Cotton Mills, 115-202); see also Moore v. Industrial Co., 138-304.

TO WHAT PROPERTY LIEN CAN ATTACH. Lease of real estate for five years is such an estate or interest as may be subjected to mechanic's lien: Woodworking Co. v. Southwick, 119-611.

Section, so far as it gives lien upon homestead for materials used in improvements upon same, is unconstitutional: Cumming v. Bloodworth, 87-83.

Property of corporation chartered for purpose of supplying water to city is subject to lien for materials furnished: Pipe and Foundry Co. v. Howland, 111-615. Courthouse can not be subjected to lien for labor or materials: Snow v. Comrs., 112-335.

Fact that house and improvements built by contractor upon tract of land belonging to owner are enclosed by fence including a small portion of land, is not a segregation of house from tract so as to confine mechanic's lien to enclosure: Broyhill v. Gaither, 119-443. Where house built by contractor for owner upon undivided tract of land in country, mechanic's lien attaches to whole tract: Ibid—especially where it appears that house alone apart from tract of land would be of comparatively little value, Ibid.

"All crops grown this year on my land:" Weil v. Flowers, 109-212. Description of "Dement land" good, "any other land" bad: Perry v. Bragg, 109-303; Crinkley v. Egerton, 113-142. House moved from mortgaged premises: Turner v. Mebane, 110-413. Boiler in a sawmill: Baker v. Robbins, 119-289.

LIEN ON LAND OF MARRIED WOMAN. Provisions of section al-

lowing laborer's lien to be taken on property of married woman is constitutional: Finger v. Hunter, 130-529. **Lien is given on property of married woman for all debts contracted for work and labor done on same:** Ball v. Paquin, 140-83. **Written consent of husband not necessary to charge wife, where building placed or repaired on wife's land by her consent or procurement:** Ball v. Paquin, 140-98; Finger v. Hunter, 130-529.

For cases under section prior to amendment extending its provisions to property of married woman, see Weathers v. Borders, 124-610; Green v. Bennett, 120-394; Thompson v. Taylor, 110-70; Weir v. Page, 109-220; Nicholson v. Nichols, 115-200.

2017. Personal property repaired. Any mechanic or artisan who shall make, alter or repair any article of personal property at the request of the owner or legal possessor of such property, shall have a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid; and if not paid for within the space of thirty days, provided it does not exceed fifty dollars, if over fifty dollars ninety days, after the work shall have been done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks' public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there be no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work may have been done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Code, s. 1783; 1869-70, c. 206, s. 3. **Where mechanic or artisan surrenders possession of property he loses his lien:** Tedder v. R. R., 124-344; Block v. Dowd, 120-402; McDougald v. Crapon, 95-292.

One who cuts timber and manufactures it into lumber for corporation before receiver appointed therefor, has right to retain possession of such lumber until his lien discharged by payment: Huntsman v. Lumber Co., 122-583.

Under certain circumstances lienee will be restrained from selling property to satisfy lien: Ibid. **Where one sold bicycle to another, retaining title until payment of price, and thereafter made repairs thereon, returning same to purchaser, and again obtains possession against purchaser's protest, he has no lien on property for repairs:** Block v. Dowd, 120-402. **Mechanic's lien for repairs upon sawmill for owner not good as against mortgagee who did not authorize or know of repairs, and did not subsequently ratify acts of owner and mechanic:** Baker v. Robbins, 119-289. **Where laborer has possession of chattel on which he claims lien he can enforce same by sale:** McDougald v. Crapon, 95-292.

2018. Constructing railroad; claims collected; time for action. As often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for thirty or less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided, and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer, or his attorney, and shall be served on an engineer, agent or superintendent employed by said company having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided.

Code, s. 1942; 1871-2, c. 138, s. 12. **See section 2021. Laborer seeking to subject railroad company hereunder must show substantial compliance with section:** Moore v. R. R., 112-236. **Privilege conferred by section restricted to laborers, and for work done for thirty days or less in constructing road, and company can in no event be held liable for payment of accounts due by contractors for materials:** Ibid. **Contractor or subcontractor entitled to file lien within one year of doing work or furnishing material:** Dunavant v. R. R., 122-999. **After complying with requirements of section, laborer can assign claim as debt either against employer or railroad company:** Moore v. R. R., 112-236—**and assignee can enforce claim,** Ibid.

II. Subcontractors.

2019. Given preferred lien. All subcontracts and laborers who are employed to furnish or who do furnish material for the building, repairing or altering any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as provided for other liens in this chapter, except where it is otherwise provided: Provided, that the sum total of

all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given.

151-507

Code, ss. 1801, 1803; 1880, c. 44, ss. 1, 3. **Subcontractor or laborer has no lien until he files his claim with owner:** Clark v. Edwards, 119-115; Pinkston v. Young, 104-102—**and even then only has lien if owner is still indebted to contractor amount claimed,** Wood v. R. R., 131-48; Clark v. Edwards, 119-115—**for owner is not responsible to subcontractor or laborer otherwise,** Wood v. R. R., 131-48.

Laborer's lien, or lien for material, when filed, relates back and takes priority over all liens attaching subsequent to beginning work or furnishing first material: Clark v. Edwards, 119-115; Lumber Co. v. Hotel Co., 109-658; Burr v. Maultsby, 99-263; Chadbourne v. Williams, 71-444.

Mere fact that laborers and subcontractors are working on building is not notice to owner not to pay contractor until he has ascertained how much is due by him to every subcontractor, and laborer: Clark v. Edwards, 119-115.

Lien given by section does not supersede that in favor of contractor: Lester v. Houston, 101-605—**but only gives it a preference to extent of amounts which may be due subcontractor, provided it does not exceed sum which may be due original contractor,** Ibid.

Subcontractor may enforce lien for labor or materials against owner of property though contract with principal contractor has not been completed: Lumber Co. v. Hotel Co., 109-658—**or has been abandoned,** Ibid.

Duly filed lien of subcontractor has precedence of all other liens attaching to property subsequent to time work was commenced or material furnished: Lumber Co. v. Hotel Co., 109-658.

Section merely referred to in Dunavant v. R. R., 122-1001; Parsley v. David, 106-225.

2020. Notice to owner; liability of. Any subcontractor, laborer or material man, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee shall refuse or neglect to retain out of the amount due the said contractor under the contract as much as shall be due or claimed by the subcontractor, laborer or material man, the subcontractor, laborer or material man may proceed to enforce his lien, and after such notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided.

151-507
151-419
152-600

Code, s. 1802; 1880, c. 44, s. 2. **Surety for contractor not liable for deficiency arising from owner of property having accepted drafts from contractor for labor and material for more than sum due contractor:** Donlan v. Trust Co., 139-212. **Sum charged by owner in supervising completion of work on property can not be retained by owner out of funds due contractor, in preference to claims for labor and material:** Ibid. **Subcontractor can enforce lien against owner of property only to extent**

of any unpaid sums due contractor at date of giving notice to owner of his claim: Clark v. Edwards, 119-115—**and until he gives owner notice of claim he has no lien and owner justified in making payment to contractor,** Ibid; Wood v. R. R., 131-48; Pinkston v. Young, 104-102.

Mere fact that laborers and subcontractors are working on building is not notice to owner not to pay out to contractor until ascertained how much due by latter to each subcontractor, laborer or material man: Clark v. Edwards, 119-115.

Subcontractor may enforce lien for labor or materials against owner of property though contract with principal contactor has not been completed: Lumber Co. v. Hotel Co., 109-658—**or even if same has been abandoned,** Ibid. **Principal contractor is necessary party to action to enforce lien of subcontractor:** Ibid—**but trustee in conveyance, subject to lien, is not essential party,** Ibid. **As to action to enforce lien hereunder** see Parsley v. David, 106-225; also see sections 2027, et seq.

Section merely referred to in Pipe and Foundry Co. v. Howland, 111-618; Lester v. Houston, 101-610.

2021. Contractor shall furnish owner with statement of indebtedness; subcontractor may. Whenever any contractor, architect or other person shall make a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it shall be his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it shall be the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed, such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor, such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. Any laborer, mechanic, artisan or person furnishing materials may furnish to such owner or his agents before he shall have paid the contractor an itemized statement of the amount owing to such laborer, mechanic or artisan employed by said contractor, architect or other

person for work or labor on such building, vessel or railroad, and any person may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes; and upon the delivery of such notice to such owner or his agent the person giving such notice shall be entitled to all the liens and benefits conferred by this section or by any other law of this state in as full and ample a manner as though the statement had been furnished by the contractor, architect or such other person.

1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478. **Section directed against contractor, and is intended to compel him to furnish to owner of premises statement necessary to give notice of claims of subcontractors and others:** Pinkston v. Young, 104-102—**and this does not affect rule that lien of subcontractors, laborers and material men does not attach until person asserting lien shall have given prescribed notice to owner of premises upon which labor or material expended,** Ibid.

147-640
150-141
151-419
151-807

2022. Sums due by statement, a lien. The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court.

1887, c. 67, s. 2. **Section dispenses with necessity of filing itemized statement of claim before justice of the peace or clerk of superior court:** Pinkston v. Young, 104-102.

147-639
150-141

2023. Claims paid pro rata, when. In the event the amount due the contractor by the owner shall be insufficient to pay in full the laborer, mechanic or artisan, for his labor and the person furnishing materials for materials furnished, it shall be the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner.

1887, c. 67, s. 3.

150-141

III. On Colts and Calves.

2024. Season of sire a lien on. In all cases where the owner, or any agent for or employee of the owner, of any mare, jennet or cow shall turn the same to a stud-horse, jack or bull for the purpose of raising colts or calves, the price charged for the season of the stud-horse, jack or bull shall constitute a lien on the colt or calf until the price so charged for the season is paid.

Code, s. 1797; 1885, c. 72; 1887, c. 14; 1872-3, c. 94, s. 1.

2025. Not exempt from execution. The colt or calf shall not be exempt from execution for the payment of said season price by

reason of the operation of the personal property exemption: Provided, that the person claiming such lien shall institute action to enforce the same within twelve months from the foaling of the colt or dropping the calf.

Code, s. 1798; 1885, c. 72; 1872-3, c. 94, s. 2; 1879, c. 47.

IV. Proceedings to Enforce.

2026. Claims filed, when. All claims against personal property, of two hundred dollars and under, may be filed in the office of any justice of the peace in the township, but if there is no justice in the township, then before a justice in an adjoining township; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished.

Code, s. 1784; 1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; 1907, c. 148. For duty of clerk, records, etc., see section 915 (21). Essential to validity of laborer's lien that claim shall set forth in detail the times when labor performed, its character, amount due therefor, and upon what property employed: Cook v. Cobb, 101-68—and, if for materials furnished, same particularly required, Ibid. Claim of lien filed under section must comply with requirements of section: Wray v. Harris, 77-77—and where claim fails to specify in detail material furnished and labor performed, or time when material furnished and labor performed, it is irregular and void, Ibid. Upon filing of notice within proper time and in prescribed manner, lien given laborers and mechanics attaches to property upon which labor or materials bestowed: Burr v. Maultsby, 99-263—and relates back to time of beginning of work or furnishing of materials, Ibid; Clark v. Edwards, 119-115; Lumber Co. v. Hotel Co., 109-658; Chadbourn v. Williams, 71-444—and is effectual not only against all other liens or incumbrances which attached subsequently, but against purchasers for value and without notice, Burr v. Maultsby, 99-263. Notice of lien on land must be filed in office of superior court clerk: Lanier v. Bell, 81-337. Lien of person who furnished materials for building is not avoided because in notice thereof filed with clerk it is made to attach on two distinct lots separated by street: Chadbourn v. Williams, 71-444. Notice of lien required to be filed since enactment of section should be filed with clerk of superior court, though materials began to be furnished before section went into effect: Ibid. Only original contractor can file notice of mechanic's lien: Zachary v. Perry, 130-289.

Laborer's lien filed after employer's death is valid though employer

named in caption instead of administrator: Pugh v. Baker, 127-2. **For claim of laborer held to be made out in substantial compliance with section,** see Cameron v. Lumber Co., 118-266.

Section merely referred to in Kornegay v. Styron, 105-19; Jarrett v. Self, 90-479.

2027. Action brought, when and where. Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien: Provided, that if the debt be not due within six months but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due.

147-639

Code, ss. 1785, 1790; 1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, c. 250; 1876-7, c. 251. **Defects in claim prescribed by preceding section, not cured by alleging necessary facts in pleading in action brought to enforce lien:** Cook v. Cobb, 101-68.

Section can not have been intended for case in which resort to any court unnecessary, and complete relief may be obtained by parties' own act: McDougall v. Crapon, 95-295.

Action against a married woman for less than $200 for material used in building a house must be brought before a justice of the peace: Finger v. Hunter, 130-529; Smaw v. Cohen, 95-85—**but where proceeding not under section, but an action to coerce payment out of separate estate of feme covert for her contracts, superior court alone has jurisdiction, although amount be less than $200,** Smaw v. Cohen, 95-85.

As to parties to action hereunder, see Pugh v. Baker, 127-2; Lumber Co. v. Hotel Co., 109-658; Clark v. Edwards, 119-115; Moore v. R. R., 112-236.

Section merely referred to in McMillan v. Williams, 109-252; Hodges v. Hill, 105-131; Boyle v. Robbins, 71-133.

1909 56

2028. Filed in twelve months. Notice of lien shall be filed, as hereinbefore provided, at any time within twelve months after the completion of the labor, or the final furnishing the materials, or the gathering of the crops.

147-639

Code, s. 1789; 1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101. **Contractor or subcontractor, who does work or furnishes materials for construction of railroad, entitled to file lien on property of such company within one year from time of doing work or furnishing material:** Dunavant v. R. R., 122-999. **Section valid:** Pipe and Foundry Co. v. Howland, 111-623.

2029. Execution. Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest

which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant.

Code, s. 1791; 1868-9, c. 117, s. 9. **For forms of execution, see section 627. Judgment to enforce mechanic's lien upon specific property for its satisfaction, must contain general description of such property and execution thereon must direct that such property shall first be sold to satisfy judgment:** McMillan v. Williams, 109-252. **Justice can not declare, but can render direct judgment appropriating funds belonging to plaintiff:** Markham v. McCown, 124-163. **Property subject to lien must be first sold:** McMillan v. Williams, 109-252; Pipe and Foundry Co. v. Howland, 111-615.

Section merely referred to in Burr v. Maultsby, 99-266; Boyle v. Robbins, 71-133.

2030. No justice's execution against land. No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of superior court for the purpose of selling such estate or any interest there.

Code, s. 1794; 1868-9, c. 117, s. 13. **When land to be sold in enforcing lien, judgment rendered before justice shall be docketed in superior court, whence execution may issue:** Smaw v. Cohen, 95-85.

2031. Attachment, remedy, when. In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the lienee of his lien, the claimant may have a remedy by attachment.

Code, s. 1795; 1868-9, c. 117, s. 14. **As to sufficiency of affidavit to obtain attachment,** see Brogden v. Privett, 67-45.

V. Rights of Defendant.

2032. Setoff and counterclaim. The defendant in any suit to enforce the lien shall be entitled to any setoff arising between the contractors during the performance of the contract, or counterclaim allowed by law.

Code, s. 1788; 1869-70, c. 206, s. 8.

2033. How liens discharged. All liens created by this chapter may be discharged as follows:

1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

2. By depositing with the justice or clerk money equal to the

amount of the claim, which money shall be held by said officer for the benefit of the claimant.

3. By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed.

147-639

Code, s. 1793; 1868-9, c. 117, s. 12.

VI. Priorities.

2034. Laborer's lien on crops. The lien for work on crops given by this chapter shall be preferred to every other lien or incumbrance which attached to the crops subsequent to the time at which the work was commenced.

Code, s. 1782; 1869-70, c. 206, s. 2. **Lien of laborer has precedence over agricultural liens made subsequent to his contract, but before crop harvested:** Rouse v. Wooten, 104-229.

Lien provided by section arises out of simple relation of debtor and creditor for labor done or materials furnished and where there is no other security than personal obligation of debtor: Grissom v. Pickett, 98-54.

Where plaintiff, having abandoned contract with defendant to cultivate crop on shares and attempted to assert lien upon crop for labor performed on same, he does not come within section: Ibid.

Section merely referred to in Tedder v. R. R., 124-344; Pipe and Foundry Co. v. Howland, 111-617; Brewer v. Chappell, 101-254; Farrar v. Staton, 101-79. **Cases of interest, not entirely applicable under present law:** Lumber Co. v. Hotel Co., 109-658; Burr v. Maultsby, 99-263; Warren v. Woodard, 70-382.

2035. Date from notice of lien. The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk.

Code, s. 1792; 1868-9, c. 117, s. 11. **Laborer's lien, or lien for materials, when filed relates back and takes priority over all liens attaching subsequent to beginning work or furnishing first material:** Clark v. Edwards, 119-115; Lumber Co. v. Hotel Co., 109-658; Burr v. Maultsby, 99-263; Chadbourn v. Williams, 71-444.

2036. Rights not affected. Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer.

Code, s. 1786; 1869-70, c. 206, s. 6. **Judgment for labor and torts has lien prior to corporate mortgage, if purchaser thereunder had knowledge:** R. R. v. Burnett, 123-210.

VII. Hotels.

2037. May retain baggage, when; lien on. Every hotel and boarding-house keeper who shall furnish board, bed or room to any person shall have the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel or boarding-house untill all reasonable charges for such room, bed and board are paid.

1899, c. 645, s. 1. See sections 1909 et seq. Innkeeper has a lien even upon goods of third person held by guest, and brought within inn, unless he knew that they were not the property of guest: Covington v. Newberger, 99-523—but one who entertains strangers only occasionally, although he receives compensation therefor is not an innkeeper: State v. Mathews, 19-424.

2038. Baggage sold, when. If such charges are not paid within ten days after they become due then the hotel or boarding-house keeper is authorized to sell said baggage or other property at the courthouse door, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, pay to the owner of said baggage or other property.

1899, c. 645, s. 2.

2039. Notice of sale. Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he be a resident of the state, but if he be a nonresident of the state, or if his residence be unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same.

1887, c. 645, s. 3.

VIII. On Vessels.

2040. For towage. Every vessel, boat, scow, lighter, flat, raft or other water craft, shall be subject to a lien for the payment of towage done by any steamboat or tug boat, to be filed and enforced as is provided for other liens.

1893, c. 357.

2041. For labor in loading and unloading. Every vessel, her tackle, apparel and furniture shall be subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or

laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel.

Code, s. 1804; 1881, c. 356, s. 1.

2042. How filed; notice to master. The liens provided for in the preceding sections shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him, when it shall be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract, as much as shall be due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided.

Code, s. 1805; 1881, c. 356, s. 2. **Section merely referred to** in Pipe and Foundry Co. v. Howland, 111-628.

2043. How enforced. The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace.

Code, s. 1806; 1881, c. 356, s. 3.

2044. Judgment against contractor, a judgment against master and vessel. The judgment against the contractor or stevedore shall also be a judgment against he master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment.

Code, s. 1807; 1881, c. 356, s. 4.

2045. Liens not to exceed amount due contractor. The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to such contractor or stevedore at the time of notice given to such owner, agent or master, or the amount due to such contractor or stevedore at the time of the service of summons upon such master, agent or owner when no notice has been given.

Code, s. 1808; 1881, c. 356, s. 5. **Section merely referred to** in Pipe and Foundry Co. v. Howland, 111-617.

2046. Owner to see laborers paid. In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same shall employ laborers to assist or do the work by the hour, day, week or month, it shall be the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or "boss stevedore" are fully paid the wages that may be due such laborer before he shall make final settlement with the contractor, stevedore or "boss stevedore."

1887, c. 145, s. 1.

2047. May refuse settlement with contractor till laborers paid. Any owner or agent referred to in the preceding section shall have power to refuse final settlement with the "boss stevedore" or contractor until he or they shall satisfy the said owner or agent, by written oath, if necessary, that the same has been done.

1887, c. 145, s. 2.

2048. Owner may pay orders for wages. It shall be lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price.

1887, c. 145, s. 3.

2049. Laborers may sue owner, when. Any owner or agent of such vessel who shall neglect or refuse to comply with the preceding provisions shall be liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or "boss stevedore."

1887, c. 145, s. 4.

2050. Contractors for loading vessels licensed. No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel, either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations.

1891, c. 450; 1899, c. 595.

2051. Tax and bond. Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sure-

ties in the sum of two thousand dollars, payable to the state of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained.

1891, c. 450.

IX. Agricultural Liens.

146-544

2052. On crops for advances. If any person shall make any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person so making such advance shall be entitled to a lien on the crops which may be made during the year upon the land in the cultivation of which the advance so made has been expended, in preference to all other liens existing or otherwise, except the laborer's and landlord's liens, to the extent of such advance: Provided, an agreement in writing shall be entered into before any such advance is made to this effect, in which shall be specified the amount to be advanced, or in which a limit shall be fixed beyond which the advance, if made from time to time during the year, shall not go; which agreement shall be registered in the office of the register of the county in which the person to whom the advance is made resides, within thirty days after its date.

Code, s. 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1. **As to husband's creating lien on crop raised on wife's land,** see Loftin v. Crossland, 94-76; Bray v. Carter, 115-16; Rawlings v. Neal, 126-271; Wells v. Batts, 112-283; Branch v. Ward, 114-148.

Merchant gets nothing when tenant abandons crop before maturity: Beacom v. Boing, 126-136; Thigpen v. Leigh, 93-48.

Registration of mortgage not essential to validity of lien as between parties thereto: Reese v. Code, 93-87. **Quaere, whether compliance with other requirements contained in section necessary between parties:** Ibid.

As to parol evidence to show that supplies furnished after execution of lien, see Meekins v. Walker, 119-46.

Restrictive provisions of section are for security of creditors and others dealing with debtor: Nichols v. Speller, 120-79; Reese v. Cole, 93-87.

THE AGREEMENT; FORM AND SUFFICIENCY OF. No particular form necessary; Townsend v. McKinnon, 98-103. **Agreement must be in writing:** Patapsco v. Magee, 86-350—**and strictly conform to statute,** Ibid; Rawlings v. Hunt, 90-270; Townsend v. McKinnon, 98-103—**and**

must be executed before advances are made or supplies furnished, Patapsco v. Magee, 86-350; Knight v. Rountree, 99-389; Meekins v. Walker, 119-46; Clark v. Farrar, 74-686; Harris v. Jones, 83-317; but see Reese v. Cole, 93-87. It must be for advances of money or supplies, made to the person engaged or about to engage in culivation of soil for the cultivation of the crop of that year: Clark v. Farrar, 74-686; Loftin v. Hines, 107-360; Wooten v. Hill, 98-48; Woodlief v. Harris, 95-211. Where agreement, in form of chattel mortgage, held sufficient as an agricultural lien for advancements: Townsend v. McKinnon, 98-103. Agricultural lien will not be allowed to operate as a mortgage in certain cases: Clark v. Farrar, 74-686; Patapsco v. Magee, 86-350—but where instrument intended by parties to operate as agricultural lien, but it fails to set out some essential matter, it will be given effect as a common law mortgage, if in form sufficient, Spivey v. Grant, 96-214. Instrument may be so framed as to operate in one part as a mortgage and in another part as an agricultural lien: Rawlings v. Hunt, 90-270. Agricultural lien and mortgage may be created by same instrument: Wooten v. Hill, 98-48. For cases on question as to sufficiency of description of land on which crop to be grown, see Perry v. Bragg, 109-303; Weil v. Flowers, 109-212; Brown v. Miller, 108-395; Gwathney v. Etheridge, 99-571. Where land fully described, and in same instrument it says "and upon any other land I may cultivate in county," the lien is good as to land described but not as to any other: Gwathney v. Etheridge, 99-571; Perry v. Bragg, 109-303; Weil v. Flowers, 109-212; Crinkley v. Egerton, 113-142. Land on which crop to be grown must be identified at time lien created: Gwathney v. Etheridge, 99-571. Power of sale upon default in paying advances inserted in instrument giving lien upon crops, does not invalidate instrument: Crinkley v. Egerton, 113-142.

Instrument which gives lien on crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with ordinary powers of sale, is valid both as a chattel mortgage and as an agricultural lien: Nichols v. Speller, 120-75.

Where words of grant in an instrument are that grantor "conveys a lien upon each and every of said crop," to be made upon certain land, such words will constitute valid mortgage upon crops, although not planted at time when such instrument is executed and registered: Harris v. Jones, 83-317.

WHAT ARE ADVANCES HEREUNDER. See under section 1993. As to whether a mule is an advancement, see Branch v. Galloway, 105-193. Person who gives mortgage on crops to obtain supplies under section estopped from asserting that articles which he received as compliance with contract are not "supplies" within meaning of section: Womble v. Leach, 83-84—and a second mortgagee who acquires an interest in crop after such advances made is also bound by such admission, Ibid. Supplies necessary to make and save crop are such articles as are in good faith furnished to and received by tenant for that purpose: Ledbetter v. Quick, 90-276.

NATURE, VALIDITY AND EXTENT OF LIEN. The lien only extends to the crop of the year for which advances made: Clark v. Farrar,

74-686. **Between parties, in absence of fraud and compulsion, lien attaches for dry goods, shoes, tobacco, powders, snuff and candy without showing that such articles were actually used in making crop:** Nichols v. Speller, 120-75.

Validity of lien not affected by fact that land upon which crop planted was, while crop growing, recovered from person giving lien: Brown v. Miller, 108-375.

Section intended to give lien a "preference to all other liens existing or otherwise" to extent of such advance: Nichols v. Speller, 120-78—**and section should be strictly construed when rights of other creditors intervene,** Ibid. **Mortgage on crop not expressed to be for advances to be made and not recorded in thirty days after its execution, has no rights as agricultural lien under section:** Cooper v. Kimball, 123-120. **Where agricultural lien made by vendee who has paid only portion of purchase money, of which vendor has notice but makes no objection, his assent to lien presumed:** Dail v. Freeman, 92-351.

Agreement purporting on its face to be agricultural lien, only for future advances can not be supported as a mortgage as against purchaser for a different purpose and founded on consideration not expressed, but concealed or disguised in instrument: Clerk v. Farrar, 74-686. **Crop lien to secure agricultural advances under section valid inter partes, though not registered within thirty days as required by section:** Gay v. Nash, 78-100. **One who advances money or supplies on agricultural lien for making a crop not bound to see that same are used on farm:** Nichols v. Speller, 120-75.

PRIORITY BETWEEN LIENS. As to landlord's lien for rent and advances being prior to agricultural lien hereunder, see section 1993. As to crop liens given by mortgagors or trustors in possession taking priority over mortgage and deed in trust, see section 2053.

Where mortgage given on crop and agricultural lien thereafter executed which recites that lienor is to pay certain amount out of crops, lienee holds crop subject to mortgage debt: Brasfield v. Powell, 117-140, **Subsequent mortgage on same property given to secure advancements of supplies, there being nothing to show for what purpose supplies furnished, does not create prior lien:** Brown v. Miller, 108-395. **Where two mortgages on crop of cotton, and first mortgagee advanced money in order to save crop and prepare it for market, in excess of amount secured by mortgage, not entitled to same to exclusion of second mortgagee:** Weathersbee v. Farrar, 97-106.

Agricultural lien duly executed and registered takes precedence of mortgage of prior date and registration upon "crop" therein subjected to extent of advances made: Wooten v. Hill, 98-48. **Where tenant makes agricultural lien and afterwards land is sold under execution as property of landlord, owner of lien has right to crop superior to purchaser at execution sale:** Dail v. Freeman, 92-351. **Lien of laborer has precedence over agricultural liens made subsequent to his contract, but before crop harvested:** Rouse v. Wooten, 104-229. **Mortgage given by tenant to third person on his crop produced on certain farm does not give lien on rents**

paid by subtenant of portion of farm where such rents assigned before execution of mortgage: Norfleet v. Baker, 131-99.

As to priority of landlord's lien over lien given by section, see Ford v. Green, 121-70; Spruill v. Arrington, 109-192; Fleming v. Davenport, 116-153; Ballard v. Johnson, 114-141; Thigpen v. Maget, 107-39; Branch v. Galloway, 105-193; Brewer v. Chappel, 101-251; Wooten v. Hill, 98-48; Thigpen v. Leigh, 93-47; Ledbetter v. Quick, 90-276; Harrison v. Ricks, 71-9.

2053. Lien created by mortgagors in possession. The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not.

1889, c. 476. **Where mortgagor in possession has given lien on crops for advances to aid in cultivating same, such lien superior to that of mortgagee of land:** Hinton v. Walston, 115-7; Carr v. Dail, 114-284; McNair v. Pope, 104-350; Killebrew v. Hines, 104-182—**even though lien improperly registered,** Carr v. Dail, 114-284; Killebrew v. Hines, 104-182; but see Brewer v. Chappell, 101-251.

2054. Crops seized and sold, when; issue made up for trial. If the person making such advances shall make an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it shall be lawful for him to issue his warrant directed to any of the sheriffs of this state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due: Provided, that if the person to whom such advances have been made, or any person claiming an interest in the crops, shall, within thirty days after such sale has been made, give notice in writing to the sheriff, accompanied with an affidavit to this effect, that the amount claimed is not justly due, then it shall be the duty of the said sheriff to hold the proceeds of such sale subject to the decision of the court, upon an issue which shall be made up and set down for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides: Provided further, that the lien

provided in this and the preceding sections shall not affect the rights of landlords or laborers.

Code, s. 1800; 1893, c. 9; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88.

Clerk superior court has power to revoke and supersede warrant issued under section, where same improvidently granted: Cottingham v. McKay, 86-241. **Where in proceeding under section, money arising from the sale of crop paid into court and proceeding dismissed, court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and files an affidavit that defendant is insolvent:** Ibid. **Where defendant denies that there is anything due for advances and there is a general verdict for plaintiff, it is error in court to refuse judgment because jury failed to assess damages:** Gay v. Nash, 84-333. **Not necessary to regularity of proceeding under section to enforce lien that summons should be issued to defendant:** Thomas v. Campbell, 74-787.

Section merely referred to in Crinkley v. Egerton, 113-146; Foundry Co. v. Howland, 111-627; Harrison v. Ricks, 71-9.

(1909 844)

2055. Short form in certain counties. For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced and also to constitute a valid chattel mortgage as additional security thereto, and to secure a pre-existing debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davie, Davidson, Duplin, Durham, Edgecombe, Franklin, Forsyth, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hyde, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pender, Pamlico, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrrell, Union, Vance, Wake, Watauga, Washington, Wayne and Wilson:

North Carolina, ... County.

Whereas, ... ha..... agreed to make advances to ..... for the purpose of enabling said ..... to cultivate the lands hereinafter described during the year 19....., the amount of said advances not to exceed ..... dollars; and,

Whereas, said ..... is indebted to said ..... in the further sum of ..... dollars now due; now, therefore, in order to secure the payment of the same the said ..... do..... hereby convey to said ..... all the crops of every description which may be raised during the year 19..... on the following lands in ..... County, North Carolina, ... Township, adjoining the lands of .....

and also the following other property, viz.: .....

.....

And if by the.....day of....., 19....., said .....fail..... to pay said indebtedness, then said ..... may foreclose this lien as provided in section two thousand and fifty-four or otherwise, and may sell said crops and other property after ten days' notice posted at the court house door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said ....., and the said ..... hereby represents that said crops and other property are the absolute property of ..... and free from incumbrance ..... Witness ..... hand..... and seal, ... this the .....day of ....., 19.....

Witness: .....

.....

....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do..... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said .....

This the..... day of .....19.....

Witness: .... (Seal.)

North Carolina, ... County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of ...., the subscribing witness thereto.

This the ..... day of .....19.....

..... (Seal).

North Carolina, ... County.

The foregoing certificate of ....., a ..... of ..... County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the ..... day of ..... 19.....

.....,

Clerk Superior Court.

1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; 1907, c. 843.

2056. Rights on failure to cultivate crops. If any person in the counties mentioned in the preceding section, after executing a lien as aforesaid for advances, shall fail to cultivate the lands described therein, or shall do any other act calculated to impair the security therein given, then the person to whom the lien was executed shall be relieved from any further obligation to furnish sup-

plies, and the debts and advances theretofore made shall become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It shall not be necessary to incorporate such power in the instrument, but this section shall be sufficient authority for the same: Provided, that the sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days' notice published at the courthouse door and three other public places in said county.

1899, c. 17, s. 3; 1901, c. 329, s. 3.

2057. Commissioners to furnish blank records. The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds.

1899, c. 17, s. 4; 1901, c. 329, s. 4.

For fees for probating and registering lien bonds, see sections 2773, 2776. For laborer's lien on corporate assets, see Corporations, section 1206. For power to take crops, see sections 790, 2054. For landlord's lien, see Landlord and Tenant, section 1993. For lien of docketed judgment, see section 574. For lien of docketed judgments of justices of the peace, see section 1479. For lien upon land for improvements made, see section 658. Debts which are liens on decedent's property paid by administrator, see section 87.

CHAPTER 49.

LIQUORS.

[The passage of the general prohibition act, chapter 71, Laws of 1908, has rendered obsolete many sections heretofore appearing under this head, and many decisions thereon. It was thought best not to encumber the books with them.]

2058. Manufacture and sale prohibited. It shall be unlawful for any person or persons, firm or corporation to manufacture or in any manner make or sell, or otherwise dispose of, for gain, any spirituous, vinous, fermented or malt liquors or intoxicating bitters

within the state of North Carolina, except as provided in this chapter.

1908, c. 71. **(The provisos to this section in the act as passed appear here as sections 2058c and 2061). For penalty for violating this section, see sections 3518-3521. For definition of "intoxicating liquors," see section 2058a. For fuller annotations upon subject matter of this chapter see under sections 3518-3521.**

Legislature may pass laws prohibiting sale of liquor within any designated locality: State v. Piner, 141-760, and cases cited on page 762; Guy v. Comrs., 122-471—**no one having a vested right in such traffic,** Guy v. Comrs., 122-471—**and may prescribe rules of evidence applicable to charges of violation,** State v. Barrett, 138-630.

When the liquid by common knowledge and observation, is intoxicating, the court may so declare, but if it is doubtful whether or not it be so then the question of fact is raised for the jury: State v. Piner, 141-763; State v. Parker, 139-588, and cases cited; State v. Packer, 80-439; State v. Lowry, 74-121.

As to what is a sale hereunder, see State v. Johnson, 139-640; State v. Neal, 133-689; State v. Smith, 117-809; State v. Neis, 108-787; State v. Sykes, 104-695; State v. Lockyear, 95-633; State v. Poteet, 86-612; State v. McMinn, 83-669; State v. Taylor, 89-577; see annotations under section 3518a.

Legislature has power to change rules of evidence and declare that certain facts or conditions when shown shall constitute prima facie evidence of guilt: State v. Barrett, 138-630; State v. Dowdy, 145-432—**therefore a statute making the keeping of a certain quantity of liquor prima facie evidence of keeping it with intent to sell is valid,** Ibid; State v. Dowdy, 145-432; State v. Tisdale, 145-422; State v. McIntyre, 139-601—**but statute does not operate when indictment does not specify name of person to whom sold,** State v. Tisdale, 145-422. **Such statute does not violate the provision of the federal constitution prohibiting the denial to any person the equal protection of the law:** State v. Barrett, 138-630—**quaere: Whether it is within the power of the legislature to make the mere ownership or possession of whisky in itself a crime:** State v. McIntyre, 139-599.

2058a. Intoxicating liquors defined; certain medicinal preparations excepted. All liquors, or mixtures thereof, by whatever name called, that will produce intoxication shall be construed and held to be intoxicating liquors within the meaning of this chapter and within the meaning of section three thousand five hundred and twenty-seven: Provided, that medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia and National Formulary which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution, and which are manufactured and sold as medicines and not as beverages, shall not be

held or construed to be or to come within the meaning or provisions of this chapter and of section three thousand five hundred and twenty-seven.

1908, c. 71, s. 2.

Wine is an intoxicating liquor: State v. Piner, 141-763; State v. Packer, 80-439; see also State v. Parker, 139-586; State v. Scott, 116-1012; State v. Giersch, 98-720 (but see section 2061)—**as are also brandy peaches under certain circumstances,** State v. Scott, 116-1012—**also what is known as ''singlings,''** State v. Summey, 60-496—**also lager beer and all other liquors whether produced by fermentation or distillation which by their free use produce intoxication,** State v. Giersch, 98-720—**and also drinks containing such an amount of alcohol as would make a man drunk if freely used,** State v. Parker, 139-587.

2058b. Wine for sacramental purposes. Nothing in this chapter shall be construed as making it unlawful to sell to any minister of religion or other officer of a church wine to be used for religious or sacramental purposes.

1908, c. 71, s. 5.

2058c. Pharmacists may dispense on prescription. Nothing in in this chapter shall be construed to forbid the sale of spirituous, vinous, fermented or malt liquors or intoxicating bitters by a legalized medical depository, or by any licensed and registered pharmacist, for sickness, upon the written prescription of a regularly licensed and actively practicing physician or surgeon having the person for whom such prescription is made under his charge, which said prescription shall specify the amount of spirits required.

1908, c. 71. **As to what are spirituous and intoxicating liquors, see section 2058a. As to whether a dentist is included by the words ''physician or surgeon,''** see State v. McMinn, 118-1259 (decision rendered under statute where word ''physician'' alone used).

2058d. County or city authorities may prohibit pharmacists from selling; may levy special tax. Nothing in this chapter shall be construed to prevent the county commissioners or governing body of any city or town from prohibiting the sale of spirituous, vinous, fermented or malt liquors or intoxicating bitters by any licensed and registered pharmacist in their respective counties, cities or towns: Provided, said county commissioners or governing body of any city or town may levy a special privilege tax upon any licensed pharmacist to sell spirituous, vinous or malt liquors.

1908, c. 71, s. 6. **For definition of intoxicating liquors, see section 2058a.**

2058e. Pharmacists must keep records of sales. All licensed and registered pharmacists selling intoxicating liquors by prescrip-

tion, as provided in section two thousand and fifty-eight (c), shall keep a record thereof, which shall bear the true dates of the sales, the names of all persons to whom sales were made, the names of physicians or surgeons upon whose prescriptions the sales were made, which said record shall be subject at all times to the inspection of the solicitor of the district, the sheriff and other peace officers of the county, the mayor and police officers of the city or town in which said licensed and registered pharmacist's business is located, and all other persons.

1908, c. 71, s. 3. **For penalty for failing to comply with this section, see section 3516.**

2059. Government and police force; duties. Every incorporated city or town in which spirituous, vinous or malt liquors or intoxicating bitters are permitted to be sold or manufactured under the provisions of this chapter shall maintain a town or city government as provided in its charter of incorporation and a police force of not less than two policemen; and it shall be the duty of some member of said police force to visit every place where liquor is sold or manufactured in such city or town at least once every week and make a careful and thorough inspection and examination thereof, with a view of ascertaining whether the laws regulating the manufacture and sale of liquor are observed and obeyed and whether the said business is conducted in an orderly and lawful manner, and to make a written report setting forth the result of said visitation to the mayor and board of aldermen or other governing authorities of such city or town, which report or several reports the said mayor shall deliver to the solicitor of the district on or before the assembling of the ensuing term of the superior court of the county in which such town or city is situated; and in case such town or city shall fail to maintain a city government or provide the police force, investigations and report herein prescribed, the board of commissioners of the county in which the same is situated may revoke and cancel the license and permission authorizing the sale and manufacture of liquor in such town or city.

1905, c. 339, s. 4. **[This section was not expressly repealed by the prohibition act, 1908, c. 71, and may have some bearing on the question as to whether the duties imposed will not apply to towns where druggists sell liquors on prescription.]**

2060. License from United States as evidence. The possession of or issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous or malt liquors by the United States government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous or malt liquors is forbidden by the laws of this state shall be prima facie

evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by the said license in violation of the laws of this state; and on the trial of any person charged with a violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to said person, by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept.

1905, c. 339, s. 5; 1907, c. 931.

2061. Wines and ciders from fruits. Wines and ciders may be manufactured or made from grapes, berries or fruits, and wine sold at the place of manufacture only, and only in sealed or crated packages containing not less than two and a half gallons per package; but no wine, when sold, shall be drunk upon the premises where sold, nor shall the package containing the same be opened on said premises. Nothing in this chapter shall be construed to prevent the sale of cider, in any quantity, by the manufacturer from fruits grown on his lands within the state of North Carolina.

1908, c. 71.

2062. License necessary. No person shall sell or otherwise dispose of for gain any spirituous, vinous or malt liquors or any intoxicating bitters without first obtaining, as provided by law, a license so to do. Nothing in this section shall prevent any person from selling wines and ciders according to the provisions of section two thousand and sixty-one; but manufacturers may sell wine to churches for communion services in any quantity.

1903, c. 233, ss. 2, 6; 247, s. 60; 1908, c. 71. **[The prohibitive portion of this section not expressly repealed by chap. 71 of the Laws of 1908, is apparently rendered obsolete, except as to pharmacists. The section has been amended by the editor to conform to the new statute, as the new statute repealed everything in conflict. It does not appear that it was the intention of the legislature to absolutely repeal the licensing machinery.]**

2063. License issued to druggists. All licensed and registered pharmacists may sell spirituous, vinous, fermented and malt liquors for use by a sick person upon the written prescription of a regularly licensed and actively practicing physician or surgeon having such person under his charge, and not otherwise. Nothing in this section shall be construed so as to relieve druggists from complying with the law as to license and taxes.

1903, c. 233, ss. 1, 5; 1908, c. 71. **See also section 2058c.**

2064. Application for license. Every person desiring to sell liquors shall make application to the board of county commissioners

for an order to the sheriff to issue license. The application shall be in writing and shall show that the applicant is a bona fide citizen of the United States and a legal voter of North Carolina; that he has never been convicted nor confessed his guilt in a court of competent jurisdiction, of any violation of the laws of any state regulating the sale of liquors; and the place where the business is to be carried on, which in all cases (druggists excepted) must be within an incorporated town or city, and more than two hundred feet in a direct line from any church edifice or the premises pertaining thereto. The application must have been approved before filing by the board of commissioners, aldermen or governing body, by whatever name called, of the city or town in which it is proposed to carry on the business and must be accompanied by the affidavit of six freeholders who are tax payers and residents of the township in which the applicant proposes to do business, all of whom shall declare upon oath that the applicant is a proper person to sell spirituous, vinous or malt liquors; that the building specified is a suitable place for the business to be carried on, and that he has not recommended any other person for liquor license in the same township.

1903, c. 247, s. 66. **This section must be construed along with sections 2058, 2058c, 2063, which apparently limit it to pharmacists.**

2065. Hearing, and order for license. At the hearing of the application by the board of county commissioners any person who may consider himself aggrieved by the granting of the license applied for may contest the same and may produce evidence in contradiction of any of the allegations of the application or show any other reason why the license should not be granted. If satisfied of the truth of the allegations of the application and affidavit, the board of county commissioners may grant an order to the sheriff to issue such license, except in territory where the sale of liquor is prohibited by law.

1903, c. 247, s. 66. **Board of commissioners have a limited legal discretion in passing upon an application for license:** Hillsboro v. Smith, 110-417; Muller v. Comrs., 89-171; Barnes v. Comrs., 135-33—**and do not possess arbitrary power of suppressing all places for retailing spirituous liquors nor are they bound to license an applicant though he be qualified by proof of good moral character,** Muller v. Comrs., 89-171.

A mandamus will not lie to control discretion of county commissioners in matter of granting liquor license: Barnes v. Comrs., 135-27; Howell v. Comrs., 135-26; Loughran v. Hickory, 129-281; Ewbank v. Turner, 134-77 Comrs. v. Comrs., 107-335; Mathis v. Comrs., 122-416; Muller v. Comrs., 89-171; Atty. Gen. v. Justices, 27-315.

License taxes upon liquor dealers imposed by the general revenue act and directed to be paid over to the public school fund of the county are

not county but state taxes, and the county authorities can impose additional taxes thereon for county purposes subject to the restrictions in said act and the constitution: Parker v. Comrs., 104-166.

Where the law prohibits the governing body from granting license to sell liquor, but provides that liquor dealers holding license at the time of the adoption of prohibition shall have six months after election in which to close out stock on hand at time of election, if their license remain so long in force: Held, that where license expired within six months after election, authorities had no power to renew it for the remainder of the six months: McIntyre v. Asheville, 146-475.

2066. Form and issuing of license. The license shall be printed in such form as the treasurer of the state may prescribe and furnished by the register of deeds, and shall be issued by the sheriff upon order of the board of county commissioners after the payment of the taxes required by law. Any person taking out license as provided in this chapter on any date after the first day of July or January, shall pay the whole amount of tax for the six months ending the thirty-first day of December, or the thirtieth day of June, as the case may be, after the date of the license.

1903, c. 247, s. 66.

2067. License posted in place of business. All persons taking out license to sell spirituous, vinous or malt liquors, or any mixture thereof, shall post up in some public place in their place of business the license issued to them. Any person failing to post up the license as provided in this section shall be considered as doing business without license.

1903, c. 274, s. 66.

2068. License revoked. The board of county commissioners upon complaint made by any resident of the county that any person holding a license under this chapter has violated the laws of this state regulating the sale of liquors, shall forthwith summon such person to appear before them at a time given, within thirty days, to show cause why such license and order to issue same should not be revoked, and upon satisfactory evidence of his guilt, shall revoke any license heretofore granted by them.

1903, c. 247, s. 66.

2069-2078.

146-475

[NOTE. The subchapters "Local Option Elections" and "Dispensaries" appearing in the Revisal of 1905, having been rendered obsolete by the prohibition act, chap. 71, Laws of 1908, are omitted.]

2079. Local acts not repealed. Nothing in this chapter shall operate to repeal any of the local or special acts of the general

assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this chapter; but all such acts shall continue in full force and effect and in concurrence herewith.

1908, c. 71, s. 7. **Repeals by implication or construction are not favored and they should not be extended so as to include cases not within the intention of the legislature:** State v. Perkins, 141-797; State v. Sutton, 100-474. **The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later one, it will not be repealed:** State v. Perkins, 141-797. **If the legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a reaffirmance and not a repeal of the former law:** State v. Sutton, 100-474. **An act making it unlawful to sell any drink containing alcohol is not repealed by an act which prohibits the sale of spirituous, vinous, or malt liquors or other intoxicating drinks and repeals all previous statutes in conflict:** State v. Parker, 139-586.

By express provision of section 5458, local acts prohibiting manufacture, sale or disposition of liquor passed at and prior to the session of the general assembly of 1905 were not repealed by the Revisal of 1905: State v. Herring, 145-418.

2080. Place of delivery of liquor, place of sale. The place where delivery of any intoxicating liquors is made in the state of North Carolina shall be construed and held to be the place of sale thereof, and any station or other place within said state to which any person shall ship or convey any intoxicating liquors for the purpose of delivering or carrying the same to a purchaser shall be construed to be the place of sale: Provided, nothing in this chapter shall be construed to prevent the delivery of any intoxicating liquor to any licensed and registered pharmacist in sufficient quantities for medical purposes only.

1908, c. 71, s. 4. **Legislature had power to enact this section:** State v. Herring, 145-418; State v. Patterson, 134-612.

An indictment at the place of delivery of liquor is not prohibited by the sixth amendment to the constitution of the United States: State v. Patterson, 134-612.

CHAPTER 50.

MARRIAGE.

I. How Contracted.

2081. What constitutes. The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained or authorized minister of any religious denomination or of a justice of the peace and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the right of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this or any other section of this chapter.

Code, s. 1812; 1871-2, c. 193, s. 3; 1908, c. 47. **Section only prescribes what constitutes valid marriage:** State v. Brown, 119-827.

As to sham marriages, see State v. Wilson, 121-650; State v. Brown, 119-825. **As to evidence of marriage,** see Jones v. Reddick, 79-290; State v. Robbins, 28-23; Weaver v. Cryer, 12-337. **As to marriage celebrated by ordained minister, who depends for his support upon some other occupation than minister,** see In re Cunninggim, 60-397.

Marriage by law is complete when parties, able and willing to contract, have actually contracted to be man and wife in form and with the solemnities required by law: State v. Patterson, 24-346—**and consummation by carnal knowledge not necessary to its validity,** Ibid. **Cohabitation between an Indian man and woman, according to ancient customs of their tribe, which leave parties free to dissolve the connection at pleasure, is not marriage:** State v. Ta-cha-na-tah, 64-614—**for there is but one law of marriage for all residents of this state,** Ibid. **While consent is essential to marriage in this state, it must also be acknowledged in manner and before person prescribed by section:** State v. Wilson, 121-650.

Elder in colored Methodist church is an ordained minister of the gospel within meaning of section, and as such can celebrate rites of matrimony: State v. Parker, 106-711.

For case under former enactment, see State v. Bray, 35-289.

2081a. Marriages by unordained ministers validated. All marriages solemnized prior to March fourth, one thousand nine hundred and seven, by ministers of the gospel who were licensed, but not ordained, are hereby validated and made binding and effective from their consummation.

1907, c. 529. **Legislature may, by retrospective legislation, give validity to marriage invalid because of nonobservance of some statutory requirement:** Cooke v. Cooke, 61-583—**aliter where marriage nullity as for want of consent,** Ibid.

II. Contracting Parties.

2082. Who may marry. All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of fourteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden.

Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193. **Female may lawfully marry at the age of fourteen years:** Whitaker v. Hamilton, 126-466.

2083. Who may not marry. All marriages between a white person and a negro or Indian, or between a white person and person of negro or Indian descent to the third generation, inclusive, or between a Croatan Indian and a negro, or between a Croatan Indian and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting for want of will or understanding, shall be void: Provided, that no marriage followed by cohabitation and birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person, and the other a negro or Indian, or of negro or Indian descent to the third generation, inclusive, and for bigamy.

Code, s. 1810; R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; 1887, c. 245. **See Divorce and Alimony, section 1560.**

153-174

VOID MARRIAGES. Marriage between white person and negro: Hare v. Board of Education, 113-9; Woodward v. Blue, 103-114; State v. Kennedy, 76-251, approved in State v. Cutshall, 110-552; State v. Harriston, 63-451; State v. Ross, 76-242; State v. Rheinhardt, 63-547; State v. Melton, 44-49; State v. Hooper, 27-201; State v. Fore, 23-378; State v. Watters, 25-455—**between persons one of whom has husband or wife living,** Irby v. Wilson, 21-512—**between persons one of whom is declared a lunatic,** Sims v. Sims, 121-297; Crump v. Morgan, 38-91; Johnson v. Kincade, 37-470—**between persons nearer of kin than first cousins,** Baity v. Cranfill, 91-293.

Marriage entered into by female under fourteen, or male under sixteen, not void but voidable: State v. Parker, 106-711; but see Gathings v. Williams, 27-487—**and where such marriage followed by cohabitation of twenty years, parties being acknowledged and recognized as husband**

and wife, it will not be declared void, State v. Parker, 106-711—and where one of parties under prescribed age, but persons continue to live together as man and wife after reaching prescribed age, it is a ratification tion of marriage, Koonce v. Wallace, 52-194.

To bring case of unlawful marriage within proviso to section, it must be shown, not only that one of parties dead, but that cohabitation and birth of issue followed unlawful marriage: Ward v. Bailey, 118-55. Marriage between persons nearer of kin than first cousins, followed by cohabitation and birth of issue, shall not be declared void after death of either of parties: Baity v. Cranfill, 91-293—for power of court to declare such marriages void is confined to cases where parties are living Ibid. Courts have jurisdiction to declare marriage void ab initio Setzer v. Setzer, 97-252—but such judgment will not bastardize issue, Ibid—and action to have marriage declared void because of preexisting disqualifications to enter into marriage relation is an action for divorce, Lea v. Lea, 104-603.

Marriage between white person and negro in another state is valid in this state: State v. Ross, 76-242; State v. Schlachter, 61-520—but where they leave this state for purpose of celebrating such marriage and then of returning, such marriage void, State v. Cutshall, 110-552; State v. Kennedy, 76-251. Provisions of section prohibiting marriage between races are not in conflict with state constitution or amendments to federal constitution: State v. Hairston, 63-451.

It is competent for legislature to impose, and therefore to remove conditions in respect to marriage relation: Baity v. Cranfill, 91-293—but legislature can not validate marriage which is nullity, as for want of consent, Cooke v. Cooke, 61-583.

Word "generation" defined: McMillan v. School Committee, 107-609.

For case prior to enactment of section as to impotency of one of parties, see Smith v. Morehead, 59-360. Section referred to in Hopkins v. Bowers, 111-177.

2084. Prohibited degrees of kinship. Whenever the degree of kinship shall be estimated with the view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole blood.

Code, s. 1811; 1879, c. 78. Section merely referred to in Baity v. Cranfill, 91-296.

2085. Marriages between slaves validated. Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the general assem-

bly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married.

Code, s. 1842; 1866, c. 40, s. 5. **Section valid:** Bettis v. Avery, 140-186; Baity v. Cranfill, 91-298. **Necessary consent to marriage is supplied by continuing cohabitation:** Bettis v. Avery, 140-186—**and such continued cohabitation, after passage of section, is conclusive evidence of party's consent to contract,** Long v. Barnes, 87-329; State v. Whitford, 86-636—**nor can such marriage be avoided by failure to have acknowledgment of same entered of record,** Erwin v. Bailey, 123-628; State v. Whitford, 86-636; State v. Adams, 65-538. **Relation of man and wife existing between former slaves, if continued until passage of act, culminated into valid marriage and is legalized by section:** Nelson v. Hunter, 140-598; Erwin v. Bailey, 123-628; Bettis v. Avery, 140-186; State v. Melton, 120-591; State v. Harris, 63-1.

This section has retroactive effect so as to legalize relation from beginning of it, thereby legitimatizing all offsprings of cohabitation born during entire period, and conduct of parents after passage of act could not render offspring of union illegitimate, Nelson v. Hunter, 140-598. **Section intended for benefit of those who occupied such relations to each other exclusively, and not to others at same time:** Branch v. Walker, 102-34.

As bearing upon section, see State v. Adams, 65-537. **For case prior to enactment of section,** see State v. Samuel, 19-177. **Section merely referred to in** Jones v. Hoggard, 108-178.

III. The License.

2086. Unlawful to perform ceremony without. No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there shall be delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy.

Code, s. 1813; 1871-2, c. 193, s. 4. **Marriage not invalid because solemnized without a license:** Maggett v. Roberts, 112-71; State v. Parker, 106-711; State v. Robbins, 28-23—**or under an illegal license,** Maggett v. Roberts, 112-71.

2087. Penalty for performing ceremony without. Every minister or officer who shall marry any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who shall fail to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who shall sue therefor.

Code, s. 1817; R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8. **For further penalty, see section 3372. Marriage not invalid because solemnized**

without license: Maggett v. Roberts, 112-71; State v. Parker, 106-711; State v. Robbins, 28-23—**or under illegal license,** Maggett v. Roberts, 112-71—**and the only effect of marrying a couple without legal license is to subject officer or minister to penalty of $200,** Maggett v. Roberts, 112-74; State v. Parker, 106-713; State v. Robbins, 28, 23.

Section merely referred to in Norman v. Dunbar, 53-319.

2088. Issued by register of deeds. Every register of deeds shall, upon application, issue a license for the marriage of any two persons: Provided, it shall appear to him probable that there is no legal impediment to such marriage: Provided further, that where either party to the proposed marriage shall be under eighteen years of age, and shall reside with the father, or mother, or uncle, or aunt, or brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom such infant was placed at school, and under whose custody and control he or she is, shall be delivered to him, and such written consent shall be filed and preserved by the register. And whenever it shall appear to the register of deeds that it is probable there is any legal impediment to the marriage of any person for whom a license is applied he shall have power to administer to the person so applying an oath touching the legal capacity of said parties to contract marriage.

Code, s. 1814; 1887, c. 331; 1871-2, c. 193, s. 5. **The written consent of parents is the condition precedent to issue of license to one under eighteen years:** Coley v. Lewis, 91-21.

Duty of register of deeds to be cautious and scrutinize application under peril of incurring penalty imposed by section 2090: Agent v. Willis, 124-29; Laney v. Mackey, 144-633—**to make reasonable inquiry,** Williams v. Hodges, 101-302; Laney v. Mackey, 144-633; Bowles v. Cochran, 93-398—**but he need not examine witnesses under oath, though section empowers him to do so,** Furr v. Johnson, 140-157. **See annotations under section 2090.**

This section and section 2090 being in pari materia, should be construed together: Williams v. Hodges, 101-302; Bowles v. Cochran, 93-398.

Section merely referred to in Harcum v. Marsh, 130-158; Wilkinson v. Dellinger, 126-462; Joyner v. Roberts, 112-111; Maggett v. Roberts, 112-73; Walker v. Adams, 109-483; State v. Snuggs, 85-541.

(1909 107)

2089. Form of license. License shall be in the following or some equivalent form:

To any ordained or authorized minister of any religious denomination, or to any justice of the peace for.....county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged.....years (race, as the case may

be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged ..... years (race, as the case may be), the daughter of (here state the names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties shall be under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within one year from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within two months after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this.....day of.....19..... L. M.,
Register of Deeds of.....County.

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "Indian" as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their places of residences, as follows:

I, N. O., an ordained minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the.....day of.....19,....., at the house of P. R., in (here name the town, if any, the township and county), according to law.

N. O.

Witness present at the marriage:
S. T., of (here give the residence).

Code, s. 1815; 1899, c. 541, ss. 1, 2; 1871-2, c. 193, s. 6; 1908, c. 47, s. 2. See the original act of 1918, c. 47, as it seems wrongly drawn, as far as the amendment is concerned. A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to person who is to be married, or to someone for him; and, if, at the time of such issuance, register has become functus officio, failure to record it does not render him liable to penalty imposed by sections 2091 and 2092 for failure to record substance of each marriage license issued: Maggett v. Roberts, 112-71.

2090. Penalty for issuing unlawfully. Every register of deeds who shall knowingly or without reasonable inquiry, personally or by deputy, issue a license for the marriage of an two persons to

which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis who shall sue for the same.

Code, s. 1816; 1895, c. 387; 1901, c. 722; R. C., c. 68, s. 13; 1871-2, c. 193, s. 7.

Legal definition of "penalty:" Bd of Ed v. Henderson, 126-689. **Register liable when he issues license to those under eighteen years without consent:** Lancy v. Mackey, 144-633.

When application made for license, register must be cautious and scrutinize application: Agent v. Willis, 124-29—**to make reasonable inquiry whether there is any legal impediment to marriage,** Bowles v. Cochran, 93-398—**and where he is without knowledge of parties, it must appear probable to him upon reasonable inquiry that license may and ought to issue,** Agent v. Willis, 124-29. **The inquiry necessary to be made to relieve him from liability can not be delegated to a deputy, but conducted by register himself:** Maggett v. Roberts, 112-71; Cole v. Laws, 108-185—**for the trust is personal to the register,** Maggett v. Roberts, 112-71.

This section and section 2088 are in pari materia and are to be construed together: Bowles v. Cochran, 93-398.

Where register delivers license complete in form to person with instructions not to give same to parties until written consent of mother obtained, and same delivered without such consent, register liable for penalty: Coley v. Lewis, 91-21.

Issuing of license by register in violation of section not indictable offense: State v. Snuggs, 85-541—**but penalty of $200 is prescribed to person aggreived who shall sue therefor,** Ibid—**and this mode of proceeding excludes that by indictment, unless illegal act be done mala fide,** Ibid.

As to when "reasonable inquiry" hereunder is question for court or jury, see Furr v. Johnson, 140-157; Trolinger v. Boroughs, 135-312; Harcum v. Marsh, 130-154; Joyner v. Roberts, 114-389. **As to burden of proof in actions hereunder,** see Furr v. Johnson, 140-157. **As to abatement of action by death of register,** see Wallace v. McPherson, 139-297. **As to power of legislature to relieve officer from penalty given by section by an act passed after bringing of action therefor,** see Bray v. Williams, 137-387.

For cases in which inquiry held to be reasonable, see Furr v. Johnson, 140-157; Harcum v. Marsh, 130-154; Joyner v. Roberts, 114-380; Walker v. Adams, 109-481; Bowles v. Cochran, 93-398. **For cases in which inquiry held not to be reasonable,** see Laney v. Mackey, 144-631; Morrison v. Teague, 143-186; Trolinger v. Boroughs, 133-312; Cole v. Laws, 104-651; Williams v. Hodges, 101-300. **"Reasonable inquiry" defined:** Furr v. Johnson, 140-157; Bowles v. Cochran, 93-398.

As to complaint in action hereunder, see Maggett v. Roberts, 108-174. **As to proper name under which to prosecute action,** see Ibid; see

Norman v. Dunbar, 53-320. **Section merely referred to** in Wilkinson v. Dellinger, 126-462.

2091. Record of, kept by register of deeds; original filed. Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

"Record of marriage licenses and of returns thereto, for the county of ....., from the.....day of ....., 19.., to the .... day of ....., 19...., both inclusive."

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved.

Code, s. 1818; 1899, c. 541, s. 3; 1871-2, c. 193, s. 9. **As bearing upon section,** see Bray v. Williams, 137-387. **Section merely referred to** in Maggett v. Roberts, 112-71.

2092. Penalty for failure to record license and the return. Any register of deeds who shall fail to record, in the manner above prescribed, the substance of any marriage license issued by him, or who shall fail to record, in the manner above prescribed, the substance of any return made therein, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who shall sue for the same.

Code, s. 1819; 1871-2, c. 193, s. 10. **Penalty given by section is as applicable to failure to record license,** or its substance, when issued, as to **failure to record return thereof:** Maggett v. Roberts, 108-174. **Where at time of issuance of license, register becomes functus officio, failure to record it does not render him liable to penalty:** Maggett v. Roberts, 112-71.

As to name in which action for penalty should be prosecuted, see Maggett v. Roberts, 108-174. **As to jurisdiction of action for penalty hereunder,** see Ibid. **As to constitutionality of act of legislature relieving register from penalty hereunder, passed after action brought for recovery thereof,** see Bray v. Williams, 137-387.

CHAPTER 51.

MARRIED WOMEN.

I. Separate Estate of.

2093. Secured; disposed of, by will; conveyed with husband's written assent. The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

Const., Art. X, s. 6. As to conveyances of land by married woman, see sections 952 et seq, 2097. As to power to devise and bequeath her separate property, see section 2098. As to her contracts with third person, binding her separate estate, see next section. For a late review of the right of a married woman, under this section of the constitution, to make contracts, see Ball v. Paquin, 140-83 (read also the concurring opinion of Clark, C. J.).

The word "conveyed" herein has reference only to transfers and alienations of real estate: Vann v. Edwards, 135-661; but see Walton v. Bristol, 125-423; Jennings v. Hinton, 126-48; Cutchin v. Johnston, 120-51; Coffin v. Smith, 128-252; Harris v. Jenkins, 72-183.

The constitutional and statutory restriction upon rights of married women in regard to management of their separate estates does not operate to prevent them from receiving or reducing their property into possession without written assent of husband: Kirkman v. Bank, 77-394.

Personal property of wife, acquired after 1868, becomes her separate property, even though marriage took place before that time: Morris v. Morris, 94-613.

Married woman may dispose of her property by gift or otherwise without assent of husband unless law requires disposition of it to be evidenced by conveyance or in writing: Vann v. Edwards, 135-661.

Where marriage has taken place since 1868, husband taking title to himself for lands bought with wife's money held to be trustee for her in Kirkpatrick v. Holmes, 108-206; Ray v. Long, 128-90; Cunningham v. Cunningham, 121-413; Gidney v. Moore, 86-485; Cunningham v. Bell, 63-328; Lyon v. Akin, 78-258; but see Vanve v. Vance, 118-864.

Where purchase money notes for land which wife sold were made out to husband without wife's knowledge or consent, title of wife to purchase money was not divested and securities therefor could not be subjected to payment of husband's debts: Rodman v. Harvey, 102-1.

By construing section 6, in connection with section 3, of Article X

of the constitution, and section 2094, in connection with section 2016, a lien is given upon property of married woman for all debts contracted for work and labor done: Ball v. Paquin, 140-83.

While in law earnings of wife belong to husband, he may give them to her or recognize and treat her as the owner of them, provided no creditors intervene: Cunningham v. Cunningham, 121-413; Hairston v. Glenn, 120-341; Syme v. Riddle, 88-463.

If a married woman has cows of her own and sells their milk, the earnings belong to her separate estate: State v. Lanier, 89-517.

Where husband and wife deposited their earnings in a bank, former telling cashier that they were joint earnings and that he desired certificate in their joint names, and it was so given and no right of creditors intervened, it was a valid gift of one-half to wife: Hairston v. Glenn, 120-341.

Only positive and unequivocal assent of wife to disposition by husband of crop raised on her land, and not mere silence, will estop her from asserting her title to same: Branch v. Ward, 114-148.

In action by married woman to recover her separate property, it is presumed that marriage took place since 1868: Lloyd v. Lloyd, 113-186.

Where husband deposits money in bank in name of wife and real estate is purchased with such funds and deed is made to wife, property becomes her separate estate and no trust results from such transaction in favor of husband: Flanner v. Butler, 131-151.

Where wife dies testate the husband has no interest in her real estate: Watts v. Griffin, 137-572; Hallyburton v. Slagle, 132-947; Ex parte Watts, 130-237; Tiddy v. Graves, 126-620; 127-502; see section 2098.

Where husband contracts with wife to invest money received from sale of her land in other lands, title to which is to be taken to wife, but instead he takes title to himself, he must either execute his contract by conveying land to wife or restore the money: Cade v. Davis, 96-139.

Where marriage took place and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed: Walton v. Parish, 95-259.

Where land was acquired and marriage took place prior to 1868, husband can make good title without joinder of his wife, but if land acquired or marriage took place after that date, wife must join in deed: Castlebury v. Maynard, 95-281.

2094. Can not contract without husband's consent. No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed.

Code, s. 1826; 1871-2, c. 193, s. 17. **For laborer's and material liens against, see section 2016.**

THE HUSBAND'S WRITTEN CONSENT. Husband's written consent necessary to all executory contracts of wife not within exception of section: State v. Robinson, 143-620; Loan Asso. v. Black, 119-323; Brinkley v. Ballance, 126-393; Weathers v. Borders, 124-610; Farthing v. Shields, 106-289; Causey v. Snow, 120-279; Sanderlin v. Sanderlin, 122-1; Flaum v. Wallace, 103-296. Husband's execution of the paper jointly with wife is sufficient: Jones v. Craigmiles, 114-613; Farthing v. Shields, 106-289; Arrington v. Bell, 94-247. As to different ways in which husband's assent can be given to wife's contracts, see Brinkley v. Ballance, 126-393. Signature of husband, as witness to written assignment by wife of her interest in insurance policy on his life, taken out by him for her benefit, is equivalent to an assignment by wife "with written assent of husband:" Jennings v. Hinton, 126-48. It is not necessary to make valid the disposition of her personal property by gift or otherwise: Vann v. Edwards, 135-661, overruling Walton v. Bristol, 125-419, and other cases. Where feme sole assigns stock in bank, and, after marriage, new stock is issued to her and she assigns it to same parties without assuming control thereof, such assignment is valid without consent of husband: Cox v. Dowd, 133-537. Consent of husband does not give validity to all contracts, but simply to such as before the statute she might have made without his consent: Sanderlin v. Sanderlin, 122-3, and cases therein cited. Indorsement and transfer of note by married woman without consent of husband, discussed in Vann v. Edwards, 128-425 (see especially concurring opinion of Clark, C. J.); Rawls v. White, 127-17; but see section 2180. Promise by married woman to her husband, while husband in his last sickness, that she would pay debt to creditor, who was present, out of money received from insurance, and creditor was induced thereby to forego enforcement of his demand, is invalid: Coffey v. Shuler, 112-622. A letter to which wife's name was signed by husband is sufficient consent: Brinkley v. Ballance, 126-393.

AS TO WHETHER CONTRACT WITHIN THE EXCEPTION OF STATUTE. Contract of married women, made for support of herself and family, is valid and her separate personal estate is liable therefor: Bazemore v. Mountain, 126-313, 121-59; Loan Asso. v. Black, 119-323, and cases cited; see Brinkley v. Ballance, 126-395. Where married woman, without written consent of husband employed at an agreed salary an overseer for her farm, upon income from which she and her family were not dependent, no action will lie against wife for such salary: Sanderlin v. Sanderlin, 122-1. The building of a house on a lot belonging to one's wife does not fall within any of the exceptions embraced in this section: Weathers v. Borders, 124-610. Whether a cooking stove is a necessary, within the exceptions specified, depends upon circumstances, manner of living, etc., of the feme covert: Berry v. Henderson, 102-525.

Bond given by husband and wife for supplies, clothing, etc., of which $50 worth was purchased by wife, does not prove a case within the exception: Farthing v. Shields, 106-296. Goods supplied to enable feme covert to keep a boarding house are not necessities hereunder: Clark v. Hay, 98-421—nor goods bought to enable feme covert to run a store, Brinkley v. Ballance, 126-393.

CONTRACTS AFFECTING PERSONALTY. A married woman can dispose of her personalty by gift or otherwise without written assent of husband: Vann v. Edwards, 135-661. Her contracts even with written assent of husband are invalid in law, but enforceable in equity: Harvey v. Johnson, 133-357; Moore v. Wolfe, 122-711; State v. Robinson, 143-620; Farthing v. Shields, 106-289; Loan Asso. v. Black, 119-326; Wilcox v. Arnold, 116-708; Dougherty v. Sprinkle, 88-300. She can make an executory contract affecting her personal estate with the written consent of her husband: Brinkley v. Ballance, 126-393; Weathers v. Borders, 124-610; State v. Robinson, 143-620; Farthing v. Shields, 106-289; Causey v. Snow, 120-279; Sanderlin v. Sanderlin, 122-1; Flaum v. Wallace, 103-296; Loan Asso. v. Black, 119-323—and such contract must contain an express charge upon her separate estate, Pippen v. Wesson, 74-437; Wilcox v. Arnold, 116-708; Sanderlin v. Sanderlin, 122-1; Jones v. Craigmiles, 114-613; Coffey v. Shuler, 112-625; Loan Asso. v. Black, 119-323; Long v. Rankin, 108-337; Bevill v. Cox, 107-175; but see Brinkley v. Ballance, 126-396; Bank v. Ireland, 122-574—though when consideration is sufficient to necesarily imply a charge, no express charges is necessary: Sanderlin v. Sanderlin, 122-1; Loan Asso. v. Black, 119-323; Bates v. Sultan, 117-99; Long v. Rankin, 108-337; Farthing v. Shields, 106-289.

Married woman may, with written consent of husband, expressly charge her statutory separate personal estate by her engagements in nature of executory contracts, although consideration for such engagements does not inure to her benefit or to that of her separate estate, The intent to so charge must in such cases appear in instrument creating liability but not necessary that specific property be charged: Flaum v. Wallace, 103-296; approved in Ball v. Paquin, 140-83; Loan Asso. v. Black, 119-323; Jones v. Craigmiles, 114-616; but see Bank v. Ireland, 122-574.

Contract must be in writing, Coffey v. Shuler, 112 625. As to whether the doctrine of the necessity of specially charging the separate estate of the married woman to make her estate liable is abandoned, see Brinkley v. Ballance, 126-396; Bank v. Ireland, 122-574; see also Judge Clark's concurring opinion in Vann v. Edwards, 128-434.

Note signed by husband and wife binding her separate estate for payment of a debt, amount therein having been advanced for benefit of her separate estate, is sufficient to bind her separate personal estate: Harvey v. Johnson, 133-352.

A writing, signed by married woman, with consent of her husband, in writing, expressly charging her statutory personal estate, is good without any beneficial consideration coming to her: Thompson v. Smith, 106-357.

Where husband voluntarily paid off ante-nuptial indebtedness of wife and advanced money for improvement of her separate estate, taking only her promissory note for such advances: Held that the general separate real estate was not thereby charged, and the general separate estate would have been charged by necessary implication growing out of the beneficial consideration, but the existence of such separate personal estate not being shown, there was no charge upon general separate

estate which husband could have created and therefore no consideration for promise made after disability removed: Long v. Rankin, 108-333.

Note signed by husband and wife containing a clause "and the said husband hereby consents that above note shall be a charge on the separate estate of his wife for payment of this note," expressly charges separate personal estate of wife: Jones v. Craigmiles, 114-613.

Revisal section 1041, requiring private examination of married woman to chattel mortgage on household and kitchen furniture, does not apply to note signed by husband and wife binding her separate personal estate: Harvey v. Johnson, 133-352.

CONTRACTS AFFECTING HER REALTY. A married woman can convey her real estate only with the written consent of her husband: Vann v. Edwards, 135-661; see section 952.

In order for a married woman to charge her realty by an executory contract she must do so in writing, with the written consent of her husband and her private examination must be taken: Ball v. Paquin, 140-83; Harvey v. Johnson, 133-352; Walton v. Bristol, 125-419; Bates v. Sultan, 117-94; Loan Asso. v. Black, 119-323; Long v. Rankin, 108-337; Thompson v. Smith, 106-357; Farthing v. Shields, 106-289; Thurber v. LaRogue, 105-301—and where the consideration is for her benefit or benefit of her estate and of such a character as necessarily to imply a charge, an express charge is unnecessary, Pippen v. Wesson, 74-437; Sanderlin v. Sanderlin, 122-1; Loan Asso. v. Black, 119-323; Bates v. Sultan, 117-99; Long v. Rankin, 108-337; Farthing v. Shields, 106-289—but where consideration not beneficial, contract must contain an express charge, Sanderlin v. Sanderlin, 122-1; Loan Asso. v. Black, 119-323; Jones v. Craigmiles, 114-613; Wilcox v. Arnold, 116-708; Coffey v. Shuler, 112-625; Long v. Rankin, 108-337; Bevill v. Cox, 107-175; Farthing v. Shields, 106-289; Bank v. Bridgers, 98-67; though see if this is not changed by Bank v. Ireland, 122-574; Brinkley v. Ballance, 126-396.

Where married woman's executory contract has all the elements required by statute, and is reduced to writing, assented to by the husband, and the wife is privately examined, it is binding upon her separate real estate: Ball v. Paquin, 140-93.

This section requires no more as to the contract of a married woman in any case whatever than the "written consent" of husband, and dispenses with even that in many cases: Ball v. Paquin, 140-99 (concurring opinion of Clark, C. J.).

Wife can not subject her separate real estate, or any interest therein, to any lien except by deed in which husband joins with private examination of wife: Thurber v. LaRogue, 105-301; but see Ball v. Paquin, 140-99.

Bond of wife not sufficient to charge her separate real estate unless such estate specified: Farthing v. Shields, 106-289; but consider Ball v. Paquin, 140-83.

A contract to pay for labor and material contracted for a dwelling on wife's land (describing it) signed by husband and wife, acknowledged by them, and with private examination of wife, is binding upon her separate real estate under this section by necessary implication,

though she does not expressly charge it upon her estate: Ball v. Paquin, 140-83.

Wife can not subject her land, or any separate interest therein, in any possible way, except by regular conveyance executed according to requirements of statute: Loan Asso. v. Black, 119-323; but see Ball v. Paquin, 140-83.

Draft drawn on man and wife by contractor, and accepted by them in writing, with private examination of wife, contractor having agreed to build house on land of wife, does not constitute charge on separate estate of wife: Zachary v. Perry, 130-289.

Married woman can be bound only by her deed, duly executed, with written assent of husband and with private examination, or by judgment of court of competent jurisdiction: Smith v. Bruton, 137-79.

Note signed by husband and wife without private examination of wife, can not be enforced against her separate real estate: Harvey v. Johnson, 133-352.

ENFORCING HER CONTRACT. No contract of married woman will be enforced against her (with a few exceptions) if court can discover in any part of record that she is married, although her coverture is not pleaded: Cansler v. Penland, 125-581; Weathers v. Borders, 124-610; Green v. Ballard, 116-144.

Where a married woman domiciled in this state makes a contract solvable in another state, her liability therein can be enforced in our courts only in the same cases in which it could be enforced if the contract was solvable in this state: Bank v. Howell, 118-271; Armstrong v. Best, 112-59.

Where married woman obtains possession of personalty under conditional sale, and suit is brought therefor after breach of condition, it is no defense that she is married woman: Thomas v. Cooksey, 130-148.

Duty of plaintiff seeking to enforce liability under an exception in the section to establish the exception: Moore v. Wolfe, 122-711.

Married woman can not bind herself personally and hence her contract will not be enforced against her in personam; but equity will so far recognize it as to bind her separate estate and will proceed in rem against it: Dougherty v. Sprinkle, 88-300.

A personal judgment can not be rendered against a married woman, not a freetrader, for her husband's debts: McLeod v. Williams, 122-451; Green v. Ballard, 116-144 and cases cited. Married woman can not consent to compromise judgment: McLeod v. Williams, 122-451. A judgment against a married woman on a debt embraced within exceptions of section does not constitute a lien on her real estate although her personal estate would be liable: Weathers v. Borders, 124-610.

As to complaint in action to charge separate estate of married woman with payment of a debt, see Bates v. Sultan, 117-94; Jones v. Craigmiles, 114-613; Flaum v. Wallace, 103-296; Dougherty v. Sprinkle, 88-300—and as to what necessary to show, see Bates v. Sultan, 117-94. The complaint in an action upon contract of married woman must allege that she is possessed of a separate estate and that contract is such as statute ren-

ders her competent to make, and that it is for her advantage: Dougherty v. Sprinkle, 88-300.

Payment of note executed by married woman, with her husband, without any consideration enuring to her separate estate, can not be enforced against her: Bank v. Bridgers, 98-67.

Agreement in note executed by married woman as surety and secured by mortgage on separate real estate in which there is agreement to waive defense by reason of extension of time to principal debtor, is valid and will be enforced in action to foreclose mortgage: Fitts v. Grocery Co., 144-463.

In action to charge separate personal estate, receiver will be appointed in proper cases: Jones v. Craigmiles, 114-613.

Equity will not allow married woman to repudiate a transaction and at same time to retain and enjoy its benefits: North v. Bunn, 122-766; Draper v. Allen, 114-50; Wood v. Wheeler, 106-512; Bridgers v. Bridgers, 101-71; Walker v. Brooks, 99-207.

Where married woman sets up coverture as a defense to action on purchase money notes given by her, equity will treat her as a trustee and impress upon land a charge to extent of unpaid purchase money: Draper v. Allen, 114-50; Wood v. Wheeler, 106-512—or to extent of advances made to her for which she gave note: Long v. Rankin, 108-333.

A married woman can not bind herself personally at law, and hence her contract will not be enforced against her in personam: Dougherty v. Sprinkle, 88-300; Farthing v. Shields, 106-289—but equity will make it binding upon her separate estate and will proceed in rem against it, Dougherty v. Sprinkle, 88-300.

A judgment against a married woman, appearing in suit by counsel of her husband's selection, is as binding as one against any other person unless it be obtained by the fraudulent combination of husband with the adverse litigant: Vick v. Pope, 81-22.

As to jurisdiction of actions against married woman, see section 1419, 1500. Coverture does not stop statute of limitations once begun: Causey v. Snow, 122-326. Coverture is no defense to the wife of a nonresident alien: Levi v. Marsha, 122-565. Married woman can not consent to an irregular judicial sale: Vanderbilt v. Brown, 128-498. Married woman can not both repudiate her contract and recover on same: Trimmer v. Gorman, 129-163.

Specific performance of contract to convey realty will not be decreed unless executed in accordance with statute: Tillery v. Land, 136-537.

A married woman described in summons as Mrs. M., no objection when properly described in complaint: Heath v. Morgan, 117-504.

ESTOPPEL OF MARRIED WOMAN. Married woman who permits grantee and subsequent grantees under void deed from her to take possession of land and make improvements thereon is not estopped thereby from recovering such land: Smith v. Ingram, 132-959. Where married woman, who was at the time a minor, applied for a loan and executed a note and mortgage purporting to convey her separate real estate to secure note given for loan: Held that fradulent representations made by her at time mortgage was executed that she was 21 years of age,

will not estop her to insist upon the invalidity of the mortgage, though the representations were material inducements toward the making of the loan: Loan Asso. v. Black, 119-323. A married woman can not be estopped by an oral agreement in respect to land: Fort v. Allen, 110-183 —but she can not take benefit under a conveyance and repudiate the recited terms upon which it was made; and when she has opportunity to disclaim deed and does not do so, she will be deemed to have elected to take under it, Ibid.

GENERAL OBSERVATIONS. A strict compliance with the law, when dealing with rights of infants and married women, is strongly impressed upon the profession: Ellis v. Massenburg, 126-129. Married woman can not bind herself by agreeing to arbitrate question of title to land owned by her: Smith v. Bruton, 137-79. Discussion of powers and rights of married women in respect to their property and contracts in Ball v. Paquin, 140-83. The acts allowing laborer's lien to be taken on property of married women is constitutional: Finger v. Hunter, 130-529.

In absence of proof to the contrary, contract of married woman made in New Jersey presumed to be void as at common law: Terry v. Robbins, 128-140.

Married woman who disaffirms her deed to real property and it is declared void is not personally liable for purchase money: Smith v. Ingram, 130-100.

Married woman has right to homestead in her separate estate where she, with written consent of husband, charges her estate for payment of debts, but uses no words of conveyancing in instrument charging same: Bank v. Ireland, 127-238.

As to crops raised on wife's land under crop lien given by husband, without her consent, see Rawlings v. Neal, 126-271; see also section 2052.

Married woman who becomes stockholder in a building and loan association and also a borrower, her husband joining in note and mortgage on her land to secure note, must contribute pro rata to expense and loss account in case of failure just as she would have participated in profits had it been a success: Meares v. Duncan, 123-203.

If a feme sole, after having employed a servant for an indefinite period, afterwards marries, and the servant continues in her employment, compensation for such services after marriage can only be recovered against wife when charged expressly or by necessary implication on her separate estate, and only then by action in superior court: Bevill v. Cox, 107-175.

A married woman is not incapable of making contract in respect to her separate property; she may recover and hold it, and the income derived from it, to her own use: State v. Lanier, 89-517.

Where, prior to married woman's acknowledgment of contract to convey timber land, she ascertained that it was not a mere agreement to convey standing timber as she believed when she signed it, her acknowledgment related back to the signing and rendered contract effectual as against her: Lumber Co. v. Leonard, 145-339.

To bind dower interest by mortgage husband and wife must join in the execution of mortgage deed: Slocumb v. Ray, 123-571.

Husband may be agent of wife in management of her separate estate, and for his contracts, as such agent, made for support of herself and family, her separate estate is liable: Bazemore v. Mountain, 121-59.

Where no evidence of assent of husband to her contract, married woman can not be held criminally liable for wilfully refusing to work certain crops on lands "rented" by her under section 3367: State v. Robinson, 143-620.

Where a married woman executed her note, secured by mortgage on her separate estate, for purpose of securing a line of credit to a firm of which husband a member, and such note was used as collateral by payee, original note is not discharged by renewal of notes given by payee: Fitts v. Grocery Co., 144-463.

A married woman is not bound upon a bond executed by her for the acquisition of property to make equality of partition of land between herself and sisters: Huntley v. Whitner, 77-392.

A feme covert, who is donee of a power of appointment, either collateral, appurtenant or in gross, may execute the power without consent of husband and even execute it in his favor: Taylor v. Eatman, 92-601.

This section does not confer upon wife power to make a legal contract, as distinguished from contract enforceable in equity, even with written consent of husband, or where it is for her personal expenses: Farthing v. Shields, 106-289.

No peculiar efficacy is given to a married woman's writings under seal where they are in nature of executory contracts, as the courts will in all cases look into the consideration, and, of it would be such as would sustain an action upon a contract made by a person sui juris, it will be sufficient: Flaum v. Wallace, 103-296.

Where a married woman, domiciled in this state, not being a free-trader and not having the written assent of her husband, made a contract in another state, according to whose laws a feme covert can contract, such contract can not be enforced in this state: Armstrong v. Best, 112-59.

A married woman may dispose of her property by gift or otherwise without written assent of her husband, unless the law requires the disposition of it to be evidenced by conveyance, or a writing: Vann v. Edwards, 135-661, practically overruling Walton v. Bristol, 125-419, and other cases.

[By the courtesy of the author, Prof. Samuel F. Mordecai, dean of the law department of Trinity College, Durham, N. C., the following splendid and exhaustive analysis of the law of married woman's contracts in North Carolina is reproduced from his most excellent treatise, Mordecai's Law Lectures, published in 1907. It should be borne in mind, however, that the decision of Ball v. Paquin, 140-83, was handed down after the analysis was completed by Professor Mordecai.]

ANALYSIS OF CONTRACTS OF MARRIED WOMEN, WHO ARE NOT FREETRADERS, Etc.

(If her husband be a non-resident alien who never was a resident of the United States she may contract as fully and as freely and as effectually as a feme sole.) (a)

SUCH CONTRACTS ARE

1. EXECUTED—

1. Which require husband's written consent, whether real or personal estate be thereby "conveyed" (1). But her transfer of personalty dum sola holds although she made a new transfer of the same property after coverture without the assent of her husband, if she never assumed the ownership and control of the property after her coverture; (1a) and now, by a change, not in the constitution or statutes * of the State, but in their interpretation, a feme covert may transfer her personalty regardless of her husband's assent or dissent (1b).
2. Which also require private examination of wife and other statutory forms, etc., if realty be thereby conveyed or mortgaged (2); and when household and kitchen furniture is mortgaged [if this rule can stand as to the wife's chattels since the decision in 135 N. C., 661] (2a).

2. EXECUTORY—WHICH, AS AFFECTING—

---

*All of her contracts—whether executed or executory—are governed by the lex rei sitae in so far as they affect realty in this State, 130 N. C., 100.

(a) 122 N. C., 565; 118 N. C., at p. 381; 98 N. C., 462.

(1) Const. N. C., Art. 10, § 6; 125 N. C., bot. p. 423; 120 N. C., 51; 126 N. C., 48; 122 N. C., page 176; 126 N. C., middle page 374; 125 N. C., middle page 425; 126 N. C., page 51; 128 N. C., 252, 425; (1a) 133 N. C., 537; (1b) 135 N. C., 661.

(2) The Code § 1834; Laws 1899, chapter 235; 130 N. C., 100; (2a) L. 91, c. 91; 113 N. C., 133; 133 N. C., 352.

1. Real estate of the wife, must—

1. Be written (3)—under seal—with private examination of wife (4). But she is liable by presumption for work and labor done on her real estate, and a mechanics' lien binds her realty for such work and labor under L. 1901, C. 617; though the law was just the opposite prior to this statute. This presumption seems to dispense with the written consent of the husband and all other formalities as far as the lien of mechanics and laborers is concerned (4a).
2. Have written consent of husband (5); except where mechanics' and laborers' lien is concerned (5a).
3. Be charged expressly on specific real estate (6); but the
4. Consideration need not be beneficial (7); and the
5. Homestead will not be defeated (8) unless in case of a
6. Mechanics' and Laborers' Lien duly filed and prosecuted (9); or
7. By contract which is in effect a conveyance (10).
8. It seems that her note with her husband's written consent and her own private examination can not be enforced against her real estate unless such real estate be specifically charged therewith (10a).

2. Personal property of the wife—

---

(3) 112 N. C., 622; 122 N. C., 571.

(4) 122 N. C., 572; 106 N. C., 289-359; 108 N. C., middle page 337; 117 N. C., at page 98; 119 N. C., top page 327; 119 N. C., at middle page 421; 121 N. C., bottom page 387; 133 N. C., 352; (4a) 130 N. C., 529; 133 N. C., 352.

(5) 122 N. C., 571; (5a) L. 1901, c. 617; 130 N. C., 529; 133 N. C., 352.

(6) 122 N. C., 571; 127 N. C., 238; 130 N. C., 289; compare 133 N. C., 352, Ball v. Paquin, contra.

(7) 122 N. C., 571.

(8) 122 N. C., 571; 112 N. C., 54.

(9) Constitution, Article X, § 4; 95 N. C., 85; 106 N. C., bottom page 300; 117 N. C., middle page 98; see and compare L. 1891, c. 91; 130 N. C., 529; 133 N. C., 352.

(10) 113 N. C., 349; (10a) 133 N. C., 352. But see p. 336 *post.*

1. Need Not Have the Husband's (written) Consent if Among—

Those excepted by The Code, § 1826, to-wit:(11).
1. For her necessary personal expenses.
2. For the support of the family.
3. To pay her antenuptial debts.

(The husband is primarily liable for her support and that of the family (11a), and what comes within those exceptions depends upon the circumstances and surroundings of each case (11b). They are confined to goods bought for direct benefit of herself and family, such as food, clothes and other necessaries (12), and do not embrace supplies for a boarding-house, hotel, etc., by which the family is supported (13), or goods for a store which she runs (14), or a cook stove per se (15), agricultural supplies (16), except where husband of no account (17), money borrowed to pay a lawyer (18), land bought (19), building a house (20), hiring an overseer (21).

(a). All such contracts she may charge expressly upon her separate personal estate, by a contract made in propria persona or through an agent (22).

(b). But whether they must be expressly charged is not clear. It seems not (23).

(c). Her separate personalty—but not her realty—may be subjected to satisfy such contracts (24), but

(d). She will be entitled to her personal property exemption (25). The creditor has no specific lien (26).

(e). A personal judgment may be rendered against her on such contracts (27).

2. Must have the husband's written consent to

---

(11) The Code § 1826; 119 N. C., at page 326, paragraph 1, citing 103 N. C., 296; 121 N. C., at page 388, citing 110 N. C., 70; 119 N. C., 323; 121 N. C., 59; 106 N. C., bottom page 295 and near top 298; 126 N. C., bottom page 273 and top page 274.

(11a) 122 N. C., at page 567; 102 N. C., at page 528; 106 N. C., bottom page 296.

(11b) 102 N. C., 525.

(12) 98 N. C., 421; 122 N. C., 4.

(13) 98 N. C., 421; 122 N. C., 4.

(14) 117 N. C., 94; 126 N. C., 393.

(15) 102 N. C., 525; 106 N. C., bottom page 296.

(16) 106 N. C., bottom page 296, approving 102 N. C., 525.

(17) 126 N. C., 313, re-affirming 121 N. C., 59.

(18) 116 N. C., 708.

(19) 116 N. C., 144.

(20) 121 N. C., 387.

(21) 122 N. C., 1.

(22) 121 N. C., at top page 388, citing 110 N. C., 70; 119 N. C., 323; 121 N. C., 59; 106 N. C., bottom page 295 and near top page 298; 126 N. C., top page 274.

(23) See note 35, post, and cases there cited.

(24) 124 N. C., 410; 124 N. C., at middle page 614, citing 119 N. C., 323; 105 N. C., 301; 106 N. C., 289; 102 N. C., 236; 76 N. C., 468; 74 N. C., 348; 126 N. C., top page 274.

(25) 126 N. C., at page 274.

(26) 126 N. C., at page 274.

(27) 122 N. C., at page 715, modifying the language used in 116 N. C., 144.

All contracts not excepted by Section 1826 (28), though there is a dictum that it is unnecessary if the consideration is for the benefit of her separate estate (29), of which contracts the following are the important elements to be considered—

1. **The Consideration—which**
   - (a). Is not imported by a seal (30); but will be investigated, in all cases, where material, by the Court (31).
   - (b). Need not be beneficial to the wife if her separate estate is expressly charged (32), which charge must be express (33), but need not be specific (34).
   - (c). If beneficial to her personally or to her separate estate this may dispense with the necessity for an express charge (35).
2. **The form and essential contents of the contract—which**
   - (a). Must be in writing, it seems (36).
   - (b). Must have the written consent of the husband (37);
   - (c). Must contain an express charge on her separate estate (38), unless, perhaps, when the consideration is beneficial to her personally or to her estate (39)—or an intent to charge expressly must appear from the context of the instrument (40)—which charge, however, need not be specific (41); but in 122 N. C., at bottom page 574 and top page 575, and in 126 N. C., at bottom page 396, are dicta which indicate that no "chargin" is essential. See page 336 post.
3. **The written consent of her husband—**
   - (a). Which is essential to all contracts not excepted by § 1826 (42), (except where consideration beneficial?) (43).
   - (b). Which is sufficiently manifested—

---

(28) The Code § 1826; 122 N. C., middle page 3.
(29) 108 N. C., 333, facts in the case and middle page 337, but see 94 N. C., at page 249; 106 N. C., bottom page 295; 106 N. C., at page 513; 125 N. C., at bottom page 425; 122 N. C., at page 3.
(30) 103 N. C., middle page 313.
(31) 103 N. C., middle page 313.
(32) 106 N. C., 357; 106 N. C.. at page 297; 103 N. C., at top page 313 and at page 311; 114 N. C., at page 616; 122 N. C., middle page 714; 118 N. C., at page 273; 133 N. C., 352.
(33) Cases at notes 32 and 34.
(34) 103 N. C., bottom page 312; 113 N. C., middle page 354; 114 N. C., at page 616; 119 N. C., bottom page 326; 133 N. C., 352.
(35) 94 N. C., middle page 249; 160 N. C., at page 296; 108 N. C., middle page 337; 106 N. C., at page 710; 118 N. C., at page 274; 122 N. C., top page 575; 126 N. C., bottom page 396—all dicta which seem to justify this conclusion. But see 117 N. C., 94, and 125 N. C., bottom page 425, which lay stress on the fact that the husband gave his written consent to a contract of this character.
(36) 112 N. C., 622.
(37) The Code, § 1826.
(38) 118 N. C., at page 273; 119 N. C., bottom page 326; see cases also at notes 32 and 33.
(39) See note 35.
(40) 119 N. C., bottom page 326; 114 N. C., top page 616; 117 N. C., middle page 99.
(41) 103 N. C., bottom page 312; 113 N. C., middle page 354; 114 N. C., page 616; 119 N. C., bottom page 326.
(42) 122 N. C., at middle page 3; 112 N. C., 622.
(43) See note 29.

(1). If set out in the body of the instrument—need not be by separate paper (44).
(2). By joining with the wife in executing the contract —signing it with her (45).
(3). By signing as subscribing witness to the wife's signature (46).
(4). By a separate paper of later date guaranteeing the payment of her contract (47), certainly if he also write and sign the contract as agent for the wife (48).

(c). Which written consent does not give validity to all her contracts, but simply to such as before the Act of 1871-'2 (The Code, § 1826) she might have made without his consent (49). Nor does it enable the wife to make a contract at all—but simply to enter into an agreement in the nature of an executory contract (50).

4. The legal effect—

The legal effect of those contracts to which the written consent of her husband is required, is not that of a contract at all, but of an agreement, which will be enforced in equity against her separate personal estate (51), not only that which she had when contract was made, but that acquired afterwards (52). No judgment in personam can be rendered upon such contracts or quasi contracts (53). Being enforceable only in equity, a Justice of the Peace has no jurisdiction (54).

It must be remembered that a Justice has jurisdiction of an action in which a mechanics' lien is involved (55), and of actions against a freetrader (55a); also of a debt contracted dum sola (55b); and of claim and delivery proceedings to take personalty acquired by her under contract of conditional sale or lease of chattels—her title or interest being forfeited by the terms of such contract (55c); and that a judgment in personam can be rendered by the Superior Court on contracts expected by § 1826, but such judgments can be satisfied only out of the personalty (56).

Unless there is a mortgage, pledge, deed of trust, etc., or a mechanics' lien, the contract does not debar her of her personal property exemption in her personalty

---

(44) 114 N. C., at page 616; 126 N. C., at page 51; 126 N. C., top page 397.
(45) 122 N. C., at page 574; 94 N. C., at page 249; 114 N. C., at page 616; 126 N. C., at page 551; 126 N. C., top page 397.
(46) 126 N. C., 47.
(47) 117 N. C., 94; 126 N. C., bottom page 51.
(48) 117 N. C., 94; 126 N. C., bottom page 51; 126 N. C., 393.
(49) 122 N. C., middle page 3.
(50) 119 N. C., bottom page 326, citing 116 N. C., 78, and 118 N. C., 271; 133 N. C., middle page 357.
(51) 119 N. C., bottom page 326; 88 N. C., 300; 122 N. C., at page 713, bottom 714, below middle page 715; 133 N. C., 352.
(52) 117 N. C., middle page 100; 133 N. C., 352.
(53) 88 N. C., 300; 122 N. C., at pages 713, bottom page 714, below middle page 715; 133 N. C., 352.
(54) 122 N. C., at page 713, bottom page 714 and below middle 715; 133 N. C., 352.
(55) 95 N. C., 85; 106 N. C., bottom page 300; 117 N. C., middle page 98; 133 N. C., 352; (55a) 98 N. C., 462; 95 N. C., 346; 105 N. C., 130; 106 N. C., 289; 133 N. C., middle page 359; (55b) 95 N. C., 346; 105 N. C., 130; 109 N. C., 265 and at page 443; (55c) 130 N. C., 148.
(56) 122 N. C., at page 715, modifying 116 N. C., 144; 133 N. C., 352.

(57). The contract charging her separate estate does not give the creditor a lien (58), nor a right to seize her property under claim and delivery proceedings (59). He can only proceed by judgment and execution (60), which last must set out particularly the personalty to be subjected (61), but perhaps can be levied on that so described and also upon any other personalty she owns (62). She may be subjected to supplemental proceedings, and her personalty, or some of it, subjected thereby to her debts (63). A receiver may be appointed in a proper case (64). The cases require more to be in the execution than the statue requires (65). If she convey land by a void deed and receive the price, she is not liable for the money thus received, nor has the purchaser of the land any lien upon it. [In such case she may "eat her cake and have her money too"] (66). But if she still have the price in possession, the purchaser will be afforded some relief (67).

---

(57) 103 N. C., at page 313; 117 N. C., at page 101; 126 N. C., at page 273; 127 N. C., 238; 133 N. C., 352.
(58) 117 N. C., at page 100; 127 N. C., 238; 133 N. C., 352.
(59) 126 N. C., at page 273.
(60) 126 N. C., at page 273; 127 N. C., 238; 133 N. C., 352.
(61) 117 N. C., bottom page 100; compare 133 N. C., 352.
(62) 117 N. C., middle page 100 and bottom page 100; 133 N. C., 352.
(63) 117 N. C., at page 101.
(64) 114 N. C., at middle page 617; 116 N. C., middle page 54; The Code § 379 (2), and see 111 N. C., 625.
(65) The Code § 443; 117 N. C., at page 100; compare 133 N. C., 352.
(66) 130 N. C., 100; 106 N. C., 512; 108 N. C., 696; 119 N. C., 323.
(67) 85 N. C., 184; 90 N. C., 222; 94 N. C., middle page 141; 108 N. C., 503, 696; 130 N. C., 100; 114 N. C., 50.

2095. May draw checks. Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her check, receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof.
1891, c. 221, s. 30; 1893, c. 344.

2096. What leases require joinder of husband and privy examination. No lease or agreement for a lease or sublease or assignment by any married woman, not a free trader, of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be

valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto, appear on her examination separate from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert.

Code, s. 1834; 1871-2, c. 193, s. 26. **For annotations on conveyances and contracts concerning land of married women, see section 952.**

Proof of instruments ordinarily prescribed for those executed by married women is not required for the registration of a lease executed before, but acknowledged after, coverture: Darden v. Steamboat Co., 107-437.

Not necessary that a married woman should be privily examined as to execution by her of a lease for land as executrix under will of former husband and when she was a feme sole: Ibid.

For annotations as to private examination of married women generally, see under section 952.

Husband's assent to wife's conveyance is necessary: Walton v. Bristol, 125-419; Loan Asso. v. Black, 119-323; Farthing v. Shields, 106-289; Wood v. Wheeler, 106-512; Harris v. Jenkins, 72-183—**and such assent is expressed by his signing and acknowledging deed with wife,** Jennings v. Hinton, 126-51; Brinkley v. Ballance, 126-397; Bank v. Ireland, 122-571; Green v. Bennett, 120-394; Jones v. Craigmiles, 114-613; Farthing v. Shields, 106-289; Flaum v. Wallace, 103-296; Harris v. Jenkins, 72-186.

Section referred to in Featherstone v. Carr, 134-70.

2097. Land of, not sold or leased without their consent; husband's interest exempt from execution. No real estate belonging at the time of marriage to females, married since the third Monday of November, one thousand eight hundred and forty-eight, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, one thousand eight hundred and forty-nine, by femes covert, who were such on the said third Monday of November, one thousand eight hundred and forty-eight, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife, first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to femes covert. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every sale is hereby declared null and void.

Code, s. 1840; R. C., c. 56; 1848, c. 41. **As to conveyances by husband and wife, see under section 952.** 150-649

This section only prohibited husband from selling or leasing real estate of wife without her consent, and prevented sale of land under

execution against husband, but his rights as tenant by the curtesy initiate to rents and profits were not impaired thereby: Cobb v. Rasberry, 116-137.

Neither this section, nor the constitution of 1868, abolished tenancy by the curtesy initiate, but since this enactment, such testimony confers no rights which husband can assert against wife as respects her real estate acquired after act took effect—the intention and effect of act being to provide for wife a home which she can not be deprived of either by husband or his creditors: Taylor v. Taylor, 112-134; State v. Mills, 91-593; Houston v. Brown, 52-161.

The only right attaching to a tenancy by the curtesy initiate in wife's real estate is the bare right of joint occupancy with wife with right of ingress and egress, and this interest can not be sold until it has become vested in possession by death of wife; Thompson v. Wiggins, 109-508; see Walker v. Long, 109-510.

A tenant by the curtesy initiate has not such an estate in the land of the wife that will put in operation the statute of limitations against either husband or wife in favor of one claiming title by adverse possession: Jones v. Coffey, 109-515.

Interest of tenant by the curtesy initiate can not be sold under execution: Bruce v. Nicholson, 109-204—but interest of tenant by the curtesy consummate can be sold, McCaskill v. McCormick, 99-548.

The clear and manifest purpose of the last sentence of this section is to protect and preserve the rights of the wife during her life and prevent any disposition of her lands by reason of husband's rights as tenant by the curtesy initiate without her assent, evidenced by her private examination: McCaskill v. McCormick, 99-550.

Since the act of 1848, a husband, as tenant by the curtesy initiate, is not empowered by law to dispose of his life estate in lands of his wife, yet, as he is entitled to rent and profits of same, during coverture and until such time as wife objects to such claims by him, by reason of her complete ownership, he can dispose thereof: Jones v. Carter, 73-148.

2098. May make a will. Every married woman shall have power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills.

Code, s. 1839; 1871-2, c. 193, s. 31. **The wife can dispose of her property acquired since 1868 by will and thereby bar her husband's right of tenant by the curtesy:** Watts v. Griffin, 137-572; Hallyburton v. Slagle, 132-947; Ex parte Watts, 130-237; Tiddy v. Graves, 126-620, 127-502.

2099. May insure husband's life. Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture.

2100. Separate savings; husband's liability for use of. The savings from the income of the separate estate of the wife are her separate property. But no husband who, during the coverture (the wife not being a free trader under this chapter), has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt, for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next preceding her death.

Code, s. 1837; 1871-2, c. 193, s. 29. **Case directly supporting section:** Faircloth v. Borden, 130-263. **An agreement of husband to pay rent precludes the possibility of assent and implies objection on part of wife to her husband's applying her rents to his own use and such agreement removes the restriction as to husband's liability to account for rents imposed by this section:** Battle v. Mayo, 102-413.

This section does not change the rule that the husband is entitled to the earnings and services of the wife: Syme v. Riddle, 88-463.

A wife is entitled to recover and hold to her own use her separate property as also income derived from it, and agents appointed by her, whether before or after marriage, must account with and pay to her what they have received either before or after marriage: Manning v. Manning, 79-300.

Case merely referring to section: Walker v. Long, 109-512.

2101. Liable for ante-nuptial debts. The liability of a feme sole for any debts owing, or contracts made or damages incurred by her before her marriage shall not be impaired or altered by such marriage.

Code, s. 1823; 1871-2, c. 193, s. 14. **A justice of the peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage:** McAfee v. Gregg, 140-449; Beville v. Cox, 109-269; Hodges v. Hill, 105-130; Neville v. Pope, 95-346.

II. Rights and Liabilities of Husbands.

2102. Tenant by the courtesy, when. Every man who hath married, or shall marry a woman, and by her have issue born alive, shall, after her death intestate as to the lands, tenements and hereditaments hereinafter mentioned, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife shall have obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or when the husband shall have abandoned his wife, or shall have maliciously turned her out of doors, and they shall not be living together at her death; or if the husband shall have separated him-

self from his wife, and be living in adultery at her death, he shall not be tenant by the courtesy of her lands, tenements and hereditaments.

Code, s. 1838; 1871-2, c. 193, s. 30. **By marriage and birth of issue the husband becomes tenant by the curtesy of wife's land and entitled to rents and profits thereof:** Morris v. Morris, 94-613. **As to tenancy by the curtesy at common law,** see Taylor v. Taylor, 112-134; Cobb v. Rasberry, 116-139; Long v. Graeber, 64-431; Houston v. Brown, 52-161. **The estate of the husband after the wife's death is in the nature of a homestead provision:** Houston v. Brown, 52-161; Cobb v. Rasberry, 116-137. **The interest of a tenant by the curtesy consummate in land of which his wife died seized, is liable to sale under execution:** McCaskill v. McCormac, 99-548; Thompson v. Wiggins, 109-500. **Tenancy by the curtesy initiate is stripped of its common law attributes till there only remains husband's bare rights of joint occupancy with his wife with right of ingress and egress:** Thompson v. Wiggins, 109-508, citing Walker v. Long, 109-510; Jones v. Coffey, 109-515; Manning v. Manning, 79-292. **The interest of tenant by the curtesy initiate can not be sold under execution for debt:** Thompson v. Wiggins, 109-508; see Walker v. Long, 109-510.

It was not the intention of the act of 1848 to deprive a husband of his tenancy by the curtesy: Houston v. Brown, 52-161. **Tenancy by the curtesy consummate remains as at common law:** Thompson v. Wiggins, 109-509; Houston v. Brown, 52-161.

Where a deed to the wife, who bought and paid for land, was stolen or lost without registration, and after her death her husband procures another deed to be executed to himself, the husband held the land, by implication of law, as trustee for their children, subject to his life estate as tenant by the curtesy: Norcum v. Savage, 140-472.

Tenant by the curtesy can not maintain an action for rents of wife's land: Thompson v. Wiggins, 109-508.

Neither the act of 1848 nor the constitution of 1868 abolished tenancy by the curtesy initiate but since said act such tenancy confers no rights which husband can assert against wife as respects her real estate acquired after act took effect—the intention and effect of the act being to provide for wife a home of which she can not be deprived either by husband or his creditors: Taylor v. Taylor, 112-134.

Where wife has obtained divorce a mensa et thoro whatever rights husband had in her lands are suspended until reconciliation shall be effected: Taylor v. Taylor, 112-134.

A tenant by the curtesy initiate is a freeholder: Thompson v. Wiggins, 109-508; see State v. Mills, 91-581.

Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate, and let it merge in the reversion of his wife, who, with the assent of her husband, may sell same and receive the whole of the purchase money: Teague v. Downs, 69-280.

A husband tenant by the curtesy initiate has an interest in the land, and is a necessary party to a suit respecting it; and if he refuses to become a coplaintiff in an action by his wife to assert her right to the prop-

erty, he should be made a party defendant: McGlennery v. Miller, 90-215.

A deed made in 1852 by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband and wife, and then her private examination taken; and unless this order of acknowledgment and probate was observed, the deed is ineffectual to pass title either to the interest of the wife or that of her husband as tenant by the curtesy initiate: McGlennery v. Miller, 90-215.

A testator devised land to a trustee for the benefit of his daughter and her children, she having two children when the will was made, who survived testator: Held that the devisees take a fee simple estate as tenants in common; and upon the subsequent death of the mother, father is entitled to an estate for life as tenant by the curtesy in one-third part of the devised land: Hunt v. Satterwhite, 85-73.

IN WHAT LAND HUSBAND ENTITLED TO CURTESY. An estate settled on a feme covert for life, with power of appointment at her death in fee, does not give her such an estate as will entitle husband to curtesy if she fails to appoint: Graves v. Trueblood, 96-495. At common law, to entitle a person to curtesy in his wife's land, either wife or husband, in right of his wife, must have had a seizin in deed, which is the actual possession of the land: Nixon v. Williams, 95-103. Husband has no interest whatever in lands of wife acquired since 1868 where she dies testate as to such property: Watts v. Griffin, 137-572; Hallyburton v. Slagle, 132-947; Ex parte Watts, 130-237; Tiddy v. Graves, 126-620; 127-502. A husband is not entitled as tenant by the curtesy to hold land held by his wife as trustee for her children by a former marriage: Norton v. McDevit, 122-755. Seizin implies the possession of an estate of freehold, and seizin in law means the right to have such possession: Nixon v. Williams, 95-103. Mortgage foreclosed after wife's death, surplus goes to heirs, charged with husband's curtesy: Harrington v. Rawls, 136-65.

2103. Party to action against wife; may defend. In all actions brought against a married woman, who is not a free trader (as hereinafter provided for), the summons shall be served upon the husband also, and on motion to the court in which the action is pending, he may be allowed, with her consent, to defend the same in her name and behalf, but no judgment shall be given against him, upon any liability claimed against her arising before the marriage or upon any contract made by her alone after her marriage.

Code, s. 1824; 1871-2, c. 193, s. 15. A feme covert and her husband must be joined in action to charge wife's personalty with payment of note: Harvey v. Johnson, 133-352—must be joined in action to recover property fraudulently conveyed to wife: Pender v. Mallett, 123-57. She may be sued alone in tort when husband abandons her: Heath v. Morgan, 117-504—in ejectment, when her husband is an alien, resides abroad, or has abandoned her, Finley v. Saunders, 98-462. She may consent to judgment fixing no personal liability upon her without husband being joined: Roseman v. Roseman, 127-494.

A husband, tenant by the curtesy initiate, has an interest in wife's land and is a necessary party to a suit respecting it, and if he refuses to become a coplaintiff in an action by wife to assert her right to property, he should be made party defendant; but where action concerns her separate property or is between herself and her husband she may sue alone: McGlennery v. Miller, 90-215.

Where husband and wife are jointly sued for wrong of the wife and the wife die, the action abates: Roberts v. Lisenbee, 86-136.

Where husband is a nonresident or fugitive from justice this section does not apply: Heath v. Morgan, 117-504. Where husband is an alien and never lived or visited the United States, this section does not apply: Levy v. Marsha, 122-565.

Acceptance of service of summons by a married woman gives jurisdiction: Nicholson v. Cox, 83-44.

Where husband and wife are sued together on joint obligation, it is duty of husband to defend for both and to set up wife's inability in a proper case, and if he fail to do so, wife can not have judgment against her set aside on ground of her incompetency to contract: Vick v. Pope, 81-22.

Judgment against married woman appearing in suit by counsel of husband's selection is as binding as one against any other person unless it be obtained by the fraudulent combination of husband with adverse litigant: Ibid.

In action on note to charge her personal estate wife and husband must be joined as parties defendant: Harvey v. Johnson, 133-352.

No judgment can be rendered against a husband who is joined with his wife in an action under section 408: Ibid; Nicholson v. Cox, 83-48; Vick v. Pope, 81-22.

In all actions whose object is to bind real estate blonging to a feme covert, service of scmmons must be made personally upon her as well as upon her husband: Rowland v. Perry, 64-578—and where it is not so done a judgment by default against wife must be vacated, Ibid.

A power of attorney, given by a married woman, to dismiss an action concerning her land need not be registered to give it validity: Hollingsworth v. Harman, 83-153.

Where feme covert, sued with husband as surety, accepts service of summons at husband's instance, relying upon him to employ counsel and defend suit, and he does not and judgment goes by default, judgment will be set aside at her instance on ground of excusable neglect: Nicholson v. Cox, 83-48.

Where a feme covert was sued with her husband, whom she instructed to make a proper defense to the action which he failed to do, it is no ground for injunction to restrain collection of judgment in absence of fraud: Neville v. Pope, 95-346.

2104. Discharged from defense, when; pays cost. Whenever any husband shall be allowed to defend for his wife, he may be ordered to pay costs for any misconduct, and may be discharged

from the conduct of her defense, if it shall appear to the court that his defense is not bona fide in her interest.

Code, s. 1825; 1871-2, c. 193, s. 16.

2105. Jointly liable for wife's torts. Every husband living with his wife shall be jointly liable with her for all damages accruing from any tort committed by her and for all costs and fines incurred in any criminal proceeding against her.

Code, s. 1833; 1871-2, c. 193, s. 25. **Where husband and wife are jointly sued for the wrong of the wife and the wife die, the action abates:** Roberts v. Lisenbee, 86-136. **Common law and statutory liability of husband for contracts and torts of wife discussed by Ashe, J.,** in Ibid. 151-299

2106. Not liable for ante-nuptial debts. No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage.

Code, s. 1822; 1871-2, c. 193, s. 13. **Section referred to** in Neville v. Pope, 95-348.

III. Contracts Between Husband and Wife.

2107. Void without approval of probating officer. No contract between a husband and wife made during coverture shall be valid to affect or charge any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract unless such contract shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

Code, s. 1835; 1871-2, c. 193, s. 27. **For conveyance by wife and private examination, see section 952.** 152-312

The common law rule that transactions between husband and wife regarding wife's separate property are void is now modified by this section and wife may contract with husband by complying therewith: Sims v. Ray, 96-87.

Relation of husband and wife is among those confidential relations, presumptive of fraud in business dealings unless rebutted: Howard v. Early, 126-170.

While wife may execute power of appointment conferred upon her in favor of her husband, yet she can not convey her land directly to him, except as allowed by this section: Sims v. Ray, 96-87.

An insurance policy on the life of her husband, payable to a married woman, being a vested interest, is embraced in the word "body" as used in this section; Sydnor v. Boyd, 119-481.

Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same: Branch v. Ward, 114-148.

A conveyance of land from husband to wife will pass the legal estate of the vendor and enable the vendee to sustain an action to declare title and recover possession: Walker v. Long, 109-510; see McLamb v. McPhail, 126-221; Fort v. Allen, 110-183; Sydnor v. Boyd, 119-481.

Ordinarily where a conveyance of a feme covert is alleged it will be presumed, upon demurrer, that it is valid and effective, but where a conveyance by the wife to the husband is made the basis upon which equitable relief is asked, the rule is different, on account of her general incapacity to make such a conveyance, and it is therefore necessary that it should affirmatively appear in a case like the present that the provisions of this section have been strictly complied with, or that the title has been acquired in some exceptional manner: Long v. Rankin, 108-338.

It is settled law that our statutes impose no limit upon the wife's power to acquire property by contracting with her husband, or any other person, but only operate to restrain her from or protect her in, disposing of property already acquired by her: Osborne v. Wilkes, 108-667, and cases therein cited.

Policy of the courts in respect to the enforcement of contracts of a husband with his wife, based upon valuable consideration, discussed by Ruffin, J., in George v. High, 85-99.

Section merely referred to in Bailey v. Bailey, 127-475; Walton v. Bristol, 125-422; Wells v. Batts, 112-290.

As to contracts of married women generally see sections 2093-2101. As to conveyances and contracts between husband and wife, attacked as fraudulent, see sections 960-962.

2108. When valid. Contracts between husband and wife not forbidden by the preceding section and not inconsistent with public policy are valid, and any persons of full age about to be married, and subject to the preceding section, any married persons may release and quitclaim dower, tenancy by the courtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released.

Code, s. 1836; 1871-2, c. 193, s. 28. See also sections 963, 964.

Mutual releases between husband and wife of their interests in the separate property of one another does not bar the wife from making

application for temporary alimony and attorney's fee in a subsequent suit for divorce: Bailey v. Bailey, 127-474.

This section declares all contracts between husband and wife, subject to restrictions contained in the preceding sections, valid unless contrary to public policy: Sydnor v. Boyd, 119-483.

Where husband occupied his wife's land for nine years, during the whole of which period he received the rents therefrom under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent: Held, that the notes constitute a valid indebtedness on the part of the husband to the wife: Battle v. Mayo, 102-413.

The reason that all transactions of the wife with her husband in regard to her separate property were held void at common law was, not because there was fraud, but because there might be fraud. This rule is now modified by statute, and the wife may contract with the husband, by complying with the provisions of this and the preceding sections: Sims v. Ray, 96-87.

As to conveyances by husband and wife, see sections 952 et seq. As to contracts of maried women, see sections 2093-2101. As to conveyances and contracts between husband and wife, attacked as fraudulent, see sections 960-962.

The policy of the courts, in respect to the enforcement of contracts of the husband with his wife, based upon valuable consideration, discussed by Ruffin, J., in George v. High, 85-99. Case merely referring to section: Harvey v. Johnson, 133-352.

IV. Divorce and Separation.

2109. Property rights after divorce a vinculo. When a marriage shall be dissolved a vinculo, the parties respectively, or when either party shall be convicted of the felonious slaying of the other or of being accessory before the fact of such felonious slaying the party so convicted shall thereby lose all his or her right to an estate by the courtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only.

Code, s. 1843; 1871-2, c. 193, s. 42. Where a wife who had resided here, bona fide removed to Illinois, and instituted an action for divorce in one of the courts of that state, and the husband in this state appeared by attorney and defended the action there: Held that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminate from its date: Arrington v. Arrington, 102-491.

Personal choses in action which belong to the wife reduced into possession by the husband, in the words of a recent author, remain his, but as

to rights dependent on marriage, and not actually vested, a full divorce or the legal annihilation ends them: Arrington v. Arrington, 102-514.

For annotations upon the subject of divorce and alimony generally, see chapter Divorce and Alimony, sections 1557-1570.

For effect of divorce upon right to administer upon the estate of husband or wife, as the case may be, see section 7. For effect of divorce upon right of dower, see section 3083.

2110. Effects of elopement. If any married woman shall elope with an adulterer, or shall wilfully and without just cause abandon her husband and refuse to live with him, and shall not be living with her husband at his death, or if a divorce from bed and board be granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopment may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates; and in case of such elopement, abandonment, or divorce, the husband may sell and convey his real estate as if he were unmarried, and the wife shall thereafter be barred of all claim and right of dower therein.

Code, s. 1844; 1893, c. 153, ss. 1, 2, 3; 1871-2, c. 193, s. 44. See also, sections 7-9. [The amendment of 1893 made obsolete many decisions which otherwise would appear here.]

A wife who commits adultery and is not living with her husband at the time of his death is thereby deprived of her dower: Phillips v. Wiseman, 131-402.

2111. Effect of husband living in adultery. If any husband shall separate from his wife and live in adultery, or shall wilfully and without just cause abandon his wife and refuse to live with her, and such conduct on his part is not condoned by her, or if a divorce from bed and board be granted on the application of the wife, he shall thereby lose all right to courtesy in the real property of the wife, and also all right and estate of whatever character in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of the wife which may have been settled upon him solely in consideration of the marriage by any settlement before or after marraige, and in case of such adultery and abandonment or divorce, the wife may sell and convey her real property as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall there-

after be barred of all claim and right to courtesy in such real property.

Code, s. 1845; 1893, c. 153, s. 4; 1871-2, c. 193, s. 45. **See section 9; also chapter Divorce and Alimony.**

V. Free Traders.

2112. How created. Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

1. By ante-nuptial contract, proved and registered, as hereinafter required; or,

2. By her and her husband signing a writing in the following or some equivalent form:

A. B., of the age of twenty-one years or upwards, wife of C. D., of..... county, with his consent, testified by the signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed) A. B.
C. D.

Witness: E. F.
Registered this.....day of.....19.....

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business.

Code, s. 1827; 1871-2, c. 193, ss. 18, 19. **There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, section 6 of Article X. being intended to protect instead of disable her:** Hall v. Walker, 118-377.

By proper construction of section 2100 of this Revisal, where wife is not a free trader, the husband's liability is limited, but where she is a free trader his liability to account for her income received by him is unlimited except by the general law applicable to agents and other persons: Manning v. Manning, 79-302.

Section merely referred to in Finger v. Hunter, 130-531; Bazemore v. Mountain, 126-318; Williams v. Walker, 111-604; Weir v. Page, 109-223; Clark v. Hay, 98-425.

2113. Dates from registration. From the time of the registration of the writing mentioned in the preceding section, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a feme sole.

Code, s. 1828; 1871-2, c. 193, s. 20. **Where a married woman is a free trader and consents to a judgment which fixes no personal liability upon her, the husband need not be a party to the proceeding:** Roseman v. Roseman, 127-494.

A feme covert may be used in a court of a justice of the peace for

a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her as a free tader: Neville v. Pope, 95-346; Hodges v. Hill, 105-130.

Section merely referred to in Harvey v. Johnson, 133-357; Moore v. Wolfe, 122-715; Sanderlin v. Sanderlyn, 122-1; Wilcox v. Arnold, 116-711; Green v. Ballard, 116-144; Weir v. Page, 109-223; Farthing v. Shields, 106-295; Flaum v. Wallace, 103-304.

2114. Certified copy evidence. A copy of such writing, duly proved and registered and certified by the register of the county in which the same is registered, shall be admissible in evidence as certified copies of registered deeds are, or may be allowed to be.

Code, s. 1829; 1871-2, c. 193, s. 21. **The only evidence competent to prove that a married woman is a free trader is the writing itself, with its registration endorsed thereon, or a copy of such writing duly proved and registered and certified by the register of the county in which same is recorded:** Roseman v. Roseman, 127-501; dissenting opinion. **See** Williams v. Walker, 111-604.

2115. How ended; publication. The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there shall be none so published, then in any other convenient newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader.

Code, s. 1830; 1871-2, c. 193, s. 22. **Case merely referring to section:** Ball v. Paquin, 140-98.

2116. Living separate from husband; husband idiot or lunatic. Every woman who shall be living separate from her husband, either under a judgment of divorce by a competent court, or under a deed of separation, executed by said husband and wife, and registered in the county in which she resides, or whose husband shall have been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and shall have power to convey her personal estate and her real estate without the assent of her husband.

Code, s. 1831; 1871-2, c. 193, s. 23; 1880, c. 35. **Necessary that husband should have been declared idiot or lunatic before married woman shall be deemed free trader:** Abbott v. Hancock, 123-102.

A married woman whose husband is an alien and never visited or resided in the United States is personally liable on her contracts: Levi v. Marsha, 122-565.

Cases merely referring to section: Harvey v. Johnson, 133-352; Sanderlin v. Sanderlin, 122-1; Moore v. Wolfe, 122-715; Farthing v. Shields, 106-295; Hodges v. Hill, 105-130; Flaum v. Wallace, 103-304; Sparks v. Sparks, 94-527.

2117. Abandoned by husband. Every woman whose husband shall abandon her, or shall maliciously turn her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired, and she shall have power to convey her personal estate and her real estate without the assent of her husband.

Code, s. 1832; 1871-2, c. 193, s. 24. **This section is constitutional:** Hall v. Walker, 118-377; Finger v. Hunter, 130-531; Brown v. Brown, 121-8. **Where husband is a nonresident and a fugitive from justice he is not a necessary party in an action against a married woman:** Heath v. Morgan, 117-504.

An action to recover possession of land may be sustained against a married woman alone whose husband is an alien, resides abroad, or has abandoned his wife: Finley v. Saunders, 98-462.

While a safe test of the power of the wife to contract in regard to her separate property as a free trader, when abandoned by her husband, is her right to maintain an action for divorce for like cause; yet she is not required to wait for six months before she is permitted to make contract: Vandiford v. Humphrey, 139-65.

Section does not require departure of husband from state to enable wife to use her property for her support: Ibid. **As to what constitutes abandonment hereunder,** see Ibid.

A wife abandoned by her husband may maintain an action for tort in her own name against a third person: Brown v. Brown, 121-8.

A married woman, whose husband is an alien and never visited or resided in the United States, is personally liable on her contracts: Levi v. Marsha, 122-565.

Section merely referred to in Smith v. Bruton, 137-81; Ball v. Paquin, 140-98; Harvey v. Johnson, 133-357; Moore v. Wolfe, 122-715; Wilcox v. Arnold, 116-710; Farthing v. Shields, 106-295; Hodges v. Hill, 105-130.

2118. Persons trading without disclosing interest; married woman declared free trader; burden of proof. If any person or persons shall transact business as trader or merchant, with the addition of the words "factor," "agent," "and company" or "and Co.," or shall conduct such business under any name or style other than his own, except in case of corporation, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted; or if any married woman

shall conduct such business through her husband or any other agent, or if any husband or agent of any married woman shall conduct such business for her without displaying the Christian name of such married woman, and the fact that she is a feme covert, by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. Any married woman conducting such business as aforesaid without complying with the provisions of this section shall for all purposes be deemed and treated, as to all debts contracted in the course of such business, as a free trader as fully as if she had in all respects complied with the provisions of this subchapter: Provided, this section shall not apply to any person transacting business under license as an auctioneer, broker or commission merchant. In all actions under this section it shall be incumbent on such trader, merchant or married woman to prove compliance with the same.

1905, c. 443.

147-588
152-346
153-378

CHAPTER 52.

MILLS.

I. Public.

2119. What are. Every water grist-mill, steam mill, or windmill, that shall grind for toll, shall be a public mill.

Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1. **"Mill-seat" defined** in State v. Sutton, 139-574. **"Grist-mill" held sufficient description of public mill in petition for damages:** Little v. Stanback, 63-285; State v. Jaynes, 78-508; Hyatt v. Myers, 73-240. **This section merely referred to** in Mizell v. McGowan, 120-136.

2120. Grind according to turn; toll taken. All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the Indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time.

Code, s. 1847; R. C., c. 71, s. 6; 1777, c. 122, s. 10; 1793, c. 402.

2121. Measures kept, toll by weight. All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measures, and also proper toll-dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer.

Code, s. 1848; 1885, c. 202; R. C., c. 71, s. 7; 1777, c. 122, s. 11. **Keeping false toll-dishes a misdemeanor, see section, 3679.** 149-121

II. Water Mills Established.

2122. Procedure. Any person wishing to build a water mill, who hath land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter.

Code, s. 1849; 1868-9, c. 158, s. 1. **Twenty years' possession of an easement raises the presumption of a grant:** Benbow v. Robbins, 71-338; Geer v. Water Co., 127-354; Gerenger v. Summers, 24-229; Rogers v. Mabe, 15-180.

The ground on which is presumed a grant of the privilege of ponding water on another's land for the purpose of a mill is that it has been enjoyed by the person claiming and those with whom he connects himself twenty years or more in the state or to the extent to which he claims: Gerenger v. Summers, 24-229—**and it is no answer to this presumption that the height of the water had been sometimes lowered by a drought, or that the water had been occasionally let off for the purpose of repairing the mill and only for the period required for such purpose,** Ibid.

A parol license granted to one to build a dam upon grantor's land, either voluntary or supported by a valuable consideration, may be revoked by the owner without incurring liability in damages, where notice is given and reasonable opportunity afforded to remove improvements put up thereunder: Kivett v. McKeithan, 90-106. **The builder of the dam should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes:** Ibid.

An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded, so as to become useless: Burnett v. Nicholson, 72-334.

A parol license ceases at death of licensor: Bridges v. Purcell, 18-492.

Section referred to in Gwaltney v. Timber and Land Co., 111-564; Bass v. Navigation Co., 111-454.

2123. Commissioners appointed, how. If no just cause should be shown against the building of such mill, the court shall appoint

three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants shall refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown.

Code, s. 1850; 1868-9, c. 158, s. 2.

2124. What commissioner presides; penalty for failure to perform duty. The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner; any commissioner named by or for either of the parties, who, without just cause, shall fail to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president shall, in like manner, unreasonably delay to notify the other commissioners of a meeting, or fail to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum.

Code, s. 1851; 1868-9, c. 158, s. 3.

2125. Duty of commissioners. The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of the land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days.

Code, s. 1852; 1868-9, c. 158, s. 4. **Majority signing report is sufficient:** Austin v. Helms, 65-560.

2126. Report contains what. The report of the commissioners shall set forth—

1. The location, quantities and value of the several areas laid off by them.
2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.
3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.
4. Any other matter upon which they shall have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties.

Code, s. 1853; 1868-9, c. 158, s. 5.

Proper for commissioners to report whether proposed mill will overflow another or create a nuisance: Burnett v. Nicholson, 72-334. **Commissioners forbidden to include houses, etc., in survey; the valuation must be confined to the naked land:** Burgess v. Clark, 35-109. **Not necessary that all commissioners should sign report, a majority being sufficient:** Austin v. Helms, 65-560.

2127. When mill not allowed. If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built.

Code, s. 1854; 1868-9, c. 158, s. 6. **Commissioners are not authorized to include in the valuation any houses found on the condemned acre, even though erected there by petitioner before proceedings were commenced; valuation must be confined to naked land:** Burgess v. Clark, 35-109. **Commissioner must report whether proposed mill will overflow another mill, or will create a nuisance in the neighborhood:** Burnett v. Nicholson, 72-334.

Where mill would be a public benefit, on principle that private advantage must yield to public benefit, no injunction will lie: Daughtry v. Warren, 85-136. **No injunction lies where damages not irreparable:** Burnett v. Nicholson, 72-334.

2128. Power of court on return of report. If the report be in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave shall be granted; and upon such payment, the party to whom such leave shall be granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto.

Code, s. 1855; 1868-9, c. 158, s. 7. **For costs, see section 1269.**

2129. Built when; kept up. The person to whom leave shall be granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged.

Code, s. 1856; 1868-9, c. 158, s. 8.

2130. Time in which must be rebuilt. If any water mill belonging to any person not being of age, a married woman, or of unsound

mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid shall have three years from the removal of the disability.

Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9.

III. Dams; Backing and Conveying Water.

2131. Procedure. Any person who has land on one or both sides of a stream and wishes to build a water mill or has a water mill already built and may find it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, water-way, drain, mill-race or tail-race, or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, may make application by petition in writing to the clerk of the superior court of the county in which the said lands to be affected, or a greater part thereof, are situated, for the right to so convey the said water or pond the same by the erection of a dam or the raising of any dam already built; and the procedure shall be as in other special proceedings.

1905, c. 534, s. 1a, k.

2132. Petition to contain, what. The petition shall specify the lands to be affected, the name of the owner of said lands and the character of the ditch, race, water-way or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, water-way or drain to be constructed or erected, and not more than thirty feet from each bank can be condemned.

1905, c. 534, s. 1, b.

2133. Commissioners appointed. Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed ten days from the date of said notice.

1905, c. 534, s. 1, c.

2134. Commissioners; oath and duty. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice

in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have power to confirm the same.

1905, c. 534, s. 1, d.

2135. Damages assessed. In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such water-way, ditch, drain or dam they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such water-way, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said mill-owner. The damages assessed by the appraisers under this subchapter shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said water-ways, races, ditches or dams.

1905, c. 534, s. 1, e. m.

2136. When mill not allowed. If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill or pond water within two hundred feet of another mill or will overflow or pond water within two hundred feet of the mill-site or premises of a person who has the right to rebuild a mill under section two thousand one hundred and thirty or by the authority of law, or the mill create a nuisance in the neighborhood, the court shall not allow the report of the appraisers to be affirmed.

1905, c. 534, s. 1, g. **See section 2127.**

2137. Rights of petitioner. After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, water-ways, drains, races or other necessary works and construct such dams: Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this state. If the owner be a nonresident and have no known agent in this state the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided further, that the mill-owner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam.

1905, c. 534, s. 1, f.

2138. Mills not erected when; abatement of nuisance. No other person shall have the right to erect or maintain any dam, ditch, water-way, drain or race that will overflow or pond water within two hundred feet of the mill-site or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this chapter, or of any mill-site owned by any person who may have the right to rebuild a mill under section two thousand one hundred and thirty, or by the authority of law, and when any person shall violate the provisions of this section the owner of said mill or mill-site shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances.

1905, c. 534, s. 1, h.

2139. Report registered. The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk and shall pay the register the usual legal fees for registering such instruments in his office.

1905, c. 534, s. 1, i.

2140. Fees of appraisers. Each appraiser shall be entitled to a fee of one dollar for each day actually employed in making said assessment, to be paid by the petitioner.

1905, c. 534, s. 1, j.

IV. Damages.

2141. For erection of mills; procedure. Any person conceiving himself injured by the erection of any grist-mill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the endamaged land, or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions.

Code, s. 1858; 1876-7, c. 197, s. 1. **Possession alone is sufficient to support a petition for damage for ponding water hereunder:** Pace v. Freeman, 32-103; Yeargain v. Johnston, 1-180; but see Waddy v. Johnson, 27-333—**and plaintiff need not prove his title,** Yeargain v. Johnston, 1-180.

General history of the law with respect to actions for ponding water reviewed in Hester v. Broach, 84-253.

An executor or administrator has a right to pursue the remedy provided for damages for the overflowing by a mill pond of his testator's or intestate's land in the lifetime of such testator or intestate: Howcott v. Warren, 29-20—and one whose land is overflowed by a mill pond may have an action against the executor or administrator of the person who erected the mill and dam, Howcott v. Coffield, 29-24. Heir can not be sued for ancestor's erecting mill or dam which causes overflow of land: Fellow v. Fulgham, 7-254.

One is not obliged to wait until the expiration of a year before he files his petition hereunder: Cochran v. Wood, 28-194.

Plaintiff must state in his petition in what respect he was injured and his proofs can not go beyond his allegations: Bridgers v. Purcell, 23-232.

When suit is brought within the year damages are necessarily limited to the time injury has existed: Ibid.

Injury arising to adjacent land by the overflowing of the waters of a mill pond is a tort; although the statute has given a new remedy for it, it has not altered its nature: Wilson v. Myers, 11-73.

Where erection of a mill on a stream causes water to overflow land or mill of another only when stream is swollen, that circumstance will not excuse party from damage altogether, but will only diminish the quantum: Pugh v. Wheeler, 19-50.

It is not competent as defense to show that the effect of the backing of water on the lands of adjoining owners was beneficial: Chaffin v. Mfg. Co., 135-95.

It is competent to show the condition of the banks of the stream above and below the dam in order to show that this condition was not caused by erection of dam: Chaffin v. Mfg. Co., 135-95.

The mere raising of a stream within its banks, although it is not thrown out of them, is an injury to land through which it runs: Little v. Stanback, 63-285.

It is competent to show in an action for ponding water by increase in the height of defendant's dam, that, by direction of defendant, dam was built so as not to pond water above old water-marks. To sustain the action plaintiff must show affirmatively that alleged increased volume of water was occasioned by increased size of dam: Godfrey v. Maberry, 84-255.

As to whether the injury for which damage can be claimed refers only to the physical injury of the land, or includes injury to health, etc., see Gillett v. Jones, 18-339; Waddy v. Johnson, 27-333; Bridgers v. Purcell, 23-232; Purcell v. McCallum, 18-221.

Damages may be recovered for injury to land resulting proximately from the maintenance by defendant of a dam, though such injury was aggravated by other causes not within defendant's control: Cline v. Baker, 118-780.

Where sole issue was whether defendant's dam injured plaintiff's land, through which a creek passed before emptying into the pond above the dam, it was not error to instruct the jury that if the injury resulted from filling up creek with sand between plaintiff's land and the pond, by washing of hill-sides, falling of leaves and branches, and failure to

clean out channel, plaintiff could not recover, provided those obstructions did not result from the maintenance of dam: Ibid.

If plaintiff's land be overflowed by water on account of defendant's dam, he is entitled to nominal damages: Chaffin v. Mfg. Co., 135-103; McGee v. Fox, 107-769; Wright v. Stowe, 49-516.

Plaintiff has right to have question submitted to jury whether overflow was injurious; and any former benefits the land may have received from such overflow has nothing to do with the question: Kimel v. Kimel, 49-121; McGee v. Fox, 107-766.

As to relative rights of owners of land through which non-navigable streams flow with reference to use of the water thereof, see Durham v Cotton Mills; 141-615; Pugh v. Wheeler, 19-50.

Conveyance made to defeat, hinder, or delay a party injured by the erection of a mill in his recovery of damages is fraudulent and void as to such party, and the owner of such mill remains liable for damages: Purcell v. McCallum, 18-221.

The remedy under this subchapter does not apply to an action for damages for trespass committed on plaintiff's land: Henley v. Wilson, 77-216.

Sale of mill property held to pass as appurtenant an easement to pond water above mill to extent that it was done at time of the conveyance: Latta v. Electric Co., 146-285—but not to pass as appurtenant thereto an easement in another tract in which vendor had an interest under a resulting trust, when no easement actually existed, Ibid.

Where one pays for certain property which he has another purchase in his own name, the mere fact that the one paying for the property intended at some future time to raise a dam on his own property so as to back water upon the other does not ipso facto create an easement in the other property: Latta v. Power Co., 146-285.

A covenant in a deed held expressly confined to dams which might be placed in a river on lands within the boundaries mentioned: Ibid.

Dam erected below a steam mill for purpose of floating timber to mill and not for purpose of driving machinery of mill, by which water is ponded back upon land of another, does not come within meaning of section: Bryan v. Burnett, 47-305.

Where mill dam so obstructs water as to prevent land from being drained the owner is entitled to damages; Johnson v. Roane, 48-523; Wilhelm v. Burleyson, 106-381; Burnett v. Nicholson, 72-334.

Under this chapter it is no objection that some who did the injury were mere temporary owners; if their interest was limited, it should have been offered when the five years' judgment was about to be entered up: Wilson v. Myers, 11-73.

Evidence admissible to show that defendant had been warned against shutting down his flood-gates and had been told of the custom of a former owner of the dam in raising the flood-gates, Hardin v. Ledbetter, 103-90.

Other decisions upon subject of ponding water and the diverting of water upon land of another not caused by building mill, see Clark v. Guano Co., 144-64; Greenwood v. R. R., 144-446; Craft v. R. R., 136-49;

Chaffin v. Mfg. Co., 135-95; Candler v. Electric Co., 135-12; Rice v. R. R., 130-375; Mullen v. Canal Co., 130-496; Lassiter v. R. R., 126-509; Mizzell v. McGowan, 125-439; Hocutt v. R. R., 124-214; Parker v. R. R., 123-71; Harrell v. R. R., 122-822; Nichols v. R. R., 120-495; Parker v. R. R., 119-677; Fleming v. R. R., 115-676; Ward v. R. R., 112-168; Adams v. R. R., 110-325; Staton v. R. R., 109-337; 111-278; Knight v. R. R., 111-80.

HOW JURY MUST ASSESS DAMAGES. An issue involving amount of annual damage done by ponding water is the proper one to be submitted to the jury: Hester v. Broach, 84-251. Jury has no right to go back farther than one year in assessing damages, but if they do, the error may be corrected in the judgment: Goodson v. Mullen, 92-207. If the jury return a verdict assessing damages for more than one year before filing of petition, court may correct it by giving judgment for damages of only one year previous: Pugh v. Wheeler, 19-50. In assessing damages jury are not bound to give damages at an average for five years, but may assess sums for different periods during that time: Pugh v. Wheeler, 19-50. It is error to charge the jury that to entitle plaintiff to nominal damages he must show damages capable of being estimated, perceptible, as an appreciable quantity; Chaffin v. Mfg. Co., 135-95; McGee v. Fox, 107-769; Wright v. Stowe, 49-516. Verdict of jury in cases hereunder and judgment of court thereon are conclusive as to assessment of damages up to time judgment rendered: Beatty v. Conner, 34-341; Burnett v. Nicholson, 86-99. Where jury finds damages are different for different years, they should assess them separately for each year: Goodson v. Mullen, 92-207. By this section damages are to be assessed for five years as they were prior to 1877: Goodson v. Mullen, 92-207.

Where defendant erected another mill and dam lower down the stream which ponded water on plaintiff's mill, the measure of damage is the injury actually sustained up to time of trial and, in estimating same, decrease of custom (in the matter of tolls) can not be considered: Burnett v. Nicholson, 86-99—and evidence to show how much it will cost plaintiff to raise his dam and water wheel to escape injury complained of was properly excluded: Ibid.

Where a second action is brought hereunder damages should be assessed for the time between the commencement of the first action and the commencement of the second: Bradley v. Amis, 3-399; Moore v. Love, 48-215.

Damages to plaintiff's land can be estimated by comparing its productiveness before and after flooding or sobbing: Spilman v. Navigation Co., 74-675.

For assessment of damages where mill overflowed by backing water thereon, see Hardin v. Ledbetter, 103-90.

2142. Dams, when abated as nuisances. When damages shall be recovered in final judgment in such civil actions and execution shall issue and be returned unsatisfied, and the plaintiff is not able to collect the same either from the insolvency of the defendant or

by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose.

Code, s. 1859; 1876-7, c. 197, s. 3. **An injunction will not be granted to restrain erection of dam whereby mill wheel of plaintiff is flooded so as to become useless:** Burnett v. Nicholson, 72-334—**because for such injury damage will adequately compensate, and should annual damage exceed twenty dollars, plaintiff is remitted to his common law action and can compel abatement of nuisance,** Ibid.

No injunction issues to restrain the rebuilding of a mill when it is for the public benefit that it be rebuilt: Daughtry v. Warren, 85-136.

Case where party indicted for keeping up nuisance created by ponding water, not strictly within scope of this section: State v. Holman, 104-861.

As to injunctions against erection of dams, etc., on ground that they are nuisances, see Eason v. Perkins, 17-38; Daughtry v. Warren, 85-136; Dorsey v. Allen, 85-358; Brown v. R. R., 83-128; Hyatt v. Myers, 73-232; Privett v. Whitaker, 73-554; Clark v. Lawrence, 59-83; Atty Gen. v. Lea, 38-301; Atty. Gen. v. Hunter, 16-12; Bell v. Blount, 11-384.

2143. Judgment binding five years, when. A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages shall be increased by raising the water or otherwise.

Code, s. 1860; 1868-9, c. 158, s. 12. **If, at the trial, five years have elapsed since the filing of the petition, a peremptory judgment for annual damages for five years is proper, whether such annual damage be above or below twenty dollars:** Gillet v. Jones, 18-339.

Owners of land granted license to other persons "to build a mill and back water on us, so they don't back on our bottoms:" Held, that the license is exceeded when the dam is raised to such height that water is ponded back so as to sob the "bottoms" and render drainage impossible, and make them unfit for cultivation, although they are not actually overflowed: Cagle v. Parker, 97-271.

Easement obtained by twenty years' possession does not protect owner of dam from liability on account of new injury; Powell v. Lash, 64-456.

Where annual damages are assessed at less than twenty dollars per annum, judgment is for five years including year preceding the filing of petition, for each year's damages so assessed, with a cessat executio for each year after the first year: Goodson v. Mullen, 92-207.

For additional annotations, see next section.

2144. Judgment binding one year, when. In all cases where the final judgment of the court shall assess the yearly damage of the plaintiff as high as twenty dollars, nothing in this chapter contained

shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case, the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons.

Code, s. 1861; 1868-9, c. 158, s. 14. **For additional annotations, see preceding section. Owner of land injured by erection of mill, who has proceeded by petition, under which annual damage assessed is as high as twenty dollars, and who has taken judgment for and received damage for the whole five years, can not maintain an action on the case, brought after expiration of five years, without having again ascertained the annual damage by proceeding under a second petition:** Gilliam v. Canady, 33-106.

Judgment for permanent damages for a certain time for ponding water does not estop subsequent action to recover permanent damages since that time: Candler v. Electric Co., 135-12.

Where damages assessed at as much as twenty dollars a year, judgment was the same as when assessed at less than twenty dollars, except that plaintiff had his election to take judgment for five years, or only for one year preceding filing of petition, in which case he is at liberty to bring his action at common law; but if action was continued for more than five years, judgment was for entire amount and plaintiff was barred of his election: Goodson v. Mullen, 92-207.

Where jury found that land was damaged, $80 per year, and his honor gave judgment for a sum in gross, and not for each year's damage, held no error: Goodson v. Mullen, 92-211; Gillett v. Jones, 18-339.

2145. Judgment against plaintiff; costs, how paid. If the final judgment of the court shall be that the plaintiff hath sustained no damage, he shall pay the costs of his proceeding; but if the final judgment shall be in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged do not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant do not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid.

Code, s. 1862; 1868-9, c. 158, s. 15. **Jury having assessed in this case but one dollar damages, the court did right in giving plaintiff no more costs than damages under the act of 1833:** Bridges v. Purcell, 23-232.

CHAPTER 53.

NAMES OF PERSONS.

2146. Can not be altered by legislature. The general assembly shall not have power to pass any private law to alter the name of any person, * * * but shall have power to pass general laws regulating the same.

Const, Art. II, s. 11.

2147. Application to alter before clerk superior court; notice. Any person wishing, for good cause shown, to change his name, shall file his application before the clerk of the superior court of the county in which he may live, first having given ten days' notice of said application by publication at the courthouse door, and in said application shall state the true name of the applicant, the name desired to be adopted, the reasons why said change is desired, and that his name has never been changed before by law. No person shall be allowed to change his name under this chapter but once.

1891, c. 145, ss. 1, 2.

2148. Proof of good character filed. Said applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of said county who know the standing of said applicant.

1891. c. 145, s. 3.

2149. Change ordered by clerk. Upon said application being made upon the verified petition of the applicant and the proof of good character, it shall be the duty of the clerk of the superior court, if he thinks good and sufficient reason exists for the change of name, to issue an order changing the name of the applicant from his true name to the name sought to be adopted, and when said order is made and the applicant's name changed said applicant shall be entitled to all the privileges and protection under said new name as he would have been under the old name.

1891, c. 145, s. 4.

2150. Clerk to issue certificate; record made. The clerk shall issue to the applicant a certificate under his hand and seal of office, stating the change made in said applicant's name, and shall also record said application and order on the docket of special proceedings in his court.

1891, c. 145, s. 5.

NOTE. For corporate names, see Corporations, section 1137.
For protection of names, see Trademarks.
For change of name of minor child, see section 177.
For fraudulently trading under corporate or partnership name, see section 2118.

CHAPTER 54.

NEGOTIABLE INSTRUMENTS.

[N. B. It being generally understood that this chapter is largely declaratory of what the law of negotiable instruments has ever been in this state, it has been thought best to annotate a number of decisions prior to its enactment as an aid to its interpretation. These decisions, however, should be closely scrutinized lest they mislead in cases where this chapter has changed the law.]

I. Requirements for Negotiability.

2151. What to contain. An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty.

1899, c. 733, s. 1. **Instruments to be negotiable must be certain as to time of payment and amount to be paid:** Bank v. Bynum, 84-24—**must be payable in money,** Johnson v. Henderson, 76-227—**should not be dependent upon contingency,** Goodloe v Taylor, 10-458. **Certificate of deposit is negotiable when expressed in negotiable words:** Johnson v. Henderson, 76-227. **An instrument is negotiable though it expresses a consideration for which it is given:** Bank v. Michael, 96-53. 153-462

County and school orders are not negotiable: Wright v. Kinney, 123-621; Bank v. Warlick, 125-594. As to drafts with bills of lading attached, see Finch v. Gregg, 126-176.

Cases prior to this enactment holding instrument not negotiable when payable in specific articles: Thompson v. Gaylard, 3-150; Tindall v. Johnston, 2-372; Campbell v. Mumford, 2-398; Wofford v. Greenlee, 1-301—**in money and specific article, or performance of specific act,** Knight v. R. R., 46-357; Jamieson v. Farr, 2-182—**in bank stock,** Alexander v. Oaks, 19-513—**in "current bank notes,"** State v. Corpening, 32-58—**in "current bank money,"** Lacky v. Miller, 61-26—**in "current notes of state of North Carolina,"** Warren v. Brown, 64-381. **See section 2155, as to payment in current money.**

2152. What constitutes a sum certain. The sum payable is a sum certain within the meaning of this chapter, although it is to be paid (1) with interest; or (2 by stated installments; or (3) by stated installments with a provision that upon default in payment of any installment the whole shall become due; or (4) with exchange,

whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity.

1899, c. 733, s. 2.

2153. What promise unconditional. An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

151-399

1899, c. 733, s. 3. **As between original parties, a condition can be added at the time of its execution as to its payment:** Aden v. Doub, 146-10; Evans v. Freeman, 142-61.

2154. Additional promise makes non-negotiable; exceptions. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or, (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal.

1899, c. 733, s. 5. **Instrument containing promise to pay money and also to clothe slave not negotiable:** Sutton v. Owen, 65-123; Knight v. R. R., 46-357.

2155. Things which do not affect. The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

1899, c. 733, s. 6. **Instrument in form of negotiable note not vitiated by reason of being under seal:** Pate v. Brown, 85-166. **Decision prior to this enactment seeming adverse to statute:** Johnson v. Henderson, 76-227.

2156. What is a determinable future time. An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

1899, c. 733, s. 4.

2157. When payable on demand. An instrument is payable on demand (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

1899, c. 733, s. 7. **Instrument payable on demand is due immediately:** Caldwell v. Rodman, 50-139.

2158. What are payable to order. The instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees, or (6) the holder of an office for the time being. When the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

1899, c. 733, s. 8.

2159. What are payable to bearer. The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank.

1899, c. 733, s. 9.

2160. No formal language required. The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

1899, c. 733, s. 10.

II. Date.

2161. Prima facie true. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

1899, c. 733, s. 11.

2162. Incorrect, does not invalidate. The instrument is not invalid for the reason only that it is antedated or post-dated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

1899, c. 733, s. 12.

2163. Holder may insert. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date.

1899, c. 733, s. 13.

III. Incomplete.

2164. Blanks may be filled by holder. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be coverted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion be negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

1899, c. 733, s. 14. **Where a person signs an instrument in blank and delivers it to another to be filled out and negotiated, maker is bound by such instrument in the hands of a bona fide holder:** Humphreys v.

Finch, 97-303; McArthur v. McLeod, 51-476; see Wester v. Bailey, 118-193—**and bona fide holder of instrument has right to fill up blank left for payee's name with that of indorser,** Lawrence v. Mabry, 13-473.

A person dealing with a negotiable instrument has the right to act on it as it appears on the face of it: Citizens Nat. Bank v. Burch, 145-316.

2165. Not valid unless delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery.

1899, c. 733, s. 15. **Where maker of instrument, blank as to payee's name, acknowledges same to be his after insertion of such name, he is liable thereon:** Wester v. Bailey, 118-193.

2166. Revocable until delivery. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

1899, c. 733, s. 16.

IV. Signature.

2167. No liability without. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

1899, c. 733, s. 18. **Persons subscribing as obligors to bond are bound by the stipulations of same, whether their names are inserted in body of instrument or not:** Howell v. Parsons, 89-230. **One who signs in form and appearance as a principal and maker of note is bound as such to all persons who subsequently deal with the paper without knowledge of his true relation to it:** Citizens Nat. Bank v. Burch, 145-316.

2168. May be made by agent. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.

1899, c. 733, s. 19. **Authority of agent to draw, accept or indorse bills, notes and checks must ordinarily be expressly conferred:** Bank v. Hay, 143-326—**but may be implied if execution of paper is necessary incident to business,** Ibid.

2169. Effect of signing as agent. Where the instrument contains, or a person adds to his signature, words indicating that he signed for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

1899, c. 733, s. 20.

2170. Effect of, by procuration. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent so signing acted within the actual limits of his authority.

1899, c. 733, s. 21. **Attorney to whom instrument sent for collection has, prima facie, no authority to indorse it in name of client, and purchaser thereof should inquire as to extent of attorney's authority:** Sherrill v. Clothing Co., 114-436.

2171. Forgery of, renders wholly inoperative. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

1899, c. 733, s. 23.

V. Consideration.

2172. Valuable, presumed. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

1899, c. 733, s. 24. **Instrument imports prima facie that it is founded on consideration:** Campbell v. McCormac, 90-491; McArthur v. McLeod, 51-476—**but if defendant rebuts presumption, burden is upon plaintiff**

to show that there was consideration, Campbell v. McCormac, 90-491. **Sealed instrument need not express consideration:** Wester v. Bailey, 118-193.

2173. What constitutes value. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitues value and is deemed such whether the instrument is payable on demand or at a future time.

1899, c. 733, s. 25. **Antecedent or pre-existing debt is sufficient consideration to constitute person a holder for value:** Mfg. Co. v. Summers, 143-102; Brooks v. Sullivan, 129-190; Reddick v. Jones, 28-107—**and release of dower by wife is valuable consideration for instrument executed by husband to her,** Trust Co. v. Benbow, 135-303. **See also** Johnson v. Rodeger, 119-446.

2174. Holder deemed holder for value when value given. Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time.

1899, c. 733, s. 26. **Where plaintiff bank rediscounted note of defendant for another bank, and placed proceeds to credit of such bank, and, before notice of equity of defendant, paid checks of said bank to one half value of rediscount, plaintiff was purchaser for value:** Mfg. Co. v. Tierney, 133-638; Bank v. McNair, 114-335—**though fact that bank has given depositor credit for amount of negotiable instrument deposited in bank for collection does not constitute bank a purchaser for value,** Packing Co. v. Davis, 118-555, and cases cited.

2175. Holder of lien, holder for value to extent of lien. Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien.

1899, c. 733, s. 27. **Where instrument negotiated before maturity to secure pre-existing debt transferee is bona fide holder to extent of debt:** Brooks v. Sullivan, 129-190.

2176. Absence or failure of, as defense. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

1899, c. 733, s. 28. **Failure of consideration is defense as between original parties to instrument:** Washburn v. Picot, 14-390.

2177. Accommodation party, who is; liability. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the

purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

1899, c. 733, s. 29. Where draft is an accommodation paper, drawer is primarily liable upon same: Bank v. Bradley, 117-526.

An accommodation indorser is discharged from liability where instrument held as collateral security is released without his knowledge, and without placing credit therefor upon accommodation paper: Bank v. Nimocks, 124-352.

If accommodation paper is a bond, which obligee refuses to accept, it is void in the hands of a third person for want of delivery, though he is a purchaser for value: Parker v. McDowell, 95-219.

Agreement between maker and accommodation indorser that instrument should be negotiated at bank does not affect purchaser for value and before maturity: Parker v. Sutton, 103-191—although he had notice of agreement at time of taking the instrument, Ibid.

Where an instrument is made for the purpose of enabling the maker to raise money, and is indorsed by him for that purpose, the indorsee may recover upon it, not only against the payee and indorser, but against all others who may have signed it: Bank v. Griffin, 107-173.

Instrument executed by partner to third person, who as surety and for accommodation of maker, indorses it and receives no benefit therefrom, can not be subject of action by firm against indorser, Patton v. Carr, 117-176—nor in case of death of maker of note can surviving partner maintain such action against accommodation indorser, unless firm be insolvent, Ibid.

Owner of a note indorsed by payees for maker's accommodation may sue any one of several indorsers without joining maker or any other indorser: Bank v. Carr, 121-113. See as incidentally bearing upon section, Lilly v. Baker, 88-151.

VI. Indorsement.

2178. What is negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery.

153-497
153-293

1899, c. 733, s. 30. Word "indorsement" defined: Davidson v. Powell, 114-578. Instrument payable to bearer is negotiated by delivery, and no indorsement is required: Tyson v. Joyner, 139-69—but instrument payable to order must be indorsed by payee, Ibid; Mayers v. McRimmon, 140-640; Applegarth v. Tillery, 105-110—and also prior indorsees, if any, or at least in blank to constitute tansferee a bona fide holder, Tyson v. Joyner, 139-69. Signature of indorser, where indorsement required, must be proved: Ibid. Indorsement made by authorized agent with rubber stamp and with intent to indorse is a valid indorsement: Mayers v. McRimmon, 140-640—but does not prove itself, Ibid.

Indorsement of instrument to deceased person is nullity: Valentine v. Holloman, 63-475.

Distinction between assignment and indorsement pointed out in Tyson v. Joyner, 139-72; Miller v. Tharel, 75-152; Lindsay v. Wilson, 22-88.

As bearing upon section, see Fairly v. McLean, 33-158.

2179. How made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

1899, c. 733, s. 31. **Indorsement of instrument may be explained as between immediate parties:** Coffin v. Smith, 128-252. **As bearing upon subject matter of section:** Drew v. Jacocks, 6-138.

2180. Effect of, by corporations and infants. The indorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon.

1899, c. 733, s. 22. **Decisions as to indorsement by married women of instrument prior to passage of above section:** Vann v. Edwards, 130-70; Coffin v. Smith, 128-252. **Constitutionality of right of married woman to transfer negotiable instrument without husband's assent discussed** in concurring opinion of Clark, C. J., in Vann v. Edwards, 128-427.

As to binding the separate property of a married woman, see section 2094, and annotations thereunder.

2181. Must be of entire instrument. An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue.

1899, c. 733, s. 32. **Assignment of note, to enable the assignee to sue thereon, must be made by the payee and must be for whole amount, and not for portion of note:** Martin v. Hayes, 44-423.

2182. Kinds of. An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional.

1899, c. 733, s. 33. **Effect of indorsement in blank discussed** in Lilly v. Baker, 88-151. **As bearing upon conditional indorsement,** see Johnson v. Olive, 60-213.

2183. Special, defined; in blank. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the

further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.

1899, c. 733, s. 34. **As to special indorsement,** see French v. Barney, 23-219. **Instrument indorsed in blank becomes payable to bearer against acceptor, drawer and prior indorsers:** Ibid. **Indorsement in blank by payee of instrument presumed to have been intended as transfer thereof:** Coffin v. Smith, 128-255; Davis v. Morgan, 64-570. **Parol evidence is admissible to control effect of blank indorsement as between immediate parties thereto:** Bank v. Pegram, 118-671; Hoffman v. Moore, 82-313; Davis v. Morgan, 64-570.

Burden of proof is upon him who seeks to avoid by parol evidence the ordinary legal effect of blank indorsement: Hoffman v. Moore, 82-313. **As between indorser in blank and remote parties without notice such parol evidence is inadmissible, and contract implied by law stands absolute:** Bank v. Pegram, 118-671.

Where instrument, indorsed in blank, is delivered to attorney for collection, and it is transferred by him to bona fide holder without notice, transferee takes same free of equities: Bradford v. Williams, 91-7. **Instrument payable to bearer is negotiated by delivery and no indorsement required:** Tyson v. Joyner, 139-69.

2184. Holder may convert blank to special. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

1899, c. 733, s. 35. **Where instrument indorsed in blank, holder may make it payable to himself or any other person by filling up blank over signature:** Tyson v. Joyner, 139-69; Lilly v. Baker, 88-153; Hubbard v. Williamson, 26-266—**and this may be done at or before trial,** Tyson v. Joyner, 139-69; Johnson v. Hooker, 47-30; Hubbard v. Williamson, 26-266—**but holder can not write over indorsement words which may change indorser's liability,** Lilly v. Baker, 88-153—**or which is inconsistent with agreement under which indorsement made,** Ibid. **If blank indorsement not filled up, instrument considered payable to bearer:** Hubbard v. Williamson, 26-266. **Indorsement of instrument in blank before indorsement of payee is made regular by subsequent indorsement of payee:** Johnson v. Hooker, 47-30.

2185. Restrictive, defined. An indorsement is restrictive, which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or, (3) vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

1899, c. 733, s. 36. **Restrictive indorsement such as "for collection for account of, etc.," prevents transfer of title to bank to which sent for collection:** Bank v. Bank, 119-307; Boykin v. Bank, 118-566; Packing Co. v. Davis, 118-548.

Burden upon indorser to show agreement by which liability restricted: Davidson v. Powell, 114-575.

See, as bearing upon section, Drew v. Jacocks, 6-138; Smith v. St. Lawrence, 2-174.

2186. Restrictive, confers what rights. A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

1899, c. 733, s. 37. **Restrictive indorsement, such as "for collection of account of, etc." prevents transfer of title to bank to which sent for collection:** Bank v. Bank, 119-307; Boykin v. Bank, 118-566; Packing Co. v. Davis, 118-548—**and such indorsement is notice to bank collecting instrument that correspondent bank by whom sent to them is mere agent of holder,** Boykin v. Bank, 118-566.

2187. Qualified, constitutes indorser a mere assignor of title. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

1899, c. 733, s. 38. **Where indorser intends to transfer title only, he should use words "without recourse" or other phrase of similar import:** Davidson v. Powell, 114-575.

2188. Conditional, effect of. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally.

1899, c. 733, s. 39. **As bearing upon subject matter of section,** see Johnson v. Olive, 60-213.

2189. Effect of special, instrument payable to bearer. Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

1899, c. 733, s. 40. **Instrument once indorsed in blank becomes payable to bearer against acceptor, drawer and prior indorsers:** French v. Barney, 23-219.

2190. By two or more payees. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others.

1899, c. 733, s. 41. **Surviving partner has no power, after dissolution, to renew or indorse in name of firm an instrument executed by the partnership:** Bank v. Hollingsworth, 135-556.

2191. Payable to cashier or other fiscal officer, payable to corporation. Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

1899, c. 733, s. 42.

2192. Name of payee wrong, how indorsed. Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature.

1899, c. 733, s. 43.

2193. Indorser in representative capacity may negative personal liability. Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability.

1899, c. 733, s. 44. **See, as bearing incidentally upon subject matter of section,** Banking Co. v. Morehead, 116-413.

2194. Undated, presumed, before due. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

1899, c. 733, s. 45. **The law presumes that an undated indorsement of instrument was made at date of note:** Southerland v. Fremont, 107-565; Tredwell v. Blount, 86-33.

2195. Presumed made at place of date of instrument. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

1899, c. 733, s. 46.

2196. Once negotiable, continues so till discharged. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

1899, c. 733, s. 47.

2197. Holder may strike out; effect of. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument.

1899, c. 733, s. 48. See, as bearing upon subject matter of section, Smith v. Lawrence, 2-174.

2198. Transfer without, makes non-negotiable till indorsed. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires in addition the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

1899, c. 733, s. 49. Delivery of unindorsed instrument, where indorsement necessary passes only equitable title: Jenkins v. Wilkinson, 113-532; Carpenter v. Tucker, 98-316. 153-293

Holder producing such instrument and testifying that same was discounted by him before maturity, for value and without notice, is only equitable owner, in absence of proof that instrument had been indorsed, and holds same subject to any valid defenses open to maker: Mayers v. McRimmon, 140-640.

See, as bearing upon subject matter of section, Baggarly v. Gaither, 55-80; Lackay v. Curtis, 41-199.

2199. Negotiation back to prior party releases intermediate parties. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

1899, c. 733, s. 50. Person obtaining possession of negotiable paper after indorsing it is restored to his original position, and can not hold intermediate parties who could look to him: Adrian v. McCaskill, 103-182—and persons obtaining possession of paper from him with notice of this fact can not hold intermediate indorsers liable, Ibid.

VII. Rights of Holder.

2200. May sue in his own name. The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument.

1899, c. 733, s. 51. As to who is a "holder," see definition in section 2340; also see Mayers v. McRimmon, 140-643.

As to the rights of equitable owners to bring actions under section

400, being the real party in interest, see Tyson v. Joyner, 139-73; Bresee v. Crumpton, 121-122; Carpenter v. Tucker, 98-316; Kiff v. Weaver, 94-274; Holly v. Holly, 94-673; Jackson v. Love, 82-405; Andrews v. McDaniel, 68-385.

As to the presumption that the holder of a negotiable instrument is holder in due course, see Evans v. Freeman, 142-61, and cases cited under section 2208.

As to endorser, after payment refused to endorsee, bringing action, see Smith v. St. Lawrence, 2-174; Strong v. Spear, 2-214.

Donee causa mortis of bills, bonds and promissory notes payable to order, and not endorsed, may sue in his own name under section 400, see Kiff v. Weaver, 94-274.

The possession of a negotiable paper by an endorsee, whether past due or not, raises the prima facie presumption that he is the true owner and for value: Pugh v. Grant, 86-40; but see Loftin v. Hill, 131-109, which seems to differ slightly; see also Bank v. Burgwyn, 108-62; Ballinger v. Cureton, 104-474; Holly v. Holly, 94-670.

2201. What constitutes holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

1899, c. 733, s. 52. Every holder is deemed to be a holder in due course, see section 2208 and cases cited thereunder.

When it is said that there is a prima facie presumption of law that a holder is the owner, that he took it for value and before dishonor in the regular course of business, reference is made to a holder by indorsement or to an instrument which was not required to be indorsed but was negotiable by delivery: Tyson v. Joyner, 139-73. Signature of indorser must be proven before holder deemed a holder in due course: Tyson v. Joyner, 139-69; Mayers v. McRimmon, 140-640. To constitute a holder in due course of a negotiable instrument payable to order it is essential that the same be indorsed: Mayers v. McRimmon, 140-640.

Cashiers' checks are classed hereunder with bills of exchange payable on demand and if negotiated by indorsement for value and without notice and within a reasonable time the holder is a holder in due course: Mfg. Co. v. Summers, 143-102.

Decisions of interest rendered prior to this enactment: Bank v. McNair, 116-550; Burroughs v. Bank, 70-283.

As to what amounts to notice of infirmity in instrument, see section 2205.

2202. Delay in presenting when on demand. Where an instrument payable on demand is negotiated an unreasonable length of

time after its issue, the holder is not deemed a holder in due course.

1899, c. 733, s. 53. As to what is a reasonable or unreasonable time, see section 2343. Where check negotiated to party residing within another state within five days after execution of same, such negotiation was within reasonable time: Mfg. Co. v. Summers, 143-103.

2203. Effect of notice of infirmity. Where the transferee received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

1899, c. 733, s. 54. As to what amounts to notice of infirmity, see section 2205. Where original consideration of instrument illegal or fraudulent, or same taken as collateral security, right of recovery by indorsee restricted to consideration paid by him before notice of fraud or amount of debt for which it is collateral: Bank v. McNair, 116-554.

2204. Fraud, duress or force in obtaining, makes title void. The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud.

1899, c. 733, s. 55. Where a note is declared void by statute it is void into whosesoever hands it may come: Ward v. Sugg, 113-489; Glenn v. Bank, 70-191; Henderson v. Shannon, 12-147—but when statute merely declares it illegal the note is good in the hands of an innocent holder: Ward v. Sugg, 113-489; Glenn v. Bank, 70-191. (Note that these decisions were rendered prior to enactment).

Indorsee for value before maturity and without notice takes clear of all equities, excepting when by statute the paper is void in whole or in part from its inception, or when the original consideration of the paper is illegal or fraudulent: Bank v. McNair, 116-550—but exception does not extend to notes executed without consideration, Bank v. McNair, 116-555.

When maker is not at liberty to object to the want of consideration against an indorsee, neither is he at liberty to object against him the illegality of consideration: Henderson v. Shannon, 12-148.

A note embracing usurious interest is void in the hands of innocent purchaser for value before maturity: Faison v. Grandy, 128-438, 126-827; Ward v. Sugg, 113-489; Collier v. Nevill, 14-30; Ruffin v. Armstrong, 9-419—to the extent to which the contract is usurious, Ward v. Sugg, 113-489—but if note valid in its inception, a subsequent usurious agreement does not avoid it, Collier v. Nevill, 14-30. A note to secure payment of money won at cards is void: Calvert v. Williams, 64-168. An old case holding that note secured by fraud and duress should be cancelled: Meadows v. Smith, 42-7.

Decisions as to pleadings and burden of proof in actions where this section pleaded: Campbell v. Patton, 113-481; Loftin v. Hill, 131-105; Bank v. Burgwyn, 110-267, 108-62; Pugh v. Grant, 86-40; see also section 2208.

2205. Actual knowledge necessary to constitute notice of infirmity. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

1899. c. 733, s. 56. **Where purchaser of instrument has knowledge of facts and circumstances tending to show fraud on part of assignor it is his duty to inquire into character of instrument:** Loftin v. Hill, 131-110; Hulbert v. Douglas, 94-122—**and this being true he is affected with knowledge of all that inquiry would disclose,** Ibid; Hulbert v. Douglas, 94-122; Bunting v. Ricks, 22-130—**but knowledge by bona fide assignee of instrument of crookedness in business matters of assignor does not defeat title of assignee, or make it his duty to inquire relative to same,** Setzer v. Deal, 135-428.

The fact that maker of instrument does business near assignee is immaterial on question as to whether assignee a bona fide holder, Ibid.

Where a note was due the president of bank, and he negotiated it before maturity to the bank, he and the cashier acting as discount committee, held that his knowledge of an infirmity in the instrument was knowledge of the bank: LeDuc v. Moore, 111-516; but see Bank v. Burgwyn, 110-267.

The fact that negotiator of note was a stranger and offered note for considerably less than face value, and that note was made payable at a factory of which purchaser had never heard, held not sufficient to put purchaser on his inquiry: Farthing v. Dark, 111-243,

As to the effect of the knowledge of agents or attorneys of infirmities in instruments upon their principals, see Hulbert v. Douglas, 94-122; Dupree v. Ins. Co., 92-417.

Burden of proving notice or bad faith hereunder is upon the maker, Loftin v. Hill, 131-105; see section 2208.

Some decisions prior to enactment of statute as to sufficiency of notice: Bank v. Bank, 116-815; Bradford v. Williams, 91-7.

A person dealing with a negotiable instrument has a right to act on it as it appears on the face of it: Citizens Nat. Bank v. Burch, 145-316.

2206. Free from defect, in title of prior parties. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

1899, c. 733, s. 57. **Bona fide holder of instrument, for value, before maturity and without notice of infirmity takes same discharged of all**

equities and defenses existing between antecedent parties: Tyson v. Joyner, 139-72; Toms v. Jones, 127-464; Bank v. McNair, 116-550; Davidson v. Powell, 114-575; Parker v. Sutton, 103-191; Lewis v. Long, 102-206; Bank v. Michael, 96-53; Spence v. Ross and Tapscott, 93-246; Bradford v. Williams, 91-7; Tredwell v. Blount, 86-33; Blackmer v. Phillips, 67-340; Baucom v. Smith, 66-538; Calvert v. Williams, 64-168; Little v. Dunlap, 44-40; Myers v. Beeman, 31-117; Turner v. Beggarly, 33-331; Reddick v. Jones, 28-107; Henderson v. Shannon, 12-149; Guy v. McLean, 12-46; Black v. Bird, 2-273—**except where note void as treated of under section 2204.**

In action on instrument mere introduction of same raises presumption that holder is only equitable owner, and same subject to equities or other defenses of maker against prior holders: Tyson v. Joyner, 139-69—**and in order to render purchaser of instrument payable to order bona fide holder of title good against prior equities instrument must be specially indorsed to him by payee and prior indorsees, if any, or at least indorsed in blank,** Ibid.

2207. Holds as non-negotiable, when. In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter.

1899, c. 733, s. 58. **Purchaser of instrument after maturity takes same subject to all defenses available against it in hands of payee:** Causey v. Snow, 122-326; Griffin v. Hasty, 94-438; Pugh v. Grant, 86-40; Burroughs v. Bank, 70-283; Little v. Dunlap, 44-40; Moody v. Sitton, 37-382; Turner v. Beggarly, 33-331; Haywood v. McNair, 19-283, 14-231; Shannon v. Henderson, 12-149; Black v. Bird, 2-273.

Instruments past due, lodged with bank to secure indebtedness, are taken subject to all proper defenses by makers against original payee, Bank v. Loughran, 126-814.

Transferee of unindorsed instrument, unless same payable to bearer, takes instrument subject to all equities which maker has against payee, Bresee v. Crumpton, 121-122.

2208. Deemed prima facie in due course. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

1899, c. 733, s. 59. **Upon the execution of the instrument being proven, every holder is deemed prima facie to be holder in due course:** Mfg. Co. 153-462

v. Summers, 143-109; Evans v. Freeman, 142-61; Mayers v. McRimmon, 140-643; Loftin v. Hill, 131-109; Causey v. Snow, 120-279; Threadgill v. Comrs., 116-616; Triplett v. Foster, 115-335; Bank v. Burgwyn, 108-62; Deloatch v. Vinson, 108-147; Applegarth v. Tillery, 105-407; Lewis v. Long, 102-206; Bank v. Bridgers, 98-72; Kiff v. Weaver, 94-274; Tredwell v. Blount, 86-33; Pugh v. Grant, 86-40; Pate v. Brown, 85-166; Jackson v. Love, 82-405; Meadows v. Cozart, 76-450—though presumption rebuttable, Mayers v. McRimmon, 140-642; Loftin v. Hill, 131-109.

Where agent is furnished money to buy up negotiable claims against principal, and does buy them, his possession does not raise a presumption of ownership: Threadgill v. Comrs., 116-616. It is unnecessary for holder to make allegation of ownership in complaint: Deloatch v. Vinson, 108-147. An issue "Are defendants indebted to plaintiff and if so in what amount?" is sufficient to enable question of ownership of note to be passed on by jury: Causey v. Snow, 120-279.

THE BURDEN OF PROOF. The above section only enacts the law as it has always existed, as far as the burden of proof is concerned: Mfg. Co. v. Summers, 143-109. The burden is first upon the defendant to show that title defective: Evans v. Freeman, 142-67; Threadgill v. Comrs., 116-616; Triplett v. Foster, 115-335; Bank v. Burgwyn, 108-62; Ballinger v. Cureton, 104-474; Holly v. Holly, 94-670; Pugh v. Grant, 86-40. Upon proof of fraud or illegality being offered burden is shifted to holder, and he must show that he received instrument bona fide and for value: Bank v. Burgwyn, 110-267, 108-62; Pugh v. Grant, 86-40; Meadows v. Cozart, 76-450—but when he has shown it his prima facie case is restored, Bank v. Burgwyn, 110-267—unless circumstances under which he took instrument are shown by defendant to be such as to amount to notice of defect in same, Ibid. The prima facie case of holder is not rebutted by defendant's denial of ownership in answer: Causey v. Snow, 120-279.

Possession of unindorsed instrument raises presumption as between holder and payer that holder is owner: Holly v. Holly, 94-670; Robertson v. Dunn, 87-191—but presumption does not arise between holder and payee, who has legal title, Ibid.

In attachment proceedings intervenor having introduced bill of lading for property with draft attached properly indorsed, presumption is that he is purchaser for value without notice: Mfg. Co. v. Tierney, 133-631.

Possession of instrument by indorsee of married woman prima facie evidence of ownership, instrument having been in possession of husband after indorsement: Vann v. Edwards, 130-70 (note that action was upon instrument executed prior to enactment of section). Where evidence establishes that title of party who negotiated check to defendant was defective, burden is on defendant, claiming to be bona fide purchaser for value and without notice, to make good claim by greater weight of evidence: Mfg. Co. v. Summers, 143-103—and in action upon instrument payable to order mere introduction of same without proof of indorsement raises presumption that holder merely equitable owner, Mayers v. McRimmon, 140-640; Tyson v. Joyner, 139-69—and same subject to equities or other defenses of maker against prior holders, Ibid—also where complaint in action by indorsee of instrument does not state that he is

holder in due course, and defendant alleges that execution of instrument procured by fraud of payee, burden is on indorsee to show that he is holder in due course, Campbell v. Patton, 113-481.

VIII. Liability of Parties.

2209. Maker's admissions and engagements. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse.

1899, c. 733, s. 60.

2210. Drawer's admissions and engagements. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negotiating or limiting his own liability to the holder.

1899, c. 733, s. 61.

2211. Acceptor's engagements. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse.

1899, c. 733, s. 62. **Instrument having been accepted, drawee becomes primarily liable:** Bank v. Bradley, 117-526.

2212. Who deemed indorsers. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

1899, c. 733, s. 63. **Where instrument indorsed by payee and then the name of another person appears upon it, such person deemed to be indorser:** Lilly v. Baker, 88-151—**but if party indorses note when executed, indorser ought to be held as original promisor,** Ibid, page 154.

2213. Signing in blank, liable as indorser. Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent

parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

148-362

1899, c. 733, s. 64. **See, as bearing upon subject matter of section,** Lilly v. Baker, 88-154; Hoffman v. Moore, 82-313. **Section merely referred to in** Rouse v. Wooten, 140-558.

2214. Delivery or qualified indorsement warrants what. Every person negotiating an instrument by delivery or by a qualified indorsement warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes.

1899, c. 733, s. 65.

2215. Indorser without qualification warrants what. Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of the next preceding section; and (2) that the instrument is at the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

1899, c. 733, s. 66. **Where payee, whether original or by previous indorsement, transfers instrument by indorsement he becomes simply an indorser:** Davidson v. Powell, 114-575—**unless by terms of indorsement he limits his liability,** Ibid. **Decision prior to enactment reviewing warranties:** Henderson v. Lemly, 79-170. **See, as incidentally bearing upon subject matter of section,** Hill v. Shields, 81-253.

2216. Indorser of instrument negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

1899, c. 733, s. 67.

2217. In order of their indorsement. As respects one another, indorsers are liable prima facie in the order in which they indorse;

but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally.

153-270

1899, c. 733, s. 68. **Person obtaining possession of instrument after indorsing same is restored to original position and can not hold liable intermediate parties who could look to him:** Adrian v. McCaskill, 103-182 **—and person deriving possession of paper from him with notice of this fact is in same position,** Ibid.

Remote endorsee of instrument not affected by agreement between payee and immediate indorsee: Hill v. Shields, 81-250.

2218. Broker or agent negotiating without indorsement. Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section two thousand two hundred and fourteen, unless he discloses the name of his principal and the fact that he is acting only as agent.

1899, c. 733, s. 69.

IX. Presentation for Payment.

2219. When necessary; when not. Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

148-362

1899, c. 733, s. 70. **Liability of surety is primary:** Rouse v. Wooten, 140-557**—though that of guarantor is collateral and secondary,** Ibid. **Where drawer has funds in hands of drawee he has a right to expect the instrument to be honored, and drawer is entitled to presentment of instrument in reasonable time:** Cedar Falls v. Wallace, 83-225.

Where draft on third person given in settlement of antecedent debt it is the duty of the holder to present it and give notice of its dishonor, if not paid, and failure to do so discharges debt: Mauney v. Coit, 80-300.

Instrument must be presented to drawee for acceptance or payment and due notice must be given to indorser of its acceptance or nonpayment before action can be sustained against him: Long v. Stephenson, 72-569.

If instrument be payable at particular time and place, demand at such time and place need not be averred or proven in action by holder against maker: Nichols v. Pool, 47-23**—for failure to make such demand can only be used in defense if money was ready at time and place named,** Ibid.

2220. At what time. When the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a

reasonable time after its issue, except that in case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

1899, c. 733, s. 71.

2221. **How made.** Presentment for payment to be sufficient must be made (1) by the holder or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

1899, c. 733, s. 72. **Presentment of instrument must be made to drawee or acceptor, or to an authorized agent:** Burrus v. Ins. Co., 124-12.

2222. Proper place for. Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified but the address of the person to make the payment is given in the instrument, and is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

1899, c. 733, s. 73. **Maker of instrument made payable on demand at a particular place is not bound to pay it until it is presented at such place:** Bank v. Bank, 35-75—**but wherever instrument made payable at specific place, presentment at such place sufficient,** Sullivan v. Mitchell, 4-93—**and presentment of instrument sufficient where it is made at residence or usual place of business of drawee, where no place is specified:** Burrus v. Ins. Co., 124-12.

Presentation of a draft for payment at the place of its date is sufficient demand to charge the drawer or acceptor after notice of protest, where place at which it was payable is not stated in the writing and no proof made that any particular place was agreed upon: Wittkowski v. Smith, 84-671.

2223. Instrument exhibited to party, delivered when paid. The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it.

1899, c. 733, s. 74.

2224. Payable at bank, how made. Where the instrument is payable at a bank presentment for payment must be made during

banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

1899, c. 733, s. 75. **Whenever instrument payable at particular bank, presentment must be made at such bank:** Sullivan v. Mitchell, 4-93.

2225. When made to personal representative. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

1899, c. 733, s. 76.

2226. How made to partners. Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

1899, c. 733, s. 77. **Where instrument drawn on firm, presentment to one of its members is sufficient:** Elliott v. White, 51-98.

2227. To persons severally liable. Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all.

1899, c. 733, s. 78.

2228. When not required to charge drawer. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

1899, c. 733, s. 79. **Generally, if drawer of bill had no reasonable grounds to expect it to be honored, holder is not bound to strict presentment, but if drawer has funds in hands of drawee he has right to expect his bill to be honored, and drawer is entitled to presentment of his bill in reasonable time, and strict notice, if dishonored, although he knew or had reason to believe when he drew the bill that drawee was insolvent:** Cedar Falls v. Wallace, 83-225.

2229. Not required to charge indorser, when. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

1899, c. 733, s. 80.

2230. Delay in making, when excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable

to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

1899, c. 733, s. 81.

2231. Dispensed with, when. Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied.

1899, c. 733, s. 82. **See, as bearing upon subject matter of section:** Moore v. Coffield, 12-247.

2232. What constitutes. The instrument is dishonored by nonpayment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid.

1899, c. 733, s. 83.

2233. Dishonor gives right of action against those secondarily liable. Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

1899, c. 733, s. 84.

1907 1173

2234. When negotiable instruments payable. Every negotiable instrument is payable at the time fixed therein without grace except as allowed by the succeeding section. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday, when it is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may at the option of the holder be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday.

1899, c. 733, s. 85; 1907, c. 897.

2235. Days of grace; what allowed. All bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect, and not otherwise, shall be entitled to days of grace as the same are allowed by the customs of merchants in foreign bills of exchange payable at the expiration of a certain period after date on sight: Provided, that no days of grace shall be allowed on any bill of exchange, promissory note or draft payable on demand.

1907, c. 861. **See, as bearing upon subject matter of section,** Jarvis v. McMain and Simmons, 10-10; Fields v. Mallett, 10-465.

2236. Time, how computed. When the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

1899, c. 733, s. 86.

2237. Instrument payable at bank is an order to bank to pay. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

1899, c. 733, s. 87.

2238. Payment in due course, what is. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

1899, c. 733, s. 88.

X. Notice of Dishonor.

2239. Effect of failure to give. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or nonpayment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged.

1899, c. 733, s. 89. **Where instrument dishonored, notice must be given to all who are secondarily liable as drawer and indorser:** Bank v. Bradley, 117-526; Mauney v. Coit, 80-300; Long v. Stephenson, 72-569; Lilly v. Pettaway, 73-361; Yancey v. Littlejohn, 9-525; Austin v. Rodman, 8-194—**and indorsers must have notice of dishonor even though at time of indorsement of instrument they had reason to believe and did believe that the instrument would not be paid by maker,** Denny v. Palmer, 27-610—**but surety upon instrument not discharged from liability by reason of fact that he was not given notice of its dishonor,** Rouse v. Wooten, 140-557. 148-362

As to whether a party who indorses a note in blank at time the note is made is primarily or secondarily liable, see Lilly v. Baker, 88-154. As bearing upon section, see Hubbard v. Troy, 24-134; Spear v. Atkinson, 23-262; Bissell v. Bozman, 17-154.

2240. By whom given. The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given.

1899, c. 733, s. 90. **Any person through whose hands instrument may**

have passed may give notice to drawer or prior indorser of dishonor of same: Bank v. Seawell, 9-560—**although instrument may not at that time have been taken up by him,** Ibid.

2241. May be given by agent. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

1899, c. 733, s. 91.

2242. Who benefited by holder's notice. Where notice is given by or on behalf of the holder it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

1899, c. 733, s. 92.

2243. Given by a party inures to benefit of holder and subsequent parties. Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given.

1899, c. 733, s. 93.

2244. Agent may give to principal or parties. Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

1899, c. 733, s. 94.

2245. Defects of, not to invalidate unless party misled. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby.

1899, c. 733, s. 95. **Notice may be signed or unsigned:** Bank v. Seawell, 9-560—**and need not be in any particular form,** Ibid.

2246. Terms of, may be oral or written. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails.

1899, c. 733, s. 96. **Notice is good if it be sufficient to put indorser upon inquiry:** Bank v. Seawell, 9-560—**and no particular form is required as it may be oral or written, or in print,** Ibid.

2247. May be given to party or agent. Notice of dishonor may be given either to the party himself or to his agent in that behalf.
1899, c. 733, s. 97.

2248. When given to personal representative. When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased.
1899, c. 733, s. 98.

2249. To partner for firm. When the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.
1899, c. 733, s. 99.

2250. Joint parties, each notified. Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others.
1899, c. 733, s. 100.

2251. To trustee in bankruptcy, etc. Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee.
1899, c. 733, s. 101.

2252. At what time given. Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter.
1899, c. 733, s. 102. See sections 2253, 2254.

2253. When given to persons residing in same place. When the person giving and the person to receive notice reside in same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the postoffice in time to reach him in the usual course on the day following.
1899, c. 733, s. 103. See, as bearing upon subject matter of section, State Bank v. Smith, 7-70.

2254. When given by mail. Where the person giving and the person to receive notice reside in different places the notice must be given within the following times; (1) If sent by mail it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail if it had been deposited in the postoffice within the time specified in the last subdivision.

1899, c. 733, s. 104. **Where parties live in different places, holder must give notice of nonacceptance or nonpayment on next day:** Hubbard v. Troy, 24-134—**or by next post after day of dishonor,** Bank v. Bradley, 117-526; Denny v. Palmer, 27-610; Hubbard v. Troy, 24-134. **Contents of notice of dishonor may be proved by parol without notice to produce original:** Faribault v. Ely, 13-67.

2255. Duly mailed, deemed given. When notice of dishonor is duly addressed and deposited in the postoffice the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

1899, c. 733, s. 105. **See** Faribault v. Ely, 13-70.

2256. When deemed mailed. Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter-box under the control of the postoffice department.

1899, c. 733, s. 106.

2257. When given to antecedent parties. Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

1899, c. 733, s. 107.

2258. Where to be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or (2) if he lives in one place and have his place of business in another, notice may be sent to either place; or (3) if he be sojourning in another place notice may be sent to the place where he is so sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section.

1899, c. 733, s. 108. **Notice of dishonor should be sent to postoffice near-**

est to party's address: Bank of U. S. v. Lane, 10-453—or to place of his residence, Denny v. Palmer, 27-610—but where drawer of instrument dates it at a particular place, notice of dishonor of instrument may generally be directed to him at that place, Ibid. See, as bearing upon section, Runyon v. Montfort, 44-371.

2259. May be waived. Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

1899, c. 733, s. 109. Although protest not necessary on inland bills, yet its waiver in such cases is construed to signify as much as when applied to foreign bills: Shaw v. McNeill, 95-535—and where protest waived on inland bill and no notice given of nonacceptance and nonpayment to indorsers, held that such notice was waived by waiver of protest, Ibid. Where indorsee neglects to give notice drawer or indorser will still be liable if with knowledge of all facts he promises to pay instrument: Lilly v. Petteway, 73-358; Moore v. Tucker, 25-347.

For waiver of notice by conduct, see Shaw v. McNeill, 95-535.

2260. Waiver embodied in instrument binds all parties. Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only.

1899, c. 733, s. 110.

2261. Unnecessary when protest waived. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of a presentment and notice of dishonor.

1899, c. 733, s. 111. Where protest waived on foreign bill, presentment and notice deemed to be waived also: Shaw v. McNeill, 95-535—and notice of dishonor on inland bill is waived by waiver of protest, Ibid—but where settling partner, after dissolution of firm, gives instrument in payment of partnership debt, he can not waive protest so as to bind former copartner, Mauney v. Coit, 80-300—especially where latter has been a dormant member, Ibid. Protest only necessary in case of foreign bills: Shaw v. McNeill, 95-535, and cases under section 2302.

2262. Dispensed with, when. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

1899, c. 733, s. 112. As bearing upon subject matter of section, see Runyon v. Montfort, 44-371.

2263. Delay in giving, excused, when. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default,

misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

1899, c. 733, s. 113.

2264. Not required, when. Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) where drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment.

1899, c. 733, s. 114. **Generally if drawer of instrument has no reasonable grounds to expect it to be honored, holder is not bound to give notice of dishonor, but if drawer has funds in hands of drawee he has right to expect instrument to be honored, and drawer is entitled to strict notice of instrument dishonored, although drawer knew, or had reason to believe when instrument was drawn, that drawer was insolvent:** Cedar Falls v. Wallace, 83-225.

2265. To indorser, not required when. Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.

1899, c. 733, s. 115. **Although, at time of indorsement, indorser believed that instrument would not be paid by maker, such circumstance does not dispense with necessity of due notice:** Denny v. Palmer, 27-610.

As to whether party to be treated as indorser or as one primarily liable when he indorses paper at time of its execution, see Lilly v. Baker, 88-154.

2266. Notice of nonacceptance makes unnecessary. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted.

1899, c. 733, s. 116.

2267. Effect of failure to give notice of nonacceptance. An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission.

1899, c. 733, s. 117.

2268. Protest not required, except of foreign bills of exchange. Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be, but protest is not required except in the case of foreign bills of exchange.

1899, c. 733, s. 118. **Protest not necessary to fix drawee and indorsers of inland bills with liability:** Bank v. Bradley, 117-526; Shaw v. McNeill, 95-535; Hubbard v. Troy, 24-134—**though it is necessary in case of foreign bills,** Shaw v. McNeill, 95-535.

XI. Discharge of

2269. What constitutes. A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

1899, c. 733, s. 119.

2270. When one secondarily liable discharged. A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3 by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved.

1899, c. 733, s. 120.

2271. Payment by party secondarily liable is not. When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated.

1899, c. 733, s. 121. **Indorser who pays instrument of principal can only recover from latter amount actually paid:** Pace v. Robertson, 65-

550. **Where instrument payable to order of third person is protested and taken up by drawer letter can not again put it into circulation:** Price v. Sharp, 24-417.

2272. Holder may renounce in writing his rights against any party. The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

1899, c. 733, s. 122.

2273. Cancellation by mistake inoperative. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.

1899, c. 733, s. 123.

2274. Material alteration without assent avoids. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor.

1899, c. 733, s. 124. **Material alteration vacates a bill or note except as between parties consenting thereto:** Davis v. Coleman, 29-424—**and such alteration by principal without knowledge or consent of surety discharges such surety from instrument:** Darwin v. Rippey, 63-318.

2275. Material alteration defined. Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

1899, c. 733, s. 125. **Cutting off name of maker of instrument and substituting another is material alteration:** Davis v. Coleman, 29-424—as is

addition of words "in specie" after word "dollars" in sealed instrument Darwin v. Rippey, 63-318—**but held that prefixing of words "Pleasant Valley, S. C.," to instrument was not material alteration,** Houston v. Potts, 64-33.

XII. Bills, Form and Interpretation.

2276. Bills defined. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

1899, c. 733, s. 126.

2277. Not assignment of fund. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

1899, c. 733, s. 127. **See annotations under section 2339.**

2278. May be addressed to two or more drawees jointly but not in alternative. A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession.

1899, c. 733, s. 128.

2279. Inland bill defined. An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill.

1899, c. 733, s. 129.

2280. When holder may treat as bill or note. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or a promissory note.

1899, c. 733, s. 130.

2281. Referee in case of need. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need; that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

1899, c. 733, s. 131.

XIII. Acceptance.

2282. Defined. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawer. It must not express that the drawee will perform his promise by any other means than the payment of money.

1899, c. 733, s. 132. **Authority to accept instruments must ordinarily be expressly conferred upon agent:** Bank v. Hay, 143-326—**but may be implied if the execution of the paper is necessary incident to business,** Ibid.

2283. Must be written on bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

1899, c. 733, s. 133.

2284. Effect of, on paper other than bill. Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

1899, c. 733, s. 134. **Letter written within reasonable time before or after date of instrument, describing it in terms not to be mistaken and promising to accept it, if shown to person who afterwards takes instrument on credit of the letter, is an acceptance of same:** Bank v. Hay, 143-326; Nimocks v. Woody, 97-5.

2285. Unconditional promise in writing to accept valid, when. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

1899, c. 733, s. 135. **Letter written within reasonable time before or after date of instrument describing it in terms not to be mistaken, and promising to accept same, if shown to person who afterwards takes instrument on credit of letter is an acceptance of same:** Bank v. Hay, 143-326; Nimocks v. Woody, 97-5.

2286. Twenty-four hours allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation.

1899, c. 733, s. 136.

2287. Destruction of, or failure to return, bill deemed acceptance. Where a drawee to whom a bill is delivered for acceptance destroys

the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

1899, c. 733, s. 137.

2288. May be accepted before signed, when overdue, etc. A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

1899, c. 733, s. 138.

2289. General and qualified. And acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

1899, c. 733, s. 139. **For qualified acceptance,** see Wallace v. Douglass, 116-659.

2290. What is general. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

1899, c. 733, s. 140.

2291. What is qualified. An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that it to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all.

1899, c. 733, s. 141. **Where person accepts instrument drawn on him "payable when I receive funds to use of drawer" he becomes liable when moneys are placed to his credit, though he had not taken manual possession thereof:** Wallace v. Douglass, 116-659.

2292. Holder may refuse qualified acceptance and treat bill as dishonored. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and endorsers are discharged from

liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto.

1899, c. 733, s. 142.

XIV. Presentment for Acceptance.

2293. Necessary, in what cases. Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

1899, c. 733, s. 143.

2294. Failure to present in reasonable time discharges drawee and indorsers. Except as herein otherwise provided the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawee and all indorsers are discharged.

1899, c. 733, s. 144.

2295. How made. Presentment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and (1) where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead presentment may be made to his personal representative; (3) where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors presentment may be made to him or to his trustee or assignee.

1899, c. 733, s. 145. **Instrument payable at no particular place in city or town must be presented at maker's residence or place of business:** Bank v. Lutterloh, 95-495; Wittkowski v. Smith, 84-671.

2296. On what day presented. A bill may be presented for acceptance on any day on which negotiable instruments may be

1404
1173

presented for payment under the provisions of this chapter. When Saturday is not a holiday presentment for acceptance may be made before twelve o'clock noon on that day.

1899, c. 733, s. 146.

2297. Excused, when; can not be made before due. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

1899, c. 733, s. 147.

2298. Excused and bill treated as dishonored. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment can not be made; (3) where, although presentment has been irregular, acceptance has been refused on some ground.

1899, c. 733, s. 148.

2299. When bill dishonored by nonacceptance. A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or can not be obtained; or (2) when a presentment for acceptance is executed and the bill is not accepted.

1899, c. 733, s. 149.

2300. When bill must be treated as dishonored. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers.

1899, c. 733, s. 150.

2301. Bill dishonored by nonacceptance, holder has recourse on drawer and indorsers. When a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

1899, c. 733, s. 151.

XV. Protest.

2302. Necessary only on foreign bills. Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which had not previously been dishonored by nonacceptance is dishonored by nonpayment it must be duly protested for nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill protest in case of dishonor is unnecessary.

1899, c. 733, s. 152. **Protest necessary in case of foreign bills:** Shaw v. McNeill, 95-535—**though not necessary on inland bills,** Bank v. Bradley, 117-526; Shaw v. McNeill, 95-535; Bank v. Lutterloh, 95-495; Hubbard, v. Troy, 24-134.

Note executed in another state need not be protested before owner can sue indorser, such protest not being necessary in this state, and there being no evidence that protest required in state where note executed: Bank v. Carr, 130-479—**for that common law presumed to prevail in other state, and required no protest on this note,** Ibid; Gooch v. Faucett, 122-270; Moody v. Johnson, 112-801.

By the law merchant protest of bill by notary public is in itself evidence: Gordon v. Price, 32-385.

2303. Annexed to bill, specifies what. The protest must be annexed to the bill or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

1899, c. 733, s. 153. **Decision prior to enactment of statute as to sufficiency of protest:** Bank v. Lutterloh, 95-495.

2304. By whom made. Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

1899, c. 733, s. 154.

2305. Must be made on day of dishonor. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

1899, c. 733, s. 155.

2306. At what place made. A bill must be protested at the place where it is dishonored, except that when a bill drawn paya-

ble at the place of business or residence of some person other than the drawee has been dishonored by nonacceptance it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary.

1899, c. 733, s. 156.

2307. For nonpayment, after, for nonacceptance. A bill which has been protested for nonacceptance may be subsequently protested for nonpayment.

1899, c. 733, s. 157.

2308. Before maturity, in bankruptcy, etc. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

1899, c. 733, s. 158.

2309. Dispensed with, when. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

1899, c. 733 s. 159.

2310. On copy of lost bill. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

1899, c. 733, s. 160.

XVI. Acceptance for Honor.

2311. When may be made. Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

1899, c. 733, s. 161.

2312. How made. An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

1899, c. 733,. s. 162.

2313. Deemed for honor of drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

1899, c. 733, s. 163.

2314. Liability on. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

1899, c. 733, s. 164.

2315. Liable, when. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him.

1899, c. 733, s. 165.

2316. Maturity, how calculated. Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor.

1899, c. 733, s. 166.

2317. Protest before presentment to acceptor. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need.

1899, c. 733, s. 167.

2318. How presented for payment. Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified.

1899, c. 733, s. 168.

2319. Delay in presenting to acceptor for honor or referee in case of need excused, when. The provisions of section two thous-

and two hundred and thirty apply where there is delay in making presentment to the acceptor for honor or referee in case of need.
1899, c. 733, s. 169.

2320. Protest when not paid by acceptor. When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him.
1899, c. 733, s. 170.

XVII. Payment for Honor.

2321. After protest. Where a bill has been protested for nonpayment any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.
1899, c. 733, s. 171.

2322. Must be attested by notarial act of honor. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.
1899, c. 733, s. 172.

2323. Notarial act of honor, on what founded. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.
1899, c. 733, s. 173.

2324. Who given preference in. Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference.
1899, c. 733, s. 174.

2325. Discharges all subsequent parties. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.
1899, c. 733, s. 175.

2326. Refusing payment forfeits rights. Where the holder of a bill refuses to receive payment supra protest he loses his right

of recourse against any party who would have been discharged by such payment.

1899, c. 733, s. 176.

2327. Payer for honor entitled to bill and protest. The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest.

1899, c. 733, s. 177.

XVIII. Bills in a Set.

2328. Constitute one bill. When a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

1899, c. 733, s. 178.

2329. Two or more parts negotiated, holder whose title first accrues owner. Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

1899, c. 733, s. 179.

2330. Indorser liable for all he indorses. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills.

1899, c. 733, s. 180.

2331. Acceptor liable for all he accepts. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part and such accepted parts are negotiated to different holders in due course he is liable on every such part as if it were a separate bill.

1899, c. 733, s. 181.

2332. Payment of part does not release from outstanding accepted part. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

1889, c. 733, s. 182.

2333. Payment of one part discharges whole, when. Except as herein otherwise provided where any one part of a bill drawn in

a set is discharged by payment or otherwise the whole bill is discharged.

1899, c. 733, s. 183.

XIX. Promissory Notes and Checks.

2334. Negotiable promissory note defined. A negotiable promissory note within the meaning of this chapter in as unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him.

1899, c. 733, s. 184. **Note is not rendered nonnegotiable by reason of the fact that it is under seal:** Christian v. Parrott, 114-215; Bank v. Michael, 96-53. **Validity of note not affected because it sets out consideration for which given,** Bank v. Michael, 96-53. **To render a note nonnegotiable it must show upon its face that promise to pay is conditional, or the amount to be paid is uncertain:** Ibid; see also sections 2151-2156.

2335. Check defined, law governing. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check.

1899, c. 733, s. 185. **Cashier's checks, whether certified or otherwise, are classed with bills of exchange payable on demand:** Mfg. Co. v. Summers, 143-102—**and stipulation stamped upon face of check that it will positively not be paid to a certain company or its agents, is valid stipulation and binding upon holder,** Bank v. Bank, 118-783.

2336. Failure to present in reasonable time discharges drawer. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

1899, c. 733, s. 186. **If check negotiated by indorsement for value without notice and within reasonable time, holder can maintain position of holder in due course:** Mfg. Co. v. Summers, 143-102.

Holder of check upon bank, drawn before but presented after bank's assignment for benefit of creditors, is not entitled to amount thereof as against assignee: Hawes v. Blackwels, 107-196.

Holder of check upon bank located in town of residence may present same for payment on day after it is drawn, unless holder had information of its precarious condition: Bank v. Alexander, 84-30.

For discussion of rights of holder as against bank, drawer of check and assignee of bank, see Hawes v. Blackwels, 107-196; see also section 2339.

2337. Certification of check an acceptance. Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

1899, c. 733, s. 187. **Holder of check can not maintain action against bank upon which check drawn until after its acceptance by bank:** Bank v. Bank, 118-783; Hawes v. Blackwels, 107-202.

2338. Certification discharges drawer and indorsers. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

1899, c. 733, s. 188.

2339. Check not assignment of fund. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

1899, c. 733, s. 189. **Depositor is creditor of bank, his deposit becoming part of general fund, the property of bank, and subject to assignment by bank:** Hawes v. Blackwels, 107-196—**and though holder of check is to the extent of his check, assignee of depositor's debt due him by bank, yet he has no lien upon deposit for amount of check, though payee or holder of check has an interest in deposit as against drawer, subject to bank's right to pay outstanding checks before notice,** Ibid.

Giving of check upon bank is not, unless it is accepted by bank, an assignment of claim of depositor, and passes no title, legal or equitable, to his money on deposit in such bank: Perry v. Bank, 131-117. **Action can not be sustained against bank by payee of check unless check is accepted or certified by bank:** Perry v. Bank, 131-119; Bank v. Bank, 118-783; Hawes v. Blackwels, 107-202—**though drawer has funds on deposit sufficient for its payment against which bank has no claim,** Perry v. Bank, 131-117.

XX. General Provisions.

2340. Terms defined. In this chapter, unless the context otherwise requires—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and setoff.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

1899, c. 733, s. 191.

2341. Rules of construction. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

3. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

4. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

5. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

But see Lilly v. Baker, 88-154.

6. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

1899, c. 733, s. 17.

2342. Who primarily and secondarily liable. The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable.

1899, c. 733, s. 192. **Under this section liability of surety to instrument is primary:** Rouse v. Wooten, 140-557—**for he is, by the terms of the instrument, absolutely required to pay the same,** Ibid—**but liability of grantor is collateral and secondary,** Ibid, and other cases cited on page 559. **See also** Lilly v. Baker, 88-154.

2343. Reasonable time determined by usage. In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments and the facts of the particular case.

1899, c. 733, s. 193. **In determining what is reasonable time, regard must be had to the nature of instrument and facts of particular case:** Mfg. Co. v. Summers, 143-102; Yancey v. Littlejohn, 9-525—**and where check on bank in this state negotiated to party in neighboring state within five days after obtaining same, such negotiation is within reasonable time,** Mfg. Co. v. Summers, 143-102. **As to time in which check drawn on bank should be presented, where drawer, payee and drawee all residents of same place,** see Bank v. Alexander, 84-30.

2344. Law merchant applicable. In any case not provided for in this chapter the rules of the law merchant shall govern.

1899, c. 733, s. 196.

2345. This chapter not retroactive. The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the eighth day of March, one thousand eight hundred and ninety-nine.

1899, c. 733, s. 197.

2346. This chapter not to authorize certain things. Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof.

1899, c. 733, s. 197; 1905, c. 327. **Validity of provision for attorney's fees in instrument executed and payable in another state must be determined by laws of this state:** Bank v. Land and Lumber Co., 128-193—**as must also further agreement of waiver of homestead and exemptions,** Bank v. Land and Lumber Co., 128-195—**and such provisions in instrument will not be enforced here,** Ibid; Brisco v. Norris, 112-671; Tinsley v. Hoskins, 111-340; Beavan v. Speed, 74-544. **As to provision in instrument for attorney's fees with reference to jurisdiction of justice of the peace,** see Bank v. Land and Lumber Co., 128-193.

Section apparently nullifies old law as laid down in Bank v. Bynum, 84-24. **As bearing upon section,** see Turner v. Boger, 126-302; Williams v. Rich, 117-240.

CHAPTER 55.

NOTARIES.

2347. Appointed by governor; qualified before clerk. The governor may, from time to time, at his discretion, appoint one or more fit persons in every county, to act as notaries public, who sahll hold their office for two years from and after the date of their appointment; and on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified, by taking before said clerk an oath of office, and the oaths prescribed for officers.

Code, s. 3304; R. C., c. 75; 1777, c. 118, s. 15; 1881, c. 317.

2348. Commission; record of qualification by clerk. The governor shall issue to each a commission, a certificate of which shall be deposited with the clerk of the court, and filed among the records, and he shall note on his minutes the qualification of the notary public.

Code, s. 3305; R. C., c. 75, s. 2.

2349. Clerks notaries ex officio; may certify own seals. The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts.

Code, s. 3306; R. C., c. 75, s. 3; 1833, c. 7, ss. 1, 2. **Notarial authority is incident to office of clerk of the court:** Lawrence v. Hodges, 92-682.

2350. May take probates, administer oaths, etc.; attorneys can not take in certain cases. Notaries public, in and out of the state, shall have power to take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, to take depositions and to administer oaths and affirmations in matters incident to or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer within the state, and shall have power to take the privy examination of femes covert. No practicing attorney at law shall have power to administer any oath to a person to any paper writing to be used in any legal proceeding in which he appears as attorney.

Code, s. 3307; 1866, c. 30; 1879, c. 128; 1908, c. 105, s. 2. **For power to take acknowledgments and privy examinations of married women, see sections 989 and 952. For power as commissioner of affidavits see section 800. For protest of notes, bills, etc., by notary, see section 2304. Probate after expiration of commission is void, but open**

act of de facto officer is effectual as to third persons: Hughes v. Long, 119-52; Gilliam v. Reddick, 26-368. **The taking of acknowledgment of a deed by a justice of the peace, commissioner or notary public is a judicial, or at least a quasi judicial act:** Long v. Crews, 113-256; Piland v. Taylor, 113-1; Paul v. Carpenter, 70-502. **Registration upon an acknowledgment before an officer not authorized to take it is not even notice to creditors and subsequent purchasers:** Long v. Crews, 113-256 and cases cited.

An officer interested in a deed, either as party, trustee or cestui que trust, is disqualified to take acknowledgment of its execution: Long v. Crews, 113-256; Lance v. Tainter, 137-249; Joines v. Johnson, 133-487; McAllister v. Purcell, 124-262; Blanton v. Bostic, 126-421; Land Co. v. Jennett, 128-3; Freeman v. Person, 106-251; but see Trenwith v. Smallwood, 111-132. **The fact that officer taking acknowledgment or proof is employed by grantee does not invalidate unless such officer has an interest in it himself:** Smith v. Lumber Co., 144-47; Bank v. Ireland, 122-571.

2351. May exercise power in other than own county. Notaries public shall have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done.

1891, c. 248.

2351a. Must state expiration of commission. Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts.

2352 Seal. Official acts by notaries public shall be attested by their notarial seals.

Name is not necessary part of seal: Deans v. Pate, 114-194. **Jurat of pleadings without seal is invalid:** Tucker v. Life Asso., 112-796.

CHAPTER 56.

OATHS.

2353. Oaths administered with solemnity. Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity.

R. C., c. 76, s. 1; 1777, c. 108, s. 2. **This section applies to manner of taking and administering oath, as well as to substance:** Pearre v. Folb, 123-239; State v. Davis, 69-383.

One who believes in the existence of a Supreme Being and that God will punish in this world for every sin committed, though he does not believe in punishment after death, is competent to be sworn: Shaw v. Moore, 49-25.

An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words, "So help me, God:" State v. Paylor, 89-539.

The taking of an oath of office is a mere incident and constitutes no part of the office, and the office may exist without it: Bryan v. Patrick, 124-662; Clark v. Stanley, 66-59.

An oath to support the constitution of the state and of the United States is required of officers, but not of placemen: Worthy v. Barrett, 63-199.

No objection after verdict to manner of juror's oath: State v. Council, 129-517—**or to failure to swear a witness,** State v. Gee, 92-756—**or to swearing of an atheist,** State v. Davis, 80-412.

2354. How administered. Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token, that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head; and he shall kiss the Holy Gospel, as a seal of confirmation to the said engagements.

Code, s. 3309; R. C., c. 76, s. 1; 1777, c. 108, s. 2. **Statute must be strictly followed:** Pearre v. Folb, 123-239; State v. Owen, 72-612; State v. Davis, 69-383.

The administration of an oath to a witness is an official act of the court, and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, it is presumed that it is rightly done: State v. Mace, 86-668. **The administration of an oath is a ministerial act and may be done by anyone in the presence and by the direction of the court, but is the act of the court:** State v. Knight, 84-789; State v. Mace, 86-668; Rowland v. Thompson, 65-110. **The coroner, and not a justice of the peace, is the one authorized to administer oaths in a coroner's inquest:** State v. Knight, 84-389. **Irregular for deputy sheriff to swear appraisers of homestead:** Oates v. Munday, 127-444. **Deputy clerk may take affidavit in claim and delivery proceedings:** Jackson v. Buchanan, 89-74. **Where words "you swear" were omitted by clerk, which was reprehensible, under the circumstances of this case it did not vitiate the oath:** State v. Owen, 72-605.

As to cases excepted in above section, see sections 2355, 2356.

2355. Who may be sworn with uplifted hand; form of affirmation. When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

"I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known, (etc., as the words of the oath may be).

Code, s. 3310; R. C., c. 76, s. 2; 1777, c. 108, s. 3. **If usual form of oath upon Holy Evangelists is dispensed with, and an appeal or affirmation is substituted, it must appear that the person who affirmed had conscientious scruples else the appeal or affirmation is invalid:** State v. Davis, 69-385.

As to the validity of the oath administered to an elector by the registrar where elector only affirms by uplifted hand, see DeBerry v. Nicholson, 102-465; see also section 4319.

When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury: State v. Whisenhurst 9-458; see sections 3611-3617.

For interpretation of word "oath" to mean "affirmation," see section 2831.

2356. How Quakers, Moravians, etc., affirm. The solemn affirmation of Quakers, Moravians, Dunkers and Mennonists, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the constitution of the state, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear;" which affirmation shall be effectual to all intents and purposes.

Code, s. 3311; R. C., c. 76, s. 3; 1777, c. 108, s. 4; 1777, c. 115, s. 42; 1819, c. 1019; 1821, c. 1112.

2357. Oath to support constitution of United States; form of; all officers to take. All members of the general assembly, and all officers who shall be elected or appointed to any office of trust or profit within the state, shall agreeably to act of congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States; so help me, God.

Which oath shall be taken before they enter upon the execution of the duties of the office.

Code, s. 3313; R. C., c. 76, s. 5; 1791, c. 342, s. 2. **Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices:** Wiley v. Worth, 61-171. **The taking of an oath of office is a mere incident and constitutes no part of the office, and the office may exist without it:** Bryan v. Patrick, 124-662; Clark v. Stanley, 66-59. **An oath to support the constitution of the state and of the United States is required of officers but not of placemen:** Worthy v. Barrett, 63-199.

As to what is an office or place of trust or profit hereunder, see Wooten v. Smith, 145-476; Doyle v. Raleigh, 89-136; Ellison v. Raleigh, 89-125; Barnhill v. Thompson, 122-495; Clark v. Stanley, 66-59.

2358. Oath or affirmation to support constitution; form of; taken by all officers. Every member of the general assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the state, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the state of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the constitution of said state, not inconsistent with the constitution of the United States, to the best of my knowledge and ability: so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonists or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the constitution of the state and the constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the state, by any means, in any conspiracy whatever, against the state; that I will disclose and make known to the legislative, executive or judicial powers of the state all treasonable conspiracies which I shall know to be made or intended against the state.

Code, s. 3312; R. C., c. 76, s. 4; 1781, c. 342, s. 1. **See annotations under section 2357.**

2359. When deputies may administer. In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging

such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing.

Code, s. 3316; R. C., c. 76, s. 7; 1836, c. 27, s. 2.

2360. Oaths of sundry persons, forms of. The oaths of office to be taken by the several persons hereafter named, shall be in the words following the names of said persons respectively:

ADMINISTRATOR.

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B.. and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

ATTORNEY AT LAW.

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

ATTORNEY GENERAL, STATE SOLICITORS AND COUNTY ATTORNEYS.

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of attorney general (solicitor for the State or attorney for the state in the county of .....); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

AUDITOR.

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

BOOK DEBT OATH.

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

BOOK DEBT OATH FOR ADMINISTRATOR.

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help me, God.

CLERK OF THE SUPERIOR COURT.

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of.....; nor have I sold, or offered to sell, nor will I sell, or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the state; and I do further swear that I will execute the office of clerk of the superior court for the county of.....without prejudice, favor, affection of partiality, to the best of my skill and ability; so help me, God.

CLERK OF THE SUPREME COURT.

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will give, to any person whatsoever, any gratuity, gift, fee or reward, in consideration of my appointment to the office of clerk of the supreme court of North Carolina; nor have I sold, or offered to sell, nor will I sell, or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in this state; I do further swear that I will execute the office of clerk of the supreme court without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

COMMISSIONERS ALLOTTING A YEAR'S PROVISIONS.

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

COMMISSIONERS DIVIDING AND ALLOTTING REAL ESTATE.

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

COMMISSIONER OF WRECKS.

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of ..... in the county of .....', according to law; so help me, God.

CONSTABLE.

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of constable; I will see and cause the peace of the state to be well and truly preserved and kept, according to my power; I will arrest all such persons, as in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

COTTON WEIGHER FOR PUBLIC.

I, ... public weigher for the city of.....(or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

ENTRY-TAKER.

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of..... according to law; so help me, God.

EXECUTOR.

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help me, God.

FINANCE COMMITTEE.

I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality; so help me, God.

GRAND JURORS.

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

GRAND JURY—FOREMAN OF.

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the state's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

GRAND JURY—OFFICER OF.

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

JURY—OFFICER OF.

You swear (or affirm) that you will keep every person, sworn of this jury, together in some private or convenient place, without meat or drink (water excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

JURY, IN A CAPITAL CASE.

You swear (or affirm) that you will well and truly try, and true deliverance make, between the state and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you, God.

JURY, IN CRIMINAL ACTIONS NOT CAPITAL.

You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

JURY, IN CIVIL ACTIONS.

You and each of you swear (or affirm) that you will well and truly try all civil actions which shall come before you during this term, and true verdicts give according to the evidence; so help you, God.

(The same oath to talesmen by using the word "day" instead of "term.")

JURY, LAYING OFF DOWER.

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D. as by law she is entitled to; so help you, God.

JURY, LAYING OFF ROADS AND ASSESSING DAMAGES.

I, A. B., do solemnly swear (or affirm) that I will lay out the road, directed to be laid out by the board of commissioners of the county, to the greatest ease and advantage of the inhabitants, and with as little prejudice to the owners of land over which the same shall be laid out as may be; and will truly and impartially assess the damages which may be awarded by me for injuries done to lands by the laying out of said road, without favor, affection, malice or hatred, to the best of my skill and knowledge; so help me, God.

JUDGE OF THE SUPREME COURT.

I, A. B., do solemnly swear (or affirm) that in my office of justice of the supreme court of North Carolina I will adminster justice without respect to persons, and do equal right to the poor and the rich, to the state and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office according to the best of my abilities, and agreeably to the constitution and laws of the state; so help me, God.

JUDGE OF THE SUPERIOR COURT.

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of judge of the superior court of the said state; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not wittingly or willingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or orders notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

JUSTICE OF THE PEACE.

I, A. B., do solemnly swear (or affirm) that as a justice of the peace of the county of....., in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the state; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me;

the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatsoever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the state, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

REGISTER OF DEEDS.

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of....., in all things according to law; so help me, God.

SECRETARY OF STATE.

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of secretary of state of the state of North Carolina, during my continuance in office, according to law; so help me, God.

SHERIFF.

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of.....county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

STANDARD KEEPER.

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

STATE TREASURER.

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of state treasurer, in all things

according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

STRAY VALUERS.

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

SURVEYOR FOR THE COUNTY.

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of....., according to law; so help me, God.

TREASURER FOR A COUNTY.

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of....., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

WITNESS TO DEPOSE BEFORE THE GRAND JURY.

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN A CAPITAL TRIAL.

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the state and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN A CRIMINAL ACTION.

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the state and A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN CIVIL CASES.

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS TO PROVE A WILL.

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you

attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

GENERAL OATH.

Any officer of the state or of any county or township, the form of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of.....according to the best of my skill and ability, according to law; so help me, God.

Code, ss. 3057, 3315; 1903, c. 604; 1874-5, c. 58, s. 2; R. C., c. 76, s. 6.

2361. County surveyors may administer oaths, when. The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants.

Code, s. 3314; 1881, c. 144.

2362. Administered by certain officers. The chairman of the board of county commissioners and the chairman of the board of education of the several counties shall have power to administer oaths, in any matter or hearing before their respective boards.

1899, c. 89; 1889, c. 529. **For power of sheriff to administer oath in homestead allotment, see section 687. For power of register of deeds to administer oaths, see section 2088.**

2363. Certain oaths validated. All oaths and affidavits made prior to the first day of March, one thousand eight hundred and ninety-nine, administered by authorized officers to persons with uplifted hands be and the same are hereby validated and made as legal and binding as if administered to persons laying hands on and kissing the Holy Evangelists of Almighty God, whether said oaths and affidavits were made by persons conscientiously scrupulous of taking a "book oath" or not, and whether such oaths and affidavits were made in other respects in strict compliance with section two thousand three hundred and fifty-four: Provided, that this section shall not affect the rights of the parties in actions now pending nor in any manner affect prosecutions for perjury claimed to have been heretofore committed.

1899, c. 50.

CHAPTER 57.

OFFICES.

2364. No person shall hold more than one office. No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state or government shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes.

Const., Art XIV, s. 7. **One man may not hold two offices:** Dowtin v. Beardsley, 126-119.

Legislature may attach additional duties to an existing office and it may afterwards lop off those duties and assign them to a new office, leaving the original office as it was before the additional duties were attached to it, and original officer must not claim both offices: Ibid.

Acceptance of a second office by one already holding a public office operates ipso facto to vacate the first. While the officer has right to elect which he will retain, his election is deemed made when he accepts and qualifies for the second: Barnhill v. Thompson, 122-493.

The question of holding two public offices at the same time does not depend as at common law upon incompatibility alone, but upon the constitution: Barnhill v. Thompson, 122-493.

A public office is not property; and this applies both to constitutional and statutory offices. The reason the legislature can not abolish constitutional as well as statutory offices lies in the fact that the constitution itself has made provision for them, and not because there is any property in them: Mial v. Ellington, 134-138, overruling Hoke v. Henderson, 15-1 and cases based upon its ruling on these points.

"OFFICE OR PLACE OF TRUST OR PROFIT" INTERPRETED. As to the difference between "offices or places of trust or profit" and mere administrative agencies, see Wooten v. Smith, 145-476; Clark v. Stanley, 66-59; Doyle v. Raleigh, 89-136; Barnhill v. Thompson, 122-495; Ellison v. Raleigh, 89-125.

Under this section the "office or place of trust or profit" referred to means a public position involving a delegation to the individual of some part of the sovereign functions of the government to be exercised for the public benefit: Wooten v. Smith, 145-476; Doyle v. Raleigh, 89-136.

The true test of a public office is that it is a parcel of the administration of government, civil or military, or is itself created directly or by the law-making power: Eliason v. Coleman, 86-236.

A public office is an agency of the state, and the person whose duty it is to perform this agency is a public officer: Wooten v. Smith, 145-476; Day's Case, 124-362.

An employment by the state not connected with government, and not requiring any action as agent for the state, is not an office: Nichols v. McKee, 68-429; Welker v. Bledsoe, 68-457.

The distinction between officers and placemen is that the former is required to take an oath to support the constitutions of the state and the United States, while the latter are not: Worthy v. Barrett, 63-199.

A public office is a public trust, and public officers are merely the agents of the people: State v. Godwin, 123-697; Basket v. Moss, 115-457.

Where statute imposes certain duties to be performed by an officer after expiration of term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time: McNeill v. Somers, 96-467.

Under this section one may be both a justice of the peace and the recorder of the city recorder's court: State v. Lord, 145-479.

A director of a state institution is an officer within the meaning of this section: Nichols v. McKee, 68-429; Welker v. Bledsoe, 68-457—as is also a policeman, McIlhenny v. Wilmington, 127-146—as is also a county commissioner, Barnhill v. Thompson, 122-493—as is also a member of county board of education, Ibid—as also a county surveyor, Dowtin v. Beardsley, 126-119—as also county superintendent of roads, Ibid—as also clerk superior court, White v. Murray, 126-156.

A public administrator is not one holding an office within the meaning of this section: Wooten v. Smith, 145-476—nor is a deputy sheriff, Railroad v. Fisher, 109-1—nor is a member of a special investigating committee of the legislature a public officer such as would, under this section, oust him as member of the general assembly, Bank v. Worth, 117-152.

2365. Penalty for holding office contrary to constitution. If any person shall presume to hold any office, or place of trust or profit, or be elected to a seat in either house of the general assembly, contrary to the seventh section of the fourteenth article of the constitution of the state, he shall forfeit and pay two hundred dollars to any person who will sue for the same.

Code, s. 1870; R. C., c. 77, s. 1; 1790, c. 319; 1792, c. 366; 1793, c. 393; 1796, c. 450; 1811, c. 811.

2366. Bargains made for office void. All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void.

Code, s. 1871; R. C., c. 77, s. 2; 5 and 6 Edw. VI., c. 16, s. 3. Contracts to procure appointment to office are void, or to resign office in another's favor, traffic in public offices being against good morals and contrary to public policy: Basket v. Moss, 115-448.

Section 2838 prohibits a sheriff from letting to farm, in any manner, his county or part of it: Cansler v. Penland, 126-793; 125-578.

2367. Must take oath before acting; penalty for failure. Every officer and other person who may be required to take an oath of office, or an oath for the faithful discharge of any duty imposed on him, and also the oath appointed for such as hold any office of trust or profit in the state, shall take all said oaths before entering on the duties of the office, or the duties imposed on such person, on pain of forfeiting five hundred dollars to the use of the poor of the county in or for which the office is to be used, and of being ejected from his office or place by proper proceedings for that purpose.

Code, s. 1873; R. C., c. 77, s. 4. **The taking of the oath of office is not indispensable, for the office may exist without it; it is a mere incident and constitutes no part of the office:** Bryan v. Patrick, 124-662; Clark v. Stanley, 66-59—**and this is true also as to the salary or fees,** Ibid.

2368. Persons holding, deemed doing so lawfully; hold until their successors are qualified. Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void; and all officers shall continue in their respective offices until their successors shall have been elected or appointed, and shall have been duly qualified.

Code, s. 1872; R. C., c. 77, s. 3; 1844, c. 38, s. 2; 1848, c. 64, s. 1; Const., Art. IV, s. 25. **For quo warranto proceedings to test the title to a public office, see sections 826-845. One who professes to be the incumbent of an office and performs the duties of the same is estopped from denying the legality of his appointment:** State v. Long, 76-254. **A provision for an appointment to office "biennially" ex vi termini, implies a two years' term of office:** Bryan v. Patrick, 124-651.

Where vacancy occurred in the office of superior court clerk, the appointee of the judge holds only until the next election at which members of the general assembly are chosen: Rodwell v. Rowland, 137-617, **overruling** Deloatch v. Rogers, 86-357.

Legislature may, within reasonable limits, change the duties and diminish the emoluments of a constitutional office if the public welfare requires it to be done, and to this the incumbent must submit: Fortune v. Comrs., 140-331, and cases therein cited.

An officer appointed for a definite time to a legislative office has no vested property therein or contract right thereto of which the legislature can not deprive him: Mial v. Ellington, 134-131, **(overruling Hoke v. Henderson, 15-1);** see the famous "office-holding cases" annotated under section 827.

AS TO OFFICERS DE FACTO. There must be a legal office before one is a de facto officer: State v. Shuford, 128-591. **Acts of de facto offi-**

cers who exercise their office for considerable length of time are as effectual when they concern rights of third persons as if they were officers de jure: Hughes v. Long, 119-52; De Berry v. Nicholson, 102-475; State v. Davis, 109-782.

To constitute one an officer de facto there must be an actual exercise of the office and acquiescence of public authority long enough to cause, in the mind of a citizen, a strong presumption that officer was duly appointed: Hughes v. Long, 119-52.

When it appears or is admitted that an act was not done by an officer de jure, it is incumbent upon the party relying upon the validity of his act to show that he was an officer de facto: Hughes v. Long, 119-52.

Where an appointment is made by a de facto officer, holding an office to which is annexed the appointing power, such an appointee holds a title to the office against the appointee of a de jure officer subsequently made: Baker v. Hobgood, 126-149.

Where there are two rival boards, both de facto and both exercising as far as possible the duties of the office, and each makes an appointment the same day to the same place,, in such case the appointee of the de facto boards, which is subsequently adjudged to be the de jure board, clearly has the title: Baker v. Hobgood, 126-149.

When both officers are acting and claiming to be de facto, possession by the de jure officer excludes the consideration of any other claim: Baker v. Hobgood, 126-149.

A clerk who held over from the day of general election, to-wit, the first Thursday in August, until the first Monday in the ensuing September, when his successor was installed, was at least clerk de facto and his acts can not be collaterally impeached, and are valid as between third parties: Threadgill v. R. R., 73-178.

CHAPTER 58.

OYSTERS AND FISH.

I. Terrapin.

2369. Use of drag-nets by nonresidents for catching terrapin forbidden. If any person who is not a citizen and has not resided in the state continuously for the preceding two years shall use any drag-net or other instrument for catching terrapin he shall be guilty of a misdemeanor.

Code, ss. 3375. 3376. **Nonresident using drag-nets or other instrument not guilty if in the bona fide employ of one who has the right to take terrapin that way: State v. Conner, 107-932.**

2370. Diamond-back terrapin protected. If any person shall take or catch any diamond-back terrapin between the fifteenth day

of April and the fifteenth day of August of any year, or any diamond-back terrapin at any time of less size than five inches in length upon the bottom shell, or shall interfere with, or in any manner destroy any eggs of the diamond-back terrapin, he shall be guilty of a misdemeanor, and shall be fined not less than five dollars, nor more than ten dollars, for each and every diamond-back terrapin so taken or caught, and a like sum for each and every egg interfered with or destroyed: Provided, this section shall not apply to parties empowered by the state to propagate the said diamond-back terrapin; and the possession of any diamond-back terrapin between the fifteenth days of April and August shall be prima facie evidence that the person having the same has violated this section. It shall be the duty of all sheriffs and constables to give immediate information to some justice of the peace of any violation of this section.

Code, s. 3377; 1899, c. 582; 1881, c. 115, ss. 1, 6.

II. Oyster Beds.

2371. Natural, defined. A natural oyster or clam bed, as distinguished from an artificial oyster or clam bed, shall be one not planted by man, and is any shoal, reef or bottom where oysters are to be found growing in sufficient quantities to be valuable to the public.

1893, c. 287, s. 1. **This definition very nearly in the words of State v. Willis, 104-764.**

2373. How license is obtained. Whenever a license is desired according to the preceding section the clerk of the superior court of the county wherein the proposed oyster or clam bed may be may, in his discretion, grant a license to make such oyster or clam bed to any inhabitant of this state who shall apply therefor as herein provided; such applicant shall first stake off the proposed oyster or clam bed as provided in the preceding section, and shall publish a notice for thirty days at the courthouse door of the county wherein said bed is proposed, designating the location thereof as near as may be and the day when he will apply for the issuing such license. Upon the day named in said notice, upon which application for such license is to be made, any inhabitant of such county shall have the right to appear before said clerk and object to the issuing of such license by filing an affidavit stating that the proposed oyster or clam bed is a natural oyster or clam bed. If the said applicant shall refuse to file an affidavit denying the proposed oyster or clam bed is a natural bed, the said clerk shall refuse to grant such license. If such applicant shall file an affidavit denying that such proposed bed is a natural bed, it shall be

the duty of such clerk to transmit said affidavits to the next term of the court of said county, and at said term the issue shall be tried to determine whether the proposed bed is a natural bed, and after such trial the said clerk shall grant or refuse said license in accordance with the judgment rendered upon the determination of such issue.

Code, s. 3391; 1893, c. 287, s. 2. **A license to lay off an oyster and clam bed is not such an interest in land as would constitute one a freeholder:** State v. Young, 138-571; State v. Spencer, 114-777.

Case referring to this section: State v. Goulding, 131-715.

2374. County commissioners to cause survey to be made. The board of county commissioners may in their discretion cause to be made, not oftener than once in twelve months, a survey and examination of any and every such oyster or clam bed or garden in their county, the result of which examination or survey shall be reported under oath to the clerk of the superior court; and if it be found that the holder of such license as aforesaid has included within his stakes any natural oyster or clam bed, or a space containing more than ten acres, he shall forfeit such license and all the rights and privileges thereto belonging; further, if the holder of such license fail for the space of two years either to use such bed or keep it properly designated by stakes, he shall forfeit such license and all the rights and privileges therein granted.

Code, s. 3392; 1883, c. 332, s. 4.

2375. Under control of the state. The state shall exercise exclusive jurisdiction and control over all shell-fisheries which are or may be located in the boundaries of the state south of Roanoke and Croatan sounds and north of Core sound, and for the purposes of this chapter the southern boundary line of Hyde county shall extend, from the middle of Ocracoke inlet to the Royal Shoal lighthouse, thence across Pamlico sound and with the middle line of the Pamlico and Pungo rivers to the dividing line between the counties of Hyde and Beaufort, and the northern boundary line of Carteret county shall extend from the middle of Ocracoke inlet to the Royal Shoal lighthouse, thence to the Brant Island Shoal lighthouse, thence across Pamlico sound to a point midway between Maw point and Point of Marsh, and thence with the middle line of the Neuse river to the dividing line between the counties of Carteret, Craven or Pamlico, and that portion of Pamlico sound and the Neuse and Pamlico rivers not within the boundaries of Dare, Hyde or Carteret counties, and not a part of any other county, shall be in the county of Pamlico, and for the purposes of this chapter and in the execution of the requirements thereof, the shore line as now defined by

the United States coast and geodetic survey shall be accepted as correct.

1887, c. 119, ss. 1, 2.

2376. How beds entered. Any person a citizen and bona fide resident of the state desiring to raise, plant or cultivate shell-fish upon any ground in the county, and within the territory described in the preceding section, which has not been designated as public ground by the board of shell-fish commissioners and which is not a natural clam or oyster bed, may make application in writing, in which shall be stated as nearly as may be the area, limits and location of the ground desired, to the entry-taker of the county in which the said area for which application is made is situated, for a franchise for the purpose of raising or cultivating shell-fish in said grounds, and the said entry-taker having received said application shall proceed as with all other entries as provided in the chapter entitled Grants, except that the warrant to survey and locate the ground or grounds shall be delivered to the engineer appointed by the secretary of state and not to the county surveyor; and the said engineer shall make such surveys in accordance with the provisions of the chapter entitled Grants, except that it shall not be necessary to employ chainbearers nor to administer oaths to assistants, nor to make surveys, according to the priority of the application or warrant. No entry shall be made to cover any natural oyster or clam bed as defined in this chapter, nor of any land lying more than two miles from the main land or from any island.

1887, c. 119, s. 5; 1893, c. 272. **The decision of the board of shell-fish commissioners fixing the location of the public grounds under the provisions of chapter 119, acts of 1887, is final where there was no protest or appeal and in the absence of fraud or mistake, and an entry of a natural oyster bed not included in the boundaries fixed by the board can not be vacated on the ground that such bed was not subject to entry:** State v. Spencer, 114-770.

As to costs of an action by the state through its collector to vacate an oyster bed entry, see Blount v. Simmons, 120-19; Garner v. Worth, 122-250.

2377. How leased. Any person who is and has been continuously for two years a bona fide resident of the state of North Carolina and over twenty-one years of age may lease or enter not more than fifty acres of any bottom where oysters do not naturally grow or on any ground where there is not a sufficient growth of oysters to justify at the time of leasing the gathering of the same for profit. When any person desires to lease or enter any such ground he shall advertise the fact at the courthouse and three other places for four weeks in the county where said bottom de-

sired to be leased is located, and advertise in some newspaper published in said county for four weeks, and if there be none published in said county, then in a newspaper published in an adjoining county. Application for such land shall be made to the clerk of the superior court, who shall appoint a man and the applicant shall choose another, which two so chosen shall appoint a third man and the three shall constitute a board of arbitration, and the said board of arbitration shall inspect the bottom desired to be leased, and if they find the same subject to lease and so report to the clerk, then it shall be the duty of the said clerk to issue a lease as herein provided, and for such service the clerk shall receive the following fees, to-wit: Twenty-five cents for the application, twenty-five cents for the appointment and twenty-five cents for filing the report of arbitration, and copy-sheet fees for recording such lease and other papers necessary to be recorded. Such bottom shall be surveyed by the county surveyor; all cost and expenses to be paid by the lessee, who shall also pay a yearly rental of one dollar per acre for the first ten years, and two dollars per acre per year for the next ten years of the lease, payable annually in advance on the first day of April of each year: Provided, in the open waters of Pamlico sound the rental shall be at the rate of fifty cents per acre per year for the first three years; one dollar per acre per year for the next seven years; and two dollars per acre per year for the next ten years of the lease. The rental for the first year shall be paid in advance to an amount proportional to the unexpired part of the year to the first of April next succeeding. Such rental shall be paid to the oyster commissioner and go to the benefit of the oyster fund. A failure to pay rental for two years shall render the lease null and void. No bottom which has been surveyed prior to sixth day of March, one thousand nine hundred and five, need be re-surveyed where such leases are plainly marked at that time. The county surveyor shall furnish the lessee a map or plot free of charge. No lease shall be issued for any ground closer than two hundred yards to any natural oyster bed. If any person within four months of the publication of the notice of granting of any lease make claim that a natural oyster-bottom bed or reef exists within the boundaries of said lease, he shall under oath state his claim and request the clerk of the court to cancel said lease: Provided, however, that each such claim and petition shall be accompanied by a deposit of ten dollars, and no petition unaccompanied by said deposit shall be considered by the clerk. The clerk of the court shall notify the oyster commissioner, who shall cause an examination into said claim, and if the decision should be against the claimant, the deposit of ten dollars shall be forfeited to the state and deposited to the credit of the oyster fund, but if sustained, shall be refunded to the claimant.

Should, however, the claim be sustained, and a natural bed be within the boundary of the lease, the said natural bed shall be thrown open to the public fishery. If no such claim be presented within four months, or if when presented it fail of substantiation as provided, the lessee shall thereafter be secure from attack on such account and his lease shall be incontestable so long as he complies with the other provisions of this subchapter.

1905, c. 525, s. 2; 1907, c. 969, ss. 2, 3.

2378. Secretary of state to issue grant; amount granted limited. The secretary of state, on receipt of the auditor's certificate as provided in the chapter on Grants, shall grant to the applicant a written instrument conveying a perpetual franchise for the purpose of raising and cultivating shell-fish in and to the grounds for which application is made; and the said written instrument of conveyance shall be authenticated by the governor, countersigned by the secretary and recorded in his office. The date of the application for the franchise and a description of the ground for which such franchise was granted shall be inserted in each instrument, and no grant shall issue except in accordance with a certificate from the engineer appointed by the secretary of state as to the area, limits and location of the grounds in which the said franchise is to be granted, and every person obtaining such grant or franchise shall, within three months from the receipt of the same, record said written instrument in the office of the register of deeds for the county wherein the said grounds may lie and shall define the boundaries of the said grounds by suitable stakes, buoys, ranges or monuments; but no franchise shall be given in or to any of the public grounds as determined by the commissioners of shell-fisheries, or to any natural oyster or clam bed, and all franchises granted under this section or any previous law shall be and remain in the grantee, his heirs and legal representatives: Provided, that the holder or holders shall make in good faith within five years from the day of obtaining said franchise an actual effort to raise and cultivate shell-fish on said grounds. No grant shall be made to any one person of more than ten acres of any territory, and no person shall hold more than ten acres in any creek unless the same shall be acquired through devise, inheritance or marriage.

1887, c. 119, s. 6; 1893, c. 272.

2379. Price paid for franchise. Not less than seventy-five cents per acre shall be paid to the state treasurer for all franchises granted, and in all other respects as to protests of entry and the right of the secretary of state to sell to any one else at an increased price the chapter on Grants shall apply.

1887, c. 119, s. 7.

2380. Liable to taxation. All grounds taken up or held for the purpose of cultivating shell-fish shall be subject to taxation as real estate, and shall be so considered in the settlement of the estates of deceased or insolvent persons.

1887, c. 119, s. 9.

2381. Books of records of grants kept. The secretary of state shall keep books of record in which shall be recorded a full description of all grounds granted under the provisions of this chapter, and shall keep a map or maps upon which shall be shown the positions and limits of all public and private grounds.

1887, c. 119, s. 14.

III. Catching Oysters.

2383. Close season; exception. If any person shall buy or sell oysters in the shell which have been taken from the public grounds or natural oyster beds of this state between the fifteenth day of March and the first day of November in any year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that oysters may be taken with hand-tongs from March fifteenth to May first and with dredges from March fifteenth to April fifth, in any year, to be used for planting on private grounds entered and held under the laws of this state, upon the condition further that they shall not be removed from said private grounds within a period of three months from time of planting: Provided further, that oysters may be taken with hand-tongs, only for home consumption: Provided further, that coon osyters may be taken from November first to May first of each year in the waters of Onslow and Carteret counties.

1907, c. 969, s. 4.

2384. At night or on Sunday. If any person shall catch or take any oysters from any of the public grounds or natural oyster beds of the state at night or on Sunday, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 16.

2385. Illegal dredging. If any person shall use any scoops, scrapes or dredges for catching oysters except at the times and in the places in this chapter expressly authorized, or shall between the fifth day of April and the fifteenth day of November of any year carry on any boat or vessel any scoops, scrapes, dredges or winders, such as are usually or can be used for taking oysters, he shall be guilty of a misdemeanor.

1903, c. 516, ss. 13, 14, 15.

2386. Catching oysters without license. If any person shall catch oysters from the public grounds of the state without having first obtained a license according to law, or shall employ any person as agent or assistant, or shall as the agent or assistant of any person catch oysters from the public grounds, without all of said persons having first obtained a license according to law, he shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 6.

2387. Using boats not licensed. If any person shall use any boat or vessel in catching oysters, which boat has not been licensed according to law, and which is not in all respects complying with the law regulating the use of such vessels, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars or imprisoned not more than thirty nor less than ten days for the first offense, but for the second or subsequent offense he shall be guilty of a misdemeanor and punished at the discretion of the court.

1903, c. 516, s. 8.

2388. Displaying false number on boat. If any person shall display any other number on their sail than the one specified in their license or display a number when the boat or vessel has not been licensed, he shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars.

1903, c. 516, s. 27.

2389. Failure to stop and show oyster license. If any person using a boat or vessel for the purpose of catching oysters shall refuse to stop and exhibit his license when commanded to do so by the oyster commissioner, assistant commissioner or any inspector, he shall be guilty of a misdemeanor and be fined not less than twenty-five dollars nor more than fifty dollars.

1903, c. 516, s. 26.

2390. False statement in application for oysterman's license. If any person shall make any false statement for the purpose of procuring any license, which may be required by law, to catch oysters, or to engage in the oyster industry, he shall be guilty of perjury and punished as provided by law.

1903, c. 516, s. 17.

2391. Dredging in prohibited waters. If any person, after the governor has by proclamation suspended the right to use scoops,

scrapes or dredges on the public grounds or natural oyster beds of the state, shall during the time of such suspension, and in the waters as to which the right has been suspended, use such instruments or implements to catch oysters from any of the public grounds or natural oyster beds of the state, he shall be guilty of a misdemeanor and be fined not less than five hundred dollars or imprisoned not less than twelve months, and the boat or vessel used for this purpose shall be forfeited and shall be seized, advertised and sold by the oyster commissioner or by the inspectors in the county wherein said illegal act was committed and the proceeds paid into the oyster fund. In any prosecution for the violation of the provisions of this section against the master or owner of a boat or vessel, proof that said boat or vessel was equipped with scoop, scrape or dredge or other implement or instrument for catching or taking oysters other than ordinary oyster tongs shall be prima facie evidence of the defendant's guilt.

1903, c. 516, s. 19.

2392. Selling oysters not culled. If any person shall sell or offer for sale, transport or offer to transport out of the state, or from one point in the state to another, or have in his possession any oysters, which have not been properly culled according to law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 3.

2392a. Buy-boat captain purchasing oysters unculled. The captain of any run or buy-boat who shall purchase oysters which have not been properly culled according to law shall upon conviction be fined two hundred dollars or imprisoned in the discretion of the court, and the having of unculled oysters aboard of his boat shall be prima facie evidence of his having purchased them. It shall be unlawful for any person, firm or corporation to purchase oysters which have not been properly culled according to law, and for each violation shall upon conviction be fined two hundred dollars or imprisoned in the discretion of the court: Provided, that when any person, firm or corporation shall furnish the captain of any run or buy-boat with funds with which to purchase oysters, they shall not be held responsible for his acts and shall not be deemed the purchaser of such oysters.

1907, c. 969, s. 5.

2394. Unloading oysters on Sunday or at night. If any person shall unload any oysters from any boat, vessel or car at any factory or house for shipping, shucking or canning oysters on Sunday, or

after sunset or before sunrise, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, whenever any boat or vessel shall have partially unloaded or discharged its cargo before sunset, the remainder of said load or cargo may be discharged in the presence of an inspector.

1903, c. 516, s. 16.

2395. Dealing in oysters without license. If any person shall engage in the business of buying, canning, packing, shipping or shucking oysters without having first obtained a license as required by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 9.

2396. Dealer failing to keep record. If any person engaged in buying, packing, canning, shucking or shipping oysters shall fail to keep a permanent record of all oysters bought by him or caught by him, or by persons for him, when and from whom bought, the number of bushels and the price paid therefor, or shall fail upon demand to exhibit such record as required by law, or shall fail to verify the same, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 5.

2397. Evidence of illegal dredging. If any boat or vessel shall be seen sailing on any of the waters of this state during the season when the dredging of oysters is prohibited by law in the same manner in which they sail to take or catch oysters with scoops, scrapes or dredges, the said boat or vessel shall be pursued by any officer authorized to make arrests, and if said boat or vessel apprehended by said officer shall be found to have on board any wet oysters or the scoops, scrapes, dredges or lines, or deck wet, indicating the taking or catching of oysters at said time, and properly equipped for catching or taking oysters with scoops, scrapes or dredges, such facts shall be prima facie evidence that said boat or vessel has been used in violation of the provisions of the law prohibiting the taking or catching of oysters with scoops, scrapes, or dredges in prohibited territory, or at a season when the taking or catching of oysters with scoops, scrapes or dredges is prohibited by law, as the case may be.

1903, c. 516, s. 28.

2398. Arrests without warrant, when and how made. The oyster commissioner, assistant oyster commissioner and inspector shall have power with or without warrant to arrest any person violating any of the oyster laws.

1903, c. 516, s. 2.

2399. Using illegal measures for oysters. If any person shall in buying or selling oysters use any measure other than that prescribed by law for the measurement of oysters, or if any dealer in oysters shall have in his possession any measure for measuring oysters other than that prescribed by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 12.

2400. Catching oysters for lime. If any person shall take or catch any live oysters to be burned for lime or for any agricultural or mechanical purpose, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, shells may be taken which do not contain more than five per cent of live oysters.

Code, s. 3389; 1885, c. 182; 1907, c. 969, s. 12.

2401. Larceny of oysters on private beds. Any person who shall feloniously take, catch or capture or carry away any shell-fish from the bed or ground of another shall be guilty of larceny and punished accordingly.

1887, c. 119, s. 15. **As to venue in an action for wrongful conversion of oysters taken from oyster bed of plaintiff,** see Makely v. Boothe, 129-11.

2402. Oysters caught at night; injury to private beds. If any person shall wilfully commit any trespass or injury with any instrument or implement upon any ground upon which shell-fish are being raised or cultivated, or shall remove, destroy or deface any mark or monument lawfully set up for the purpose of marking any grounds, or who shall work on any oyster ground at night, he shall be guilty of a misdemeanor. But nothing in the provisions of this section shall be construed as authorizing interference with the capture of migratory fishes or free navigation or the right to use on any private grounds any method or implement for the taking, growing or cultivation of shell-fish.

1887, c. 119, s. 11.

IV. Oyster Industry Regulated.

2403. Commissioner and assistant, how appointed, removed; term; salary; bond; oath of office. For the purpose of enforcing the oyster law, the governor shall appoint an "oyster commissioner" and an assistant "oyster commissioner," whose term of office shall be two years, or until their successors are appointed and qualified.

They may be removed by the governor at any time for cause. The commissioner shall give bond in the sum of two thousand dollars; the assistant commissioner shall give bond in the sum of one thousand dollars. The bonds shall be payable to the state of North Carolina, shall be conditioned for the faithful discharge of their office, and the proper accounting for all moneys received, shall have at least two sufficient sureties, and shall be approved by and filed with the clerk of the superior court of the county in which the officer resides and be a part of the records of his office. They shall take and subscribe oaths to support the constitution and for the faithful performance of the duties of their office, which oaths shall be filed with the bond. The salary of the commissioner shall be nine hundred dollars per annum, and he shall be allowed three hundred dollars for expenses. The salary of the assistant commissioner shall be seven hundred and fifty dollars per annum. The salaries shall be payable monthly.

1903, c. 516. **The following cases are of historical interest:** White v. Auditor, 126-570; White v. Hill, 125-194.

2404. Inspectors, how appointed; term; salary; bond; oath of office. The oyster commissioner shall appoint, from the counties within which they are to perform their duties, a sufficient number of inspectors who shall serve during the oyster season, and may remove them for cause. He shall fix the compensation of the inspectors at not exceeding fifty dollars a month while on duty, and shall designate the length of service, the time when the inspectors go on duty, and when they go off. The inspectors shall give bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the performance of the duties of their office, and the faithful accounting for all moneys received, which bond shall have at least two sufficient sureties, to be justified before approved by and filed with the clerk of the superior court of the county where they reside, and shall take, subscribe and file with such clerk an oath of office. They shall be paid only for the time they serve.

1903, c. 516.

2405. Duties of the oyster commissioner. The oyster commissioner shall have a general supervision over every branch of the oyster industry, and see that the laws regulating the same are rigidly enforced. He shall furnish the inspectors and the clerks of the superior courts of the several counties mentioned in this subchapter such receipt and record books, and other kinds of stationery as may be necessary to keep a correct record and account of all the money collected and all information necessary to be kept. Such

stationery shall be furnished by the commissioner of labor and printing upon requisition of the oyster commissioner. He shall see that the law regulating the catching and handling of oysters is enforced; that no illegal methods are used in catching, selling or shipping; that the cull law is rigidly enforced, and that only proper and legal measures are used in buying and selling. He shall prosecute all violations of the law, and whenever it is necessary he may employ counsel for this purpose. He may also employ or charter sail vessels, tugs and other boats when necessary to the performance of the duties of his office. He shall in his official capacity have power to administer oaths and to send for and examine persons and papers. He shall, on or before the twenty-fifth day of each month, mail to the treasurer of the state a consolidated statement showing the amount of taxes collected during the preceding month and by and from whom collected. He shall make a biennial report to the governor, setting forth in detail an account of his official acts, the condition of the oyster industry in all its branches, and shall recommend such additions to or modifications of existing laws relating thereto as he may deem proper and necessary He shall have power and authority and it shall be his duty to make and prescribe all such reasonable rules and regulations as may be necessary and to carry into effect and operation the laws relative to the oyster industry according to its true intent and purposes.

1903, c. 516, ss. 3, 18.

2406. Duties of the assistant commissioner. The assistant oyster commissioner shall be charged with the special supervision, under the commissioner, of all matters relating to oyster industry in the different counties. He is particularly charged with the rigid enforcement of the cull feature of the law, the provisions against the use of illegal measures in buying or selling and the unlawful use of scoops, scrapes and dredges in the bays, creeks, straits, sounds, rivers and their trbutaries and elsewhere where the same is prohibited

1903, c. 516, s. 3.

2407. Duties of inspectors. The inspectors shall, under the commissioner and assistant commissioner, be charged with all matters relating to the oyster industry in their respective counties; they shall inspect all oysters offered for sale in their county, see that they are promptly culled, see that none of the provisions of the law regulating the oyster industry are violated, collect all taxes from dealers on oysters purchased or caught; keep a correct record of all taxes collected by them and from whom and for what purpose collected; and on or before the fifth day of each month mail to the

oyster commissioner a report, on such form as he may prescribe, showing all taxes collected by them and from whom received, and at the same time pay over to the commissioner the amount of such taxes.

1903, c. 516, s. 3.

2408. Who may be licensed to catch oysters. No person shall be licensed to catch oysters from the public grounds of the state who is owner, lessee, master, captain, mate or foreman, or who owns an interest in or who is an agent for any boat that is used or that may be used in dredging oysters from the public grounds of the state, who is not a bona fide resident of this state and who has not continuously resided therein for two years next preceding the date of his application for license, and no nonresident shall be employed as a laborer on any boat licensed to dredge oysters under this subchapter who has an interest in or who receives any profit from the oysters caught by any boat permitted to dredge oysters on the public grounds of the state. Any person, firm or corporation employing any nonresident laborer forbidden by this section, upon conviction shall be fined not less than fifty dollars nor more than five hundred dollars.

1903, c. 516, s. 6; 1905, c. 525, s. 3.

2409. How license obtained to catch oysters; who may issue; form of. Any person desiring to catch oysters from the public grounds and natural oyster beds shall make and subscribe to the following oath, before some officer qualified to administer oaths:

I, ... (state if owner, lessee, master, captain, mate, foreman or agent of any boat used or that may be used in dredging oysters from the public grounds of the state), being an applicant for oyster license, do solemnly swear that I am a citizen of North Carolina and have been a resident of the state for the two years next preceding this day; that my place of residence is now in ..... county; that I will not, if granted license, employ any nonresident or unlicensed person as an assistant or serve as an assistant to any nonresident who is owner, lessee, master, captain, mate or foreman, or who has any interest in, or in the profits derived from, any boat that is used or that may be used in dredging oysters from the public grounds of the state, or unlicensed person, nor will I transfer, assign, or otherwise dispose of my license to any person, firm or corporation; that I will not knowingly or wilfully violate or evade any of the laws or regulations of the state relating to oyster industry; so help me, God.

He shall then present to and file said oath with the oyster commissioner, assistant oyster commissioner or inspector, who, if satisfied with the truth of the statement made in the oath of application, shall issue to him an oysterman's license in the following form:

State of North Carolina,.....County.

....., a resident of .....county, having this day made application to me for an oysterman's license, and having filed with

me the oath prescribed by law, I do hereby grant to him license to catch oysters from the public grounds of this state from the fifteenth day of October, ..., until the first day of next April. Witness my hand and official seal, this the..... day of ..... 19.....

.....

Oyster commissioner, assistant oyster commissioner or inspector (as the case may be).

The said oath and a record of the license shall be kept by the oyster commissioner, assistant commissioner or inspector, and for issuing and recording the same he shall receive from the applicant a fee of twenty-five cents, which, together with all other license fees collected under this chapter, shall be paid over to the state treasurer and constitute part of the oyster fund. No fee shall be charged by the clerk for administering the oath.

1903, c. 516, s. 7; 1905, c. 525, ss. 4, 6. For making false affidavit, see Crimes.

2410. License for boat used in catching oysters. The oyster commissioner, assistant oyster commissioner or inspector may grant license for a boat to be used in catching oysters, upon application made, according to law, and the payment of a license tax as follows: On any boat or vessel without cabin or deck, and under customhouse tonnage, using scoops, scrapes or dredges, measuring, over all, twenty-five feet and under thirty, a tax of three dollars; fifteen feet and under twenty feet a tax of two dollars; on any boat or vessel with cabin or deck and under customhouse tonnage, using scrapes or dredges, measuring over all, thirty feet or under, a tax of five dollars; over thirty feet a tax of six dollars; on any boat or vessel, using scoops, scrapes or dredges, required to be registered or enrolled in the customhouse, a tax of one dollar and fifty cents a ton on gross tonnage. No vessel propelled by steam, gas or electricity, and no boat or vessel not the property absolutely of a citizen or citizens of this state on the first day of January, one thousand nine hundred and three, or unless built and owned in this state subsequent thereto and actually owned by a bona fide resident of this state under this chapter, shall receive license or be permitted in any manner to engage in the catching of oysters anywhere in the waters of this state. All boats or vessels so licensed to scoop, scrape or dredge oysters shall display on the port side of the jib, above the reef and bonnet and on the opposite side of mainsail, above all reef points, in black letters, not less than twenty inches long, the initial letter of the county granting the license and the number of said license, the number to be painted on canvas and furnished by the oyster commissioner, assistant oyster commissioner or inspector issuing the license, for which he shall receive the sum of fifty cents. Any boat or vessel used in catching oysters without

having complied with the provisions of this section may be seized, forfeited, advertised for twenty days at three public places in the county where seized, and sold at some public place designated in the advertisement, and the proceeds paid into the oyster fund.

1903, c. 516, s. 8; 1907, c. 969, s. 6.

2411. License to oyster dealers. The oyster commissioner, assistant oyster commissioner or inspector shall, upon application and the payment of a fee of fifty cents, grant to the applicant a dealer's license, authorizing the applicant to engage in the business of buying, purchasing, canning, packing, shucking or shipping oysters. Such license shall not be issued prior to the fifteenth day of November of any year and shall expire on the fifteenth day of March following. The assistant oyster commissioner or inspector granting the license shall at once mail a duplicate to the oyster commissioner.

1903, c. 516, s. 9; 1905, c. 525, s. 6; 1907, c. 969, s. 7.

2412. Licenses reported monthly. The oyster commissioner, assistant oyster commissioner or inspector who are authorized to issue license or to collect a license tax, shall, on or before the fifteenth day of each month, mail to the oyster commissioner a statement, showing all licenses issued during the preceding month, to whom issued and for what purpose, and the amount of tax collected by them from all sources under the oyster laws, and shall at the same time remit said amount direct to the state treasurer. They shall at the same time mail to each inspector asking for the same a list of all persons to whom license has been issued and of all boats or vessels licensed, and for what purpose.

1903, c. 516, s. 4; 1905, c. 525, s. 6.

2413. Dredging, when allowed; prohibited territory. Any bona fide resident of the state duly licensed according to law and using a licensed boat or vessel may use scoops, scrapes or dredges in catching or taking oysters from the fifteenth day of November in each year to the first day of April following, from the public grounds and natural oyster beds in the broad open waters of Pamlico sound, Pamlico river, Neuse river and Long Shoal river, except in those portions of said sound and rivers in which the use of such instruments and implements is prohibited as herein provided. No person shall use any implement or instrument except hand-tongs in catching oysters in any bay, river, creek, strait, or any tributary of such which border upon or empty into Pamlico sound, Pamlico river, or Long Shoal river, except as hereinafter provided; and any point inside of a line drawn from the farthest or extreme outward

point of land or marsh on the one side to the farthest or extreme outward point of land or marsh on the opposite side of any creek, strait or bay, shall be construed to be within the said creek, strait or bay for the purposes of this section. Nor shall any person use any implement or instrument except hand-tongs in the waters of Pamlico sound from what is known as the Reef or Reefs in the eastern portion of said sound to the line of banks bordering its eastern shores; nor along the shores of Pamlico county inside of a line beginning at Maw Point and running to the west end of Brant island, thence to Pamlico Point; nor in the waters of Pamlico sound north of a line running from Long Shoal light to Gull Shoal life-saving station, from the first day of February of each year to the fifteenth day of November, nor in any of the waters of Carteret county. And for the purpose of this section, the northern boundary of said county shall be a line extending from Swan Point to Harbor Island light, thence a line to Southwest Straddle light, thence a line to Northwest Point light, thence a line to the middle of Ocracoke Inlet: nor in the waters of Neuse river above a line in said river running from Carbacon buoy to the western point of land at Pierce's creek.

1903, c. 516, ss. 13, 14, 15; 1905, c. 507, s. 2.

2414. Governor may suspend right to dredge. The governor upon the request of the oyster commissioner, may, whenever in his judgment it is necessary, by proclamation, suspend entirely the use of all scoops, scrapes or dredges in any of the waters of the state, either for a definite period of time or until the sitting of the next general assembly.

1903, c. 516, s. 19.

2415. Oysters culled on grounds. All oysters taken from the public grounds of this state, with whatsoever instrument or implement, shall be culled and all oysters whose shells measure less than three inches in longest diameter, except such as are attached to a large oyster and can not be removed without destroying the small oyster, and all shells taken with the said oysters shall be returned to the public ground when and where taken, and no oysters shall be allowed by the inspectors to be marketed which shall consist of more than ten per cent. of such small oysters and shells, except "coon" oysters and oysters largely covered with mussels: Provided, these musseled oysters must not contain more than five per cent. of shells or small oysters under regulation size.

1903, c. 516, s. 11; 1905, c. 525; 1907, c. 969, s. 8.

2416. Oysters not culled seized and put on public grounds. Whenever oysters are offered for sale or loaded upon any vessel,

car or train, without having been properly culled according to law, the commissioner, assistant commissioner, or inspector shall seize the boat, vessel, car or train containing the same and shall cause the said oysters to be scattered upon the public grounds, and the costs and expenses of said seizure and transportation shall be a prior lien to all liens on said boat, vessel, car or train, and if not paid on demand the officers making the seizure shall, after advertisement for twenty days, sell the same and make title to the purchaser, and after paying expenses as aforesaid pay the balance, if any, into the oyster fund. For the towing of said boat, a charge of three dollars and fifty cents per hour shall be charged against said boat for towage.

1903, c. 516, s. 3; 1907, c. 969, s. 9. **For selling unculled oysters, see section 2392.**

2417. Dimensions of oyster measure. All oysters measured in the shell shall be measured in a circular tub with straight sides and straight, solid bottom, with holes in the bottom not more than one-half inch in diameter. The said measure shall have the following dimensions: A bushel tub shall measure eighteen inches from inside to inside across the top, sixteen inches from inside to inside chimb to the bottom and twenty-one inches diagonal from inside chimb to top. All measures found in the possession of any dealer not meeting the requirements of this section shall be destroyed by said oyster commissioner, assistant commissioner or inspector.

1903, c. 516, s. 12; 1907, c. 969, s. 10.

2418. Dealers to keep records. All persons engaged in buying, packing, canning, shucking or shipping oysters shall keep a permanent record of all oysters either bought or caught by them, or by persons for them, when and from whom bought, the number of bushels and the price paid therefor. All these records shall at all times be open to the examination and inspection of the oyster commissioner, assistant oyster commissioner and inspector, and upon request shall be verified by the parties making them.

1903, c. 516, s. 5.

2419. Purchase tax. All dealers in oysters and all persons who purchase oysters for canning, packing, shucking or shipping shall pay a tax of one and one-half cents on every bushel of oysters purchased by them, or caught by them, or any one for them: Provided, that coon oysters shall be taxed one-half a cent a bushel only; and no oysters shall be twice taxed. This tax shall be paid to and collected by the inspectors, and when paid a receipt shall

be given therefor. Upon failure or refusal by any person, firm or corporation to pay said tax, his license as a dealer shall at once become null and void, and no further license shall be granted him during the current year, and it shall be the duty of the commissioner, assistant commissioner or inspector to institute suit for the collection of said tax. Such suit shall be in the name of the state of North Carolina on relation of the commissioner or of the inspector at whose instance such suit is instituted, and the recovery shall be for the benefit and to the use of the general oyster fund.

1903, c. 516, s. 10; 1905, c. 507.

2419a. Tax on oysters going out of state. All oysters going out of the state in any boat or vessel shall pay a tax of one and one-half cents per tub.

1907, c. 969, s. 11. **An act levying a tax upon clams and oysters shipped out of county is constitutional:** Brooks v. Tripp, 135-159.

2420. Vessels with oysters, when allowed to go through canals. No boat or vessel loaded with oysters shall be permitted by the inspectors of South Mills and Coinjock to pass through the canals, which do not have a certificate showing that the cargo has been inspected and the tax paid thereon.

1903, c. 516, s. 17.

2421. Shells scattered on oyster beds. The oyster commissioner is hereby empowered to expend one-half of the balance to the credit of the oyster fund on the fifteenth day of April in each year for the purpose of buying oyster shells and scattering the same on the natural oyster grounds of the state during the months of April and May.

1903, c. 516, s. 20.

2422. Oyster funds kept separate, how paid out. The treasurer of the state shall keep all funds derived from the oyster industry separate and apart from other funds in the treasury and shall pay the same out only upon the warrant of the auditor, and the auditor shall issue no warrant on said fund in payment of any claim unless the same shall have been first approved by the oyster commissioner.

1903, c. 516, s. 20.

V. Clams.

2423. Clams. If any person between the first day of April and the first day of November of any year shall take any clams from the waters of Brunswick, New Hanover or Pender counties for the pur-

pose of shipping, selling, marketing, or for bedding or pounding the same in any artificial bed, or if any person shall take or catch any oysters in the waters of Carteret county by dredging or scoops, or in any manner other than with the ordinary clam rake, or tongs, or if any nonresident shall take or catch any clams, he shall be guilty of a misdemeanor. If any person or corporation shall, between the fifteenth day of April and the fifteenth day of October of any year, take any clams from the waters of Newport River and its tributaries, for the purpose of shipping, selling, marketing or bedding the same, he or it shall be guilty of a misdemeanor, and shall be fined not less than ten dollars for each offense, or imprisoned not exceeding thirty days, or both, in the discretion of the court.

1901, c. 113; 1897, c. 333; 1899, c. 579; 1903, cc. 131, 414, 658, 732; 1907, c. 840.

VI. Fishing.

2424. Croatan marshes. If any person, for the purpose of taking fish, shall between the first day of February and the first day of May, of the same year, use or cause to be used, at or within half a mile of the marshes separating the waters of Croatan and Pamlico sounds, any weir, hedge, net or seine, he shall be guilty of a misdemeanor.

Code, s. 3378; R. C., c. 81, s. 4; 1844, c. 40, s. 3.

2425. Masonboro and Myrtle Grove sound. If any person shall use any pyke nets or set down seine, or place any fish trap for the purpose of catching fish in the waters of Masonboro and Myrtle Grove sounds in New Hanover county, he shall be guilty of a misdemeanor, and fined not more than fifty dollars, or imprisoned not more than twenty days.

Code, s. 3421; 1883, c. 288, ss. 1, 2.

2426. Catching oysters in Myrtle Grove sound. If any person shall take or catch any oysters from Myrtle Grove sound, from Perrines or Whitaker's creek to the head waters of said sound in New Hanover county, from the first day of May until the first day of September, except for his own consumption, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than twenty days.

Code, s. 3423; 1883, c. 358, ss. 1, 2.

2427. Lay days for Pamlico river. If any person, from the fifteenth day of February to the tenth day of May of every year, from twelve o'clock meridian of Saturday until sunrise Monday

morning of each week, shall fish any seine, set net, drift net, or any other net of any name or kind whatever, in the waters of Pamlico or Tar rivers and tributaries, except bow or skim nets, he shall be guilty of a misdemeanor.

Code, s. 3416; 1883, c. 137, s. 3.

2428. Fishing dutch nets in Pamlico and Tar rivers. If any person shall set down or fish any dutch, pod, pyke, or pound net or net of like kind in the waters of Pamlico or Tar rivers or their tributaries except in the manner, and in the part, and during the time, which such nets are by law allowed to be fished, he shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than one hundred dollars, and shall be imprisoned in the county jail not less than thirty and not more than sixty days.

Code, s. 3417; 1903, c. 52.

2429. Dutch nets in Pamlico river. It shall be lawful to fish with dutch, pod, pyke or other pound nets, or nets of like kind, in the waters of Pamlico river below a line beginning on the southern shore of Pamlico river at Maule's Point, and running due north to a point on the northern shore of said river: Provided, that no dutch, pod, pyke or pound net, or other net of like kind, shall extend out in said river more than one-eighth of the distance across said river from the shore, and that none of said dutch, pod, pyke or pound nets shall be set, placed down or fished nearer to each other than five hundred yards, measuring up and down the river; nor shall they be placed, set down or fished within five hundred yards of any seine beach in actual use for hauling a seine, nor within one mile of the mouth of Bath creek: Provided, no nets of the kind enumerated in this section, or other nets of like kind, shall be placed down, set or fished in said rivers between the tenth day of May and the first day of July in any year. Whenever any person shall complain to the oyster commissioner or any inspector that dutch, pod or pyke nets, or other nets of like kind, have been placed down or set in any of the waters of Pamlico river, or in any of its tributaries, contrary to and in violation of this section, said oyster commissioner or inspector, or person performing the duties of such, shall at once visit said river, make complete and full examination of all dutch, pod or pyke nets, or other nets of like kinds in said river, and ascertain whether they are placed down, set or fished in violation of the provisions of this section, and he shall report to the solicitor of the district in which the offense is committed.

Code, s. 3417; 1903, c. 52.

2430. Dutch nets in Currituck sound. If any firm, company or corporation shall operate or cause to be operated in the waters of

Currituck county, or to be interested in (in any manner whatsoever) more than six-pound or dutch nets, or use more than one hundred yards of hedging to a net, or set a stand of such nets exceeding eight hundred yards in length from land to the extreme outward end; or if any person shall set any pound or dutch nets to the east of the centre of Currituck sound, except that part from the west point of Mackey's island north of the Virginia line; or if any person shall leave any landing or anchorage before sunrise for the purpose of fishing in Currituck sound or tributaries, or shall continue to fish after dark, he shall be guilty of a misdemeanor and be fined not less then twenty-five, nor more than fifty dollars. This section shall not prohibit fishing after dark in that part of said sound west of a line beginning at the north point of Bell's island, thence north not more than one thousand yards from the main land to the mouth or entrance of Tull's creek, nor night fishing between the thirty-first day of March and the twentieth day of October five hundred yards from the shore from Martin's Point to Kitty's Hawk bay.

1905, c. 273, ss. 3-7.

2431. Shipping or selling fish, Currituck county. If any person shall catch or capture any fish with nets or other appliances in the waters of Currituck county between the fifteenth day of April and the twentieth day of October of each year, or shall sell or ship out of the county or state any fresh fish between said dates; or if any person shall be found with more than twenty-five pounds of fresh-water fish in his possession between the thirty-fist day of March and the twentieth day of October of each year, herrings, mullets, shad and eels excepted; or if any person shall in said county catch eels for market between the thirtieth day of April and the twentieth day of September following in each year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars and not less than twenty-five dollars. Any citizen may catch, not to exceed twenty-five pounds, at any time for home consumption, and sell or give not more than ten pounds to any one person in one day

1905, c. 273; 1907, c. 520.

2432. Game warden's right to search vessels. If any constable, game warden or justice of the peace of Currituck county shall be informed, or have cause to suspect, that either of the two preceding sections are being violated, he is hereby authorized and empowered to examine the contents of any fishing boat, or packages in transit, and any person or common carrier refusing to exhibit the contents of any fishing boat or package to such officer shall be guilty of a misdemeanor, and shall be fined not less than twenty-five and not more than fifty dollars.

1905, c. 273, ss. 2, 7.

2433. Direction of nets in Pamlico sound. Every net (unless the same be a drag-net and hauled to the shore), which may be used for catching shad in that portion of the waters of Pamlico sound, lying between a line draw eastwardly from Stumpy Point and Mount Pleasant in Hyde county to a point ten miles south of Hatteras inlet in said sound, shall be set and fixed in said waters, in a direction from north to south, and shall not be used in any other manner; and any person offending against this section shall, for every offense, forfeit five dollars.

Code, s. 3381; 1889, c. 261; R. C., c. 81, s. 7; 1844, c. 40, s. 6.

2433a. In Durham Creek and Lee's Creek, Beaufort county. If any person shall catch fish with seine, drag-nets, purse-nets, thrash-nets or hauling-nets of any description in the waters of Durham Creek, Lee's Creek, or their tributaries in Beaufort county, he shall be guilty of a misdemeanor, and shall be fined not less than five nor more than ten dollars for each and every offense.

1907, c. 439.

2433b. In North Creek, Beaufort county. If any person shall use or fish with any drag-nets, purse-nets, drop-nets or fike-nets in the waters of North Creek and its tributaries in Beaufort county, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not more than thirty days for each offense.

1907, c. 629.

2434. In Carteret county. If any person shall catch mullets in the waters of Carteret county with a seine or net having a mesh of less than one and one-eighth inch; or if any person shall in the waters of Carteret county, except in Neuse river, use for the purpose of catching fish, except menhaden or fatbacks, any seine or net more than two hundred and seventy-five yards long; or shall join two or more nets together in said county so that the length thereof shall be more than two hundred and twenty-five yards, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. And any person using a net exceeding the length allowed by this section shall forfeit said net, one-half thereof to go to the informer, the other half to the school fund.

1895, c. 25; 1903, c. 508.

2435. Dutch nets in Carteret county. If any person shall use or cause to be used any dutch net, pond net or other stationary trap, net or seine of similar description by whatever name known, in the waters of Carteret county for the purpose of taking fish therefrom,

he shall for each day's use thereof forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by a warrant before any justice of the peace in the county of Carteret, and shall be applied to the use of the public schools of said county; and such offender, in addition to the penalties contained in this section, shall be guilty of a misdemeanor, and fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, this section shall not apply to the ordinary set nets heretofore in use in the waters of said county.

Code, s. 3420; 1883, c. 199.

2436. Obstruction in Carteret county. If any person shall obstruct any navigable water or passageway for fish in Carteret county by placing bushes, posts on any stationary material or fixtures in such a manner as to prevent the free passage of fish, he shall be guilty of a misdemeanor and fined not less than one hundred dollars. Nothing in this section shall be construed to prohibit any person from using a lawful net or seine in any way or manner except as a stop net or seine. This section shall not apply to any net that the fish can pass freely by one end.

1903, c. 520.

2437. Food fish in Carteret. It shall be unlawful for any person, firm or corporation to catch any food fish in a purse seine or purse-net in any waters within the limits of Carteret county extending to the extreme limits of the state's jurisdiction in and over such waters, making the boundaries of said county to which said waters shall extend to be the distance of three nautical miles, measured from the outer beach or shores of Carteret county out into the waters of the Atlantic ocean. Any waters within a distance of three miles of any beach or shore of said county shall be deemed the waters of said county for the purposes hereof. It shall be unlawful for any person, firm or corporation to purchase, buy, or trade for, or deal in, or sell any food fish caught as is set forth in this section. Any person, firm or corporation violating any provision of this section shall be deemed guilty of a misdemeanor, and shall be fined not less than three hundred dollars nor more than five hundred dollars, or imprisoned, in the discretion of the court. Any person who shall furnish information upon which any person, firm or corporation shall be convicted of a violation of any of the provisions of this section shall be entitled to one-half of the fine imposed therefor.

1908, c. 857.

2438. Menhaden fishing. If any person shall catch any mehaden or fatbacks within the waters of the state of North Carolina, to the extreme limits of the state's jurisdiction in and over such waters in any purse-net or purse-seine with a bar of less than one inch and with a mesh of less than two inches, or shall knowingly cook or manufacture for fertilizer any menhaden or fatbacks caught in any net or seine having bars of less than one inch or having meshes of less than two inches at any place within the state of North Carolina, he shall be guilty of a misdemeanor, and for each and every offense shall be fined not less than five hundred dollars or imprisoned for one year, or both, in the discretion of the court. For the purposes of this section the following boundaries are hereby declared to be the boundaries to which the waters of the said state extend, to-wit: A distance of three nautical miles, measured from the outer beach or shores of the state of North Carolina out and into the waters of the Atlantic ocean; and any portions of any water within a distance of three miles from said waters of the Atlantic ocean to any beach or shore of said state shall be deemed within the waters of said state for the purposes of his section. This section shall not apply to the counties of Dare, Brunswick, Pender and New Hanover. Every person found fishing for menhaden or fatbacks within three miles of the shore of any county, except the counties of Brunswick, New Hanover and Pender, shall be presumed to have violated this section. And all such persons, firms or corporations shall be subject to all the pains and penalties denounced in this section, and they may be prosecuted in the courts of any county in this state. All persons aiding and abetting shall be guilty as principals.

1905, cc. 274, 508.

2439. Dutch nets in Albemarle sound and its tributaries. No person shall set or fish any dutch net or pound net in Roanoke river, Cashie or Middle and Eastmost rivers, or within two miles of the mouth of said rivers, or within one mile of the mouth of any other river emptying into Albemarle sound, of less than two miles in width at its mouth, and any such net set within one mile of the mouth of any other river emptying into said sound shall not extend into the main channel at its mouth. No person shall set or fish with a dutch net or pod net within half mile to the eastward or westward of the outside windlasses or snatch-blocks of any seine fishery in operation on said sound; and any such net set or fished within one mile of such windlasses or snatch-blocks of any seine fishery in operation shall run in a due north and south course from the shore, and shall not extend further into the sound from the water's edge than the distance from such windlasses or snatch-

blocks to the line of such net; and all persons who shall set or fish any such net in said sound shall pull up and remove the stakes used for the same by the first day of June next succeeding the fishing season, and if any person shall set or fish any dutch net or pod net in said sound in violation of this section he shall be guilty of a misdemeanor, and be subject to a penalty of three hundred dollars, to be recovered by any person in the superior court of the county in which the offense shall be committed. And the sheriff of such county shall, when requested, remove any portion of such nets set or fished in violation of this section at the cost of the violator: Provided, that dutch nets may be used in Cashie river two and one-half miles from its mouth, if they do not extend more than one-third the width of said river from the shore, and such nets may be along the sound shore on the Bertie county side between the following points along said shore, to-wit: commencing at the mouth of Cherry Tree Cut branch, Kentrock field and Landing field, and running around the shore to the mouth of Morgan swamp, thence to Rock Spring branch, and that any nets set or fished within that line shall not extend from the shore in any direction a greater distance than four hundred and fifty yards measured at high water, and within this distance of four hundred and fifty yards is to be included the nets, hedges and all parts thereof.

Code, s. 3383; 1889, c. 122; 1891, c. 322; 1895, c. 245; 1899, c. 310; 1899, c. 412. **One engaged in seine fishing on the shores of Albemarle sound has the right to remove stakes put up to operate a pod-net, when his seine fishery is interfered with by them:** Hettrick v. Page, 82-65.

2440. Dutch nets in Pamlico and Albemarle sound. If any person shall set or fish any net, seine or appliance of any kind for catching fish at any place within a radius of two and one-half miles either way from Roanoke Marshes light-house at a distance more than five hundred yards from the shore of Roanoke island or the mainland on the western side of Croatan and Pamlico sounds; or shall set or fish any pound or dutch net on the eastern side of Pamlico sound within ten miles of the Roanoke Marshes light-house, except such as shall be fished within five hundred yards of the Roanoke island or Hog island shores; or shall set or fish any dutch or pound net on the eastern side of Pamlico sound more than two thousand yards west of a line running south-southeast from Big island to Bulkhead or shoal west of Chicamacomico or south of said point more than two thousand yards from the shoals as marked on the United States government chart made from data obtained to November twenty-second, one thousand nine hundred and four; or shall set or fish any dutch or pound net on the west side of Pamlico sound in said sound extending into the water more than

two thousand yards from the shore of the mainland; or shall set or fish any pound or dutch net in Croatan sound further from the shore than one-fifth the width of said sound at that point; or shall set or fish any pound or dutch net in the Albermarle sound more than two thousand yards from the shore of the mainland, or in Chowan river further from shore than one-third the width of said river at place where said nets are fished or set, or within one-fourth mile of any wharf used by a steamer on said river; or shall set or fish any net or appliance of any kind for catching fish within one mile on north or south side of a line five miles long running west from centre of New inlet or Oregon inlet, or on north or south side of a line five miles long running northwest from centre of Hatteras inlet, he shall be guilty of a misdemeanor and be fined or imprisoned in the discretion of the court. The provisions of this section shall apply only to that part of each year beginning January fifteenth and ending May fifteenth. The place of trial for offenses under this section shall be the county opposite where the act was committed. It shall be the duty of the oyster commissioner or assistant oyster commissioner, whenever an affidavit is delivered to him stating that the affiant is informed and believes that this section is being violated at any particular place, to go himself or send a deputy to such place, investigate same, and he shall seize and remove all nets or other appliances setting or being used in violation of this section, sell same at public auction and apply proceeds of sale to payment of cost and expenses of such removal, and pay any balance remaining to the school fund of county nearest to where offense is committed.

1905, c. 292. **Fishing in prohibited waters is a public nuisance, and a private individual, if injured thereby, may remove the impediment:** Daniels v. Homer, 139-224, **approving** Hettrick v. Page, 82-65—**but no unnecessary damages must be done to the property removed,** Hettrick v. Page, 82-65; Rea v. Hampton, 101-51.

Statute which specifies that it is a misdemeanor for one to set or fish net, in streams and provides that such nets be seized and sold at auction, proceeds to pay costs and balance to go to school funds, is constitutional: Daniels v. Homer, 139-219; Rhea v. Hamilton, 101-51.

2440a. Pound or other tarred nets in Pamlico, Tar and Neuse rivers, Pamlico sound, and Carteret county; size of mesh. On and after January first, one thousand nine hundred and eight, there shall be no pound or other tarred nets with a mesh smaller than one and one-half inches bar, before tarring, fished in Pamlico, Tar, and Neuse rivers, Pamlico sound and the waters of Carteret county, and there shall be no pound or stake nets fished within three miles of the inside mouths of Ocracoke inlet nor in the principal channel or channels of said inlet nor within one mile of said channel or channels until the said channel or channels reach deep water, at any time,

and the other inlets north of it shall be left under the provisions of chapter two hundred and ninety-two, Laws of one thousand nine hundred and five. No stake or pound net which shall be fished in any of the waters mentioned herein without being tarred shall have a mesh of less than one and three-eighths inches bar. The bunt of all seines and haul-nets fished in the waters of Pamlico, Tar and Neuse rivers, and Pamlico sound shall not be smaller than one and one-eighth inches bar net: Provided, this bunt shall not be longer than thirty yards: Provided, that nothing herein shall apply to nets fishing for menhaden. Any person violating any of the provisions hereof shall be guilty of a misdemeanor, and shall be fined not less than one hundred dollars and imprisoned at the discretion of the court.

1907, c. 948, ss. 1-4.

2441. Perquimans river. If any person shall fish with any seine, or set any dutch net or hedge within one mile of a straight line commencing at Stephenson's point on the north side of Perquimans river and running in a southwesterly direction to the nearest point of land on the south side of said river known as Belgrade bluff, or shall haul any seine or set any dutch net or other kind of net so as to extend beyond the middle of said river at any part thereof, he shall be guilty of a misdemeanor.

1893, c. 147, ss. 1, 2, 4.

2442. Pasquotank county. If any person shall set any pyke or pound net in Pasquotank river above the town of Elizabeth City, or shall haul or fish with a drag-net, or set a pound net in Big Hatley creek, or Little Hatley creek within two hundred yards of the mouth of either of said creeks, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1895, c. 389; 1903, c. 497.

2443. Obstructions in Little river. If any person shall place any obstruction in Little river, dividing the counties of Pasquotank and Perquimans, and allow it to remain for a longer time than ten days, he shall be guilty of a misdemeanor, and fined not less than five dollars, nor more than ten dollars: Provided, nothing in this section shall be so construed as to prohibit citizens from fishing with dip-nets in said river during the months of March and April in each year.

Code, s. 3400; 1881, c. 18.

2444. Fish offal not thrown in navigable waters. If any person shall throw, or cause to be thrown, into the channel of any of

the navigable waters of the state, any fish offal, in any quantity that shall be likely to hinder or prevent the passage of fish along such channel, or if any person shall throw or cause to be thrown into the waters known as the Frying Pan, tributary to the Great Alligator river, in Tyrrell county, any fish offal in any quantities whatsoever, he shall be guilty of a misdemeanor.

Code, ss. 3386, 3389, 3407. **Navigable waters defined in annotations under section 2460.**

2445. Scuppernong river. If any person shall set any kind of a fish weir or pod net, gill net or net of any kind in the Scuppernong river using more than one-half of the channel of said river, or within one hundred yards of the public bridges at Columbia and the Cross landing, crossing said river, he shall be guilty of a misdemeanor, and fined a sum not to exceed fifty dollars, or imprisoned not to exceed thirty days: Provided, this section shall not apply to the hauling of seines.

Code, s. 3408; 1885, c. 18; 1903, c. 91.

2446. Drift nets in the sounds. If any person shall drift or fish any drift nets between the first day of February and the first day of May of any year, within two miles of the mouth of any river emptying into Albemarle sound, or within three miles of any seine-beach on the Albemarle or Croatan sounds while being fished, or within ten miles of Ocracoke, Hatteras, Oregon or New inlets, or within ten miles of the Roanoke marshes, he shall be guilty of a misdemeanor, and be fined not less than fifty dollars or imprisoned not less than thirty days: Provided, the people of Dare county shall be allowed to use drift nets for herring.

Code, s. 3396; 1881, c. 274, ss. 1, 2; 1883, c. 145.

2447. Frying Pan creek, Tyrrell county. If any person shall fish any pound net, gill net, seine or nets of any kind in Alligator river within one mile of the mouth of Frying Pan creek in Tyrrell county, or shall set any weir or fish net of any kind or any other obstruction that prevents the passage of fish in said creek from its mouth to Jarmin's Point, at the two pines and low cypress, he shall be guilty of a misdemeanor.

1889, c. 105; 1899, c. 465.

2448. Net stakes removed from Pamlico, Croatan and Albemarle sounds. Every person who shall set or use any net in the waters of Pamlico, Croatan, or Albemarle sounds or their tributaries, except Perquimans river, shall be required to pull up and remove their broken, decayed and abandoned net stakes within thirty days

from the day the nets were taken from them, and not later than the first day of June, and any person failing to pull up and remove their stakes, as required by this section, shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Code, ss. 3382, 3414; 1883, c. 69; R. C., c. 81, s. 8; 1844, c. 40, s. 7; 1852, c. 13; 1893, c. 147; 1908, c. 19. As to net stakes in Currituck sound, see section 2448a. One engaged in seine fishing on the shores of Albemarle sound has the right to remove stakes put up to operate a pod-net, when his seine fishery is interfered with by them: Hettrick v. Page, 82-65.

2448a. Net stakes removed from Currituck sound. Every person who shall set or use any net in the waters of Currituck sound or its tributaries, shall be required to pull up and remove their net stakes within thirty days from the day the nets were taken from them, and not later than the first day of June, and any person failing to pull up and remove their stakes, as required by this section, shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Code, ss. 3382, 3414; 1883, c. 69; R. C., c. 81, s. 8; 1844, c. 40, s. 7; 1852, c. 13; 1893, c. 147; 1908, c. 19.

2449. Fishing in Frying Pan, Tyrrell county. If any person shall set any pound net or dutch net in Alligator river within one-half mile of the mouth of Frying Pan creek in Tyrrell county, or in Frying Pan creek within three miles of where it enters into Alligator river, he shall be guilty of a misdemeanor and shall be fined fifty dollars or imprisoned thirty days, or both, at the discretion of the court.

1905, c. 282.

2450. Dutch nets at the inlets. If any person shall set any pound net, dutch net or hedge net within two miles of Oregon inlet or Hatteras inlet or within ten miles of New inlet in Dare county, North Carolina, or shall between the first day of January and the first day of May following of any year, set or operate any seine or stationary nets of an kind in the main channels within three miles of the inside mouths of Ocracoke, Hatteras, Oregon, or any other inlet north of Ocracoke inlet, connecting the waters of the Atlantic ocean with any of the sounds or other inland waters of North Carolina, or shall fish with seines or nets of any description in the waters of Bear inlet or Brown's inlet or within one mile of Bear inlet or Brown's inlet, on the eastern or western beach of said inlets, except at regularly established fisheries on said Bear or Brown's inlet beaches, or shall fish with seines or nets on the inside of said Bear

or Brown's inlet within one-fourth mile of said inlets between the first day of October and the first day of April, he shall be guilty of a misdemeanor.

1893, c. 216; 1903, c. 724; 1903, c. 416.

2451. Anchor nets in Albemarle sound. If any person shall set or fish an anchor, drift or staked gill net in the waters of Albemarle sound or its tributaries west of a line running from Skinner's Point buoy to Roanoke lighthouse, or if any person shall east of said line set or fish in the waters of said sound or its tributaries any anchor, drift or staked gill net longer than one thousand yards, or combination of such nets longer than one thousand yards; or shall set or fish any anchor, drift or staked gill nets within one and one-half miles of any seine grounds on the said sound or rivers emptying therein or within one-half mile of any dutch net stand where the same is now located in said sound or rivers, unless said seine ground or dutch net stand is owned by the person setting such nets; or shall set or fish any line or row of anchor, drift or staked gill nets anywhere in said sound or rivers nearer to any other row of such nets than half the length of the longer of said row he shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or be imprisoned not more than thirty days. And any person who shall lawfully violate the provisions of this section shall forfeit and pay for each violation of the same the sum of one hundred dollars to be recovered in a civil action by any one who will sue therefor; one-half of said recovery shall inure to the benefit of the public school fund.

1897, c. 51; 1899, c. 41; 1899, c. 130.

2452. Pamlico county. If any person shall set or fish any dutch or pound nets in the waters of Pamlico county, or shall use any seine or drag net in the waters of said county including the north side of Neuse river from the mouth of the river to the mouth of upper Broad creek from the first day of May to the first day of January next ensuing, or shall at any time catch fish with a seine or drag net along the shores of said county on any day of the week except Monday, Wednesday and Friday, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days.

1885, c. 198; 1889, c. 544; 1893, c. 334.

2453. Dutch nets in Neuse river. If any person shall use or cause to be used any dutch net, pound net, or other stationary trap net, or seine of similar description by whatever name known, in the waters of Neuse river for the purpose of taking fish therefrom, ex-

cept the ordinary set net in use in said river prior to the first day of January, one thousand eight hundred and ninety-seven, he shall for each day's use thereof as aforesaid forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by warrant before any justice of the peace in the county of Carteret, Craven and Pamlico or Lenoir, and shall be applied to the use of the public schools of said counties, and such offender in addition to the penalties contained in this section shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars, nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, that a resident and citizen of the state may fish with dutch, trap or pound nets in the waters of Neuse river on the Pamlico side of said river between the mouth of said river and Upper Broad creek not more than five hundred yards from the shore.

Code, s. 3397; 1897, c. 145; 1899, c. 299; 1899, c. 422; 1899, c. 435; 1901, c. 74; 1903, c. 704; 1905, c. 817.

2454. Size of meshes for seines in Neuse and Trent rivers. If any person shall use any drag-net or seine with bars of less size than one and a quarter inch in the Neuse and Trent rivers, or in any of the tributaries thereof, except for the purpose of catching herring, from the fifteenth day of January to the fifteenth day of May of each year, he shall be guilty of a misdemeanor, and fined not less than five nor more than fifty dollars for every offense. This section shall not apply to the waters of the Neuse and its tributaries above the Wayne and Johnston county lines.

Code, s. 3395; 1881, c. 146, ss. 1, 2.

2455. Fishing in Trent river. If any person shall set any trap, dutch, pound or pod net of any description whatever in Trent river, or shall at any time extend his set nets more than one-third the distance across the Trent river from either side, or shall set any net nearer to any other net than one hundred yards either on the same or on the opposite side of the river, or shall fish with seines or set nets of any description in Trent river from its mouth to upper Tucker bridge, between the hours of twelve o'clock noon on Saturday and twelve o'clock noon on Monday of each week, or shall set or haul a net or seine of any description between the town of Trenton and Brown's mill on said river from the sixteenth day of May to the first day of August in each year, he shall be guilty of a misdemeanor, and shall be fined not less than five dollars nor more than ten dollars or be imprisoned not less than ten nor more than thirty days.

Code, s. 3397; 1893, c. 447; 1897, c. 294.

2456. Fishing or shooting on bridges across Neuse or Trent river at New Bern. If any person being upon the bridges or either of them which span the Neuse and Trent rivers at the city of New Bern, shall fish in the waters of said rivers while being on said bridges, except with hand line not attached to any pole, or shall use fire or shoot any firearms while standing or being upon either of said bridges, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1901, c. 36; 1901, c. 326; 1903, c. 71.

2457. Setting nets across streams. If any person shall set a net of any description across the main channel of any river or creek, or shall erect, so as to extend more than three-fourths of the distance across any such river or creek any stand, dam, weir, hedge or other obstruction to the passage of fish, or shall erect any stand, dam, weir, or hedge, in any part of any river or creek that may be left open for the passage of fish, or who, having erected any dam where the same was allowed, and shall not make and keep open such slope or fishway as may be required by law to be kept open for the free passage of fish, he shall be guilty of a misdemeanor.

1909 818

Code, ss. 3387, 3388, 3389. **As to obstructing passage of fish in watercourses,** see State v. Glenn, 52-321; McLaughlin v. Mfg. Co., 103-100.

General assembly has complete authority to make provision for removal of any obstruction and nuisance to fishing in the waters of this state: Rea v. Hampton, 101-51.

Obstructions may be removed by private party under certain circumstances: Daniels v. Homer, 139-219; Hettrick v. Page, 82-65; Rea v. Hampton, 101-51.

2458. Hauling seines, Cherokee county. If any person shall fish with seines or drag-nets or place any finger or fall traps in the Valley river, Notla and Hiawassee rivers in the county of Cherokee, for the purpose of catching fish from said rivers, from the fifteenth of March to the first day of June in each year, he shall be guilty of a misdemeanor, and fined not less than ten, nor more than fifty dollars, or imprisoned not less than ten nor more than thirty days.

Code, s. 3399; 1881, c. 12; 1897, c. 293.

2459. License tax on nonresidents fishing with seines. If any person, not being a citizen and resident of this state, shall catch fish by seines, nets or other appliances for taking fish for marketable purposes in any waters within the jurisdiction of this state, without first obtaining therefor a license from the state treasurer and for which he shall pay a privilege tax of twenty-five hundred dollars per annum, he shall be guilty of a misdemeanor, and upon conviction in the superior court of any county contiguous to the waters so

fished as aforesaid, shall be fined not exceeding three thousand dollars or imprisoned not exceeding two years, or be both fined and imprisoned, as aforesaid, in the discretion of the court; and any citizen of this state, or other person who shall form an alliance or co-partnership with a nonresident for the purpose of evading this section or who shall act as an agent of any such nonresident, or as his servant, agent or employee, shall be deemed guilty of a misdemeanor, and upon conviction in the superior court of any county bordering upon the waters fished as aforesaid, shall be fined not less than one hundred dollars or imprisoned not les than six months, or be both in the discretion of the court; and the nets, seines, boats or other appliances of such person shall be liable by civil action to seizure and confiscation for the benefit of the public school fund. Any person who shall violate this section shall forfeit and pay the sum of five hundred dollars for each day engaged in fishing as aforesaid, to be sued for and recovered by any citizen of this state, the one-half of such recovery to be to the use of such citizen so suing and recovering the same, and the other half to the school fund. In any civil action for the recovery of the penalties hereinbefore provided for and mentioned, no person, agent, servant or other employee shall be excused from testifying therein on the ground of incriminating himself by his answer, but such answer shall not be used as evidence against such witness so testifying in any criminal action whatsoever.

Code, s. 2202; 1897, c. 35; 1899, c. 52. **Citizens of other states may be excluded from fishing in the waters of this state:** Daniels v. Homer, 139-222. **Legislature may prohibit even landowners from fishing on their own land at certain seasons and may exclude nonresidents from the privilege altogether:** State v. Gallop, 126-979.

2460. Right to fisheries. Whenever any person shall acquire title to lands covered by navigable water under the chapter entitled Grants, the owner or person so acquiring title shall have the right to establish fisheries upon said lands; and whenever the owners of such lands shall improve the same by clearing off and cutting therefrom logs, roots, stumps or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, then and in that case the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drifting or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines thereon; and this section shall apply

where the owner of such lands shall erect platforms or structures of any kind thereon to be used in fishing with nets and seines; and every person who shall wilfully destroy or injure the said platform or structures, or shall interfere with or molest the owner in the use of such lands as aforesaid, or in any other manner shall violate this section, shall be guilty of a misdemeanor: Provided, this section shall not be so construed as to relieve any person from punishment for the obstruction of navigation.

Code, s. 3384; 1874-5, c. 183, ss. 1-6. See section 1696-1698. It seems that a fishery in a river which is not affected by the ebb and flow of the tide, but which is in fact navigable, belongs to the riparian proprietor: Ingram v. Threadgill, 14-59.

By making entry riparian owners of land on navigable waters may acquire an absolute, instead of qualified, property in the land covered by water up to deep water: Bond v. Wool, 107-139.

In the absence of specific legislation riparian owners have a qualified property in their water fronts: Ibid.

The right to wharves on waterfronts is subject to legislative control and the regulation of an adjoining incorporated town: Ibid.

No one can be entitled to a several fishery, or exclusive right of fishery in any navigable water unless such right be derived from an express grant by the sovereign power, or perhaps by such a lenghth and kind of possession as will cause a presumption of such grant to arise: Collins v. Benbury, 27-118—and for the purpose of presuming a grant of an exclusive right it should appear that all others have been kept out by him and his grantors, not only from fishing with a seine, but from fishing in any manner in the waters to which he lays claim, Ibid—for the mere circumstance of fishing at a particular place, no matter for how long a time, raises no presumption of such a grant, because the person so fishing, exercises, prima facie, only a right which belongs to him in common with all others, Ibid.

Persons owning land on navigable streams may erect wharves next to their land up to deep water, and may make entry and obtain title as in other cases, subject to the regulation that they must not obstruct navigation, and that they shall be confined to straight lines from their water fronts: Bond v. Wool, 107-139.

Whether a stream is navigable is a question for the jury: State v. Twiford, 136-603.

Where a stream is navigable in fact, it is navigable in law, and its capability of being used for the purpose of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use: State v. Twiford, 136-603; State v. Club, 100-477; State v. Baum, 128-605, and cases cited.

There is no individual or property rights of fishery in navigable waters: Daniels v. Homer, 139-219.

The right of fishing in a navigable river is subordinate to the right of navigation: Lewis v. Keeling, 46-299—and can only be exercised a marine league from the sea, Daniels v. Homer, 139-222.

The right of fishery rests in the state, and is subject to absolute control of the general assembly: Daniels v. Homer, 139-219, and cases cited on page 222; Brooks v. Tripp, 135-161; State v. Gallop, 126-979; State v. Conner, 107-932; Rea v. Hampton, 101-51; State v. Woodward, 123-710.

For additional annotations as to entries on land covered with water and the right to establish fisheries, see sections 1696-1698.

2461. Obstruction of fish in Hiawassee river. No person shall make, construct or build any dam, drag-net or seine across more than three-fourths of Hiawassee river, so as to prevent or hinder the free passage of fish in said river, and any person making or using any dam, drag-net or seine in said river shall leave open and unobstructed to the free passage of fish at least one-fourth of said river, in width, on the side most favorable to the passage of fish. Any person offending against this section shall be guilty of a misdemeanor, and fined not more than ten dollars for each twenty-four hours said river is so obstructed, one-half to the use of the school fund, the other half to the use of the county in which such violation occurs.

Code, s. 3398; 1881, c. 11, ss. 1, 2, 3. **As to obstructions of passage of fish,** see Rea v. Hampton, 101-51; State v. Glen, 52-321; McLaughlin v. Mfg. Co., 103-100.

2462. Regulated in certain streams. No person shall place or allow to remain any dam for mill or factory purposes in the Chowan river between Holliday's island and the Virginia line in the Meherrin river between its mouth and the Virginia line; in the Roanoke river from the mouth of the Cashie river to the Virginia line; in the Dan river from the crossing of the state line to a point nearest Danbury; in the Neuse river from New Bern to Neuse station in Wake county; in Contentnea creek from its junction with the Neuse to the junction of Turkey and Moccasin creeks; in the Cape Fear river from Wilmington to the junction of Haw and Deep rivers and thence in Haw river to the line of Chatham and Alamance counties, and also in Deep river to the Randolph and Chatham line; in Rocky river from its mouth to the crossing of the Pittsboro and Ashboro road; in the New Hope river from its mouth to the Orange county line; in Northeast Cape Fear river from Wilmington to South Washington; in Black river from its mouth to the junction of the Coharie; in the South river from its junction with the Black river to the crossing of the Fayetteville and Warsaw public road; in Lumber river from the state line to the northern boundary of Robeson county; in the Yadkin river from the state line to Patterson's factory; in Elk creek, a tributary of the Yadkin river, from its mouth to Daniel Wheeler's in Watauga county; in Stony Fork creek, a tributary of the Yadkin river,

from its mouth to John Jones' old store; in Ararat river from its mouth to the bridge at Mount Airy; in Linville river from its mouth to Linville Falls; in North Fork of Catawba from its mouth to Turkey Cove; in Broad river from the state line to Reedy Patch creek; in Green river from its mouth to its junction with North Pacolet; in the Tennessee river from the state line to its junction with the Nantahala; in Pigeon river from the state line to the Forks of Pigeon; in the French Broad river from the state line to Brevard and in the Swannanoa river; in Toe river from the state line to the confluence of the North and South Forks of Toe; in New river from the state line to the point of divergence from the western boundary line of Alleghany county; in Little river in Johnston county from its junction with Neuse river in Wayne county to the Wake county line; in Cain river from the mouth of same to mouth of Bolling creek in Yancey county, also Old Fields of Toe on North Toe river in Mitchell county; Johns river from its mouth to the forks of said river near Carrell Moore's in Caldwell county; Catawba river from the South Carolina line to the town of Old Fort in McDowell county, unless the owner thereof shall construct thereon at his own expense a sluice-way for the free passage of fish, of a width not less than three feet nor more than ten feet: Provided, such sluice-way shall be constructed according to plans and specifications to be furnished by the board of agriculture, and shall not injure the water-power of such owner: Provided further, in order to ascertain whether sluice-ways will or will not injure the water-power aforesaid the owner of such dam may select two disinterested persons and the board of agriculture two others, who may select the fifth person to aid in the arbitration and settlement of such complaint: Provided further, this section shall not apply to Pigeon river in Haywood county: Provided also, it shall be lawful for any person to remove any obstruction in the main channel of the Cape Fear river to the width of one hundred feet, for the free passage of fish in the county of Harnett. This proviso, however, shall not apply to any dam or obstruction placed or kept upon said river by the Cape Fear Iron and Steel Company.

Code, s. 3410; 1901, c. 208; 1880, c. 34; 1881, cc. 21, 32, 250, 320; 1905, c. 278. **Section merely referred to, in the case of the obstruction in French Broad River,** in Gwaltney v. Land Co., 111-566.

2463. Sluice-ways kept open when constructed. The sluice-ways referred to in the preceding section shall be so constructed and placed upon such dams by the owner thereof within sixty days after notice has been given by the board of agriculture, under a penalty of one hundred dollars per day for each day thereafter that such dam shall remain without such sluice-way, and shall be kept open

by him during the months of February, March, April, May, June, October and November, and at all other times when there is sufficient water to supply both the water-power and the sluice-way, a fine of fifty dollars per day for each day said sluice-way shall be allowed to remain closed, and any person who shall fish with net, trap, hook and line, or who shall take in any way whatsoever any fish within two hundred feet of said sluice-way shall be subject to a fine of one dollar for each fish so taken, or a fine of fifty dollars for each offense, or imprisonment for thirty days.

Code, s. 3411; 1880, c. 34, s. 2.

2464. Obstructions removed. No other obstruction to the passage of fish shall exist or be built between the designated points in the streams mentioned in the two preceding sections unless an opening of not less than twenty-five feet, and not more than seventy-five feet, embracing the main channel of said stream, shall be made by the owner of such obstructions within twenty days after notice from the board of agriculture to make such opening under penalty of fifty dollars per day for each day such obstruction shall remain unopened. Said notice shall be served by the sheriff of the county, and his return shall be prima facie evidence of notice in any suit for such penalty.

Code, s. 3412; 1880, c. 34, s. 3. **General assembly has complete authority to make provision for the removal of any obstruction and nuisance to fishing in the waters of this state:** Rea v. Hampton, 101-51.

2465. Vessel injuring nets. If any master or other person having the management or control of a vessel or boat of any kind, in the navigable waters of the state, shall wilfully, wantonly, and unnecessarily do injury to any seine or net, which may be lawfully hauled, set or fixed in said waters for the purpose of taking fish, he shall forfeit and pay to the owner of such seine or net, or other person injured by such act, one hundred dollars, and shall be guilty of a misdemeanor.

Code, ss. 3385, 3389. **A company injuring fishing nets in a navigable stream by unnecessarily and wantonly running its boats into same is liable for damages:** Hopkins v. R. R., 131-463.

2466. Use of dynamite for killing fish. If any person shall use any dynamite or any other explosive agent whatever for killing fish, or shall explode any dynamite or other explosive agent in the public waters of the state where fish are found, except for mechanical or manufacturing purposes, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. The possession of fish killed by explosive agencies

shall be prima facie evidence that explosives were used for the purpose of killing fish.

Code, s. 3405; 1889, c. 312. **Special act for Cherokee county, 1907, c. 452, s. 4.**

2467. When nonresident may use seines. If any person who has not resided in the state continuously for at least twelve months next preceding the day on which he shall begin to take fish shall use, or cause to be used, in any of the waters of the state, any weir, hedge, net, or seine, for the purpose of taking fish for sale or exportation, or if any person shall assist in using, or be interested in using or causing to be used, in any such waters for the purpose aforesaid, any weir, hedge, net, seine or tongs in the use of which any such nonresident person may have an interest, he shall be guilty of a misdemeanor. Nothing herein shall prevent any person from fishing with seines hauled to the shore at any fishery, the title to which fishery or any interest therein having been acquired by such person by purchase or inheritance. This section shall not extend to servants employed to fish by any persons allowed to fish in the navigable waters of the state: Provided, no nonresident of the state shall make any sale, assignment or transfer of any fishery, weir, or other fishing apparatus, or privilege mentioned in this section, to any citizen of the state for the purpose of operating and working said fishery, weir, or other fishing apparatus as aforesaid, under the name and ownership of such citizen, or as the servant or employee of any citizen; and any sale, transfer or assignment not made bona fide and for a full consideration, shall be null and void. Upon affidavit founded upon information and belief that any nonresident of the state is operating any such fishery, weir, or other fishing apparatus as aforesaid in the waters of the state, under such sale, assignment or transfer, as the pretended servant or employee of any citizen of the state, it shall be the duty of the justice of the peace before whom said affidavit is made, to issue a warrant against the said nonresident and citizen under whose name said fishery is operated, and upon conviction the said offenders shall be guilty of a misdemeanor and shall, for every offense, be fined not more than fifty dollars, or imprisoned not more than thirty days. Upon the said trial, the burden of proof shall be on the defendants to prove the bona fides and full consideration of said sale or transfer.

Code, ss. 3379, 3380; R. C., c. 81, s. 5; 1844, c. 40, s. 1; 1876-7, c. 33; 1883, c. 171. **Nonresident using dragnet or other instrument not guilty if in the bona fide employ of one who has the right to take terrapin that way:** State v. Conner, 107-932.

2468. In New Hanover county. If any person shall use any net for catching sturgeon in the waters of New Hanover county, the

bars of the meshes of which net shall be less than ten inches in the diamond; or shall haul a seine or nets or pod fish within three hundred yards of any established fishery, except with the nets of such fishery; or shall set or fish any stationary nets in the waters of the Cape Fear river, except on the east side thereof and in New Hanover county; or shall set any net in said river otherwise than east or west, or shall own or control more than one line of nets, or shall operate or fish any shad nets in Cape Fear river below the mouth of Brunswick river between the fifteenth day of April and the fifteenth day of January; or shall set any set net or stationary net of any kind in the Cape Fear river north of the mouth of the Brunswick river, or in the Brunswick river; or shall operate any drift net in the Cape Fear river of more than three hundred yards in length, or shall catch shad in said river with seines or nets from the twentieth of April to the fifteenth of January, he shall be guilty of a misdemeanor. The possession of a sturgeon net with meshes of a size smaller than allowed by this section shall be prima facie evidence of having fished the same. In setting nets in Cape Fear river as allowed by this section the following rules shall prevail: They shall begin at a point one hundred yards from the edge of the channel on the east side of said river and running thence due east one hundred and twenty yards, then leaving a gap of one hundred and twenty yeards. Then from the east end of said gap another net may be set one hundred and twenty yards only, and to continue in the same proportion, always requiring a gap of one hundred and twenty yards to intervene between each one hundred and twenty yards of nets so set, and no net or sets of nets of any kind shall be placed opposite said gaps, within a distance of a half mile of same, and none of the nets so set shall be nearer than a half mile of the west shore of said Cape Fear river. An established fishery in the meaning of this section is one where there is a camp for the use of the hands, and where the seine or nets and boats used by the said fishery are kept, and where the said fishery was established prior to the first day of January one thousand eight hundred and ninety-nine. Any person violating the provisions of this section shall be guilty of a misdemeanor; and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both, at the discretion of the court.

Code, s. 3403; 1901, c. 173; 1899, c. 440; 1881, c. 280; 1907, c. 752, ss. 1, 2.

2469. Northeast Cape Fear. If any person shall fish in the northeast branch of the Cape Fear river with seine, net or trap, from the twenty-third day of February to the first day of July of any year, between the hours of six o'clock p. m. on Saturday and

six o'clock p. m. on Monday of each week, or shall at any time use more than one seine at a time in any fishing hole in said river, or use, set or place in said river any hedge, trap or other obstruction which will prevent the free passage of fish up said river, which said hedge, trap or other obstruction shall extend more than one-third across the main channel of the said river, he shall be guilty of a misdemeanor. This section shall not apply to that portion of said river which lies between the city of Wilmington and a point on said river known as The Three Cypresses, twelve miles distant from said city of Wilmington.

1889, c. 182; 1891, c. 198.

2470. In Brunswick, New Hanover and Pender counties. If any person shall use in any of the waters of Brunswick, New Hanover and Pender counties any nets, seines, set-downs, fish traps or any other nets of any description for the purpose of taking fish, the bars of the meshes of which nets, seines, set-downs, or fish traps shall be less than one and one-eighth inches in length; or shall with seines or nets of any kind, catch any fish in the waters of the Cape Fear river from its mouth to the Bladen county line, or in the waters of the Northeast Cape Fear or Black rivers in Pender county between six o'clock p. m. on Saturday and six o'clock p. m. on Monday, or shall obstruct the free passage of fish in the waters of said rivers, he shall be guilty of a misdemeanor.

1885, c. 226; 1887, c. 71; 1907, c. 811.

2471. In Black river and Mingo creek. If any person shall fish in that part of Black river in Sampson and Cumberland counties and below the Atlantic Coast Line Railroad bridge, or in Mingo Creek in said counties below the Averasboro and Clinton road otherwise than with a hook and line, he shall be guilty of a misdemeanor.

1895, c. 276.

2471a. In Oyster creek and Goose creek. If any person shall fish with a drag or haul net of any description in the waters of Oyster Creek and Goose Creek or its tributaries, (said creek being a dividing line between the counties of Pamlico and Beaufort) he shall be deemed guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the Court.

1907, c. 222.

2472. In certain streams in Cumberland, New Hanover, Brunswick and Sampson counties. If any person shall catch or destroy with seines, nets, firearms, bows and arrows, or by muddying or stirring the waters, or by striking any fish of any kind in the waters

of Black or South rivers, or the waters of Big Coharie, Little Coharie, Bear Skin and Big Swamps in the counties of New Hanover, Sampson, Cumberland and Harnett, and of the waters of Six Runs in the counties of New Hanover and Sampson, and of the waters of the Cape Fear river in the counties of New Hanover and Brunswick, and of the northeast branch of the Cape Fear river in the county of New Hanover, between the fifteenth days of May and August of each year, he shall be guilty of a misdemeanor, and fined not to exceed five dollars.

Code, s. 3409; 1889, c. 414; 1871-2, c. 152; 1879, c. 283; 1881, c. 369.

2472a. In certain portions of Black and Six Runs river, in Sampson county. It shall be unlawful for any person or persons to fish in that part of Black river from the Cape Fear river to the mouth of Great Coharrie and in that part of Six Runs river from its mouth to where it is crossed by the Atlantic Coast Line Railroad, with any wire trap, net or contrivance whatever that will obstruct the free passage of fish in said waters, from the first day of March to the fifteenth day of June of each year, except from six o'clock p. m. to six o'clock a. m. on Tuesday, Thursday and Saturday nights. It shall be unlawful for any person or persons fishing as permitted to leave, or permit being left, in the parts of the said streams defined any wire trap, net or contrivance whatever that will obstruct the free passage of fish, or any parts of any such wire trap, net or contrivance, at any time during which such fishing is prohibited. Any person violating the provisions hereof shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days.

1907, c. 169, ss. 1, 2, 3.

2473. Obstructions in South Fork river. No person or corporation shall place or allow to remain in the South Fork river, from its mouth in Gaston county to its fork in Catawba county, any obstruction to the free passage of fish up said stream: Provided, this section shall not apply to milldams where the owners thereof shall construct a sufficient fishway over said dams at least ten feet wide which will allow fish to pass over said dams: Provided further, this section shall not apply to dams in existence or which may be erected for manufacturing or milling purposes. The violation of this section shall be a misdemeanor.

Code, s. 3406; 1879, c. 244, ss. 1, 2; 1881, c. 90.

2474. Obstructions in Neuse river. Any person who shall construct a dam, put in traps, dutch net, wire seine, or anything else in Neuse river between its mouth and the Falls of Neuse in Wake

county, for the purpose of obstructing the passage of fish in said river, shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this section shall not apply to seines, set nets, running or skimming nets: Provided, this section shall not prevent the use of traps in Wayne county, where the trap and its wings do not extend more than one-third across the stream.

Code, s. 3422; 1885, c. 391; 1893, c. 354; 1883, c. 301, ss. 1, 2; 1895, c. 403; 1901, c. 395.

2474a. In Moccasin river or Contentnea creek. It shall be unlawful for any person or persons to hedge or otherwise obstruct the free passage of water, fish, timber, rafts or boats, in the run of Moccasin river or Big Contentnea creek from the mill known as Barefoot Mill in Wilson county to the mouth of said river or creek, or to make any like obstructions in the run in Little Contentnea creek or to fish with traps of any description in the waters of either of the said streams. Any person who shall violate any of the provisions hereof shall be guilty of a misdemeanor and shall be fined not less than five dollars and not more than fifty dollars or imprisoned not more than thirty days; and one-half of the fine so imposed shall be paid to the person who shall report such offense to the proper lawful officer, and the other half to the common school fund of the county in which said misdemeanor shall be committed.

1907, c. 615,, ss. 1-3.

2475. Regulated in Lumber river. It shall be unlawful for any person to use any seine, net or gig, or, by muddying the water or by shooting, to catch, take or kill fish in the Lumber river by any means except the ordinary rod, line and hook, from the first day of March to the first day of November in each and every year; and any person violating this provision shall be guilty of a misdemeanor, and shall pay a fine of forty dollars, or be imprisoned not more than twenty days. If any person shall set any trap for the purpose of catching fish in Lumber river or its tributaries in Columbus and Robeson counties, between the first day of April and the first day of September in any year, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 3404; 1881, c. 288, ss. 1, 2; 1883, cc. 13, 78; 1907, c. 608.

2476. Fishways to be erected in Haw river. All persons maintaining dams across Haw river in the county of Chatham shall, upon thirty days' notice from the board of commissioners of said county,

establish fishways in said dams; and if said fishways shall not be made within three months from the service of the notice, said persons so offending shall be guilty of a misdemeanor, and fined at the discretion of the court.

Code, s. 3402; 1881, c. 343, ss. 1, 2.

2477. Regulated in Nantahala river. If any person shall use any drag-net, basket or seine for the purpose of catching fish in Nantahala river or its tributaries, he shall be guilty of a misdemeanor, and fined not less than five nor more than twenty dollars for each offense, one-half to go to the school fund of the county where such offense is tried, and the other half to the informer; and whenever the Nantahala river forms the dividing line between any counties persons offending against this section may be prosecuted and punished in the courts of any of the counties between which the said river constitutes the dividing line.

Code, s. 3401; 1881, c. 30, ss. 1, 3.

2478. Robbing nets. If any person shall, without authority of the owner, take any fish from any nets of any kind, he shall be guilty of a midemeanor.

Code, s. 3418; 1883, c. 137, s. 5. **Fish in the public waters of the state do not become private property until reduced to possession:** State v. Gallop, 126-979.

2479. Obstructions in certain streams in Henderson county. No person shall make, construct or build any dam, drag-net or seine across more than three-fourths of the French Broad, Mills, Green or Broad rivers or any of their tributaries, in Henderson county, so as to prevent or hinder the free passage of fish in said rivers and their said tributaries, and any person making or using any dam, drag-net or seine in said streams, shall leave open and unobstructed to the free passage of fish at least one-fourth of said streams, in width, on the side most favorable to the passage of fish. Any person offending against this section shall be fined not more than ten dollars for each twenty-four hours said streams are so obstructed, one-half to the party suing for the same, and the other half to the school fund in said county; and any person violating this section shall, in addition to the penalty prescribed, be guilty of a misdemeanor: Provided, this section shall not apply to dams for manufacturing purposes

Code, s. 3425; 1885, c. 58. **As to the obstruction of the passage of fish in watercourses,** see State v. Glen, 52-321; McLaughlin v. Mfg. Co., 103-100.

2480. Trout in Cataloochee creek, Haywood county. If any person shall fish for trout in Cataloochee creek or its tributaries in

Haywood county, and offer such trout for sale as a matter of traffic, or shall fish for trout in such streams without permission from the owners of the land contiguous thereto, he shall be guilty of a misdemeanor and be fined not more than twenty dollars or imprisoned not more than ten days.

1885, c. 61. **For manner of establishing prior right of fishery, see sections 1697, 1698.**

2481. Mullets in Brunswick county. If any person, firm or corporation shall fish for and catch any mullets with any purse seine or purse net in the waters within the limits of Brunswick county, extending to the extreme limits of the state's jurisdiction in and over said waters; and for the purpose of this section, any portion of any water within a distance of three nautical miles from the outer shores of said county shall be deemed the waters of said county. Or if the master or any employee on any steamboats engaged in fishing for menhaden or fatbacks shall discharge from said boat fish offal, blood or slime within a distance of one-half of a mile of an established mullet fishery on the Brunswick county coast between the first of August and the thirty-first of December of each year, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned at the discretion of the court. For the purposes of this section an established fishery is declared to be that point on the beach occupied by the surfboat and seine in regular use.

1905, c. 748.

2482. Fishing within twelve miles of Grandfather mountain. If any person shall take, catch or kill any kind of fish in the waters of Linville river or in any other stream within twelve miles from the summit of Grandfather mountain in Mitchell county, without the written consent of the owners or lessees of the land through which said streams flow, or shall throw or empty into said river or streams any matter or substance deleterious or injurious to the life of mountain trout, he shall be deemed guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. If any person be seen at or near said stream or streams with net, seine, rod or any other kind of fishing tackle, the same shall be prima facie evidence of the violation of this section.

1905, c. 113.

2483. Fish traps in Cape Fear river. If any person shall construct, operate or maintain any fish traps in the Cape Fear river, or shall fail to remove all traps now in the channel of said river within sixty days from the first day of March, one thousand nine hundred

and five; or shall fail on the first day of June of each year to remove the slats or fingers from any fish trap allowed to be operated in said river under this section, he shall be guilty of a misdemeanor. This section shall not apply to Brunswick or New Hanover counties or to a fish trap which extends to not more than one-third the channel of said river.

1905, c. 500.

2484. Kitty Hawk bay. If any person shall take, catch or capture any fish with nets or other appliances in the waters of Kitty Hawk bay and its tributaries, that part lying in Dare county, between the thirtieth day of April and the fifteenth day of October of each year, or shall sell or ship out of the county any chub or perch between said dates he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. Nothing in this section shall prevent any citizen from catching fish at any time for home consumption.

1905, c. 363.

VII. Fish Industry Regulated.

2484a. Fish commissioner and deputy appointed; bonds; oaths. For the purpose of enforcing the laws relating to fin-fish, the governor shall appoint a fish commissioner within thirty days after the eleventh day of March, one thousand nine hundred and seven. The commissioner shall be responsible for the carrying out of the duties of his office to the geological and economic survey board and shall make semi-annual reports to them. The term of office of such commissioner and his successors in office shall be four years, or until their successors are appointed and qualified, and in case of vacancy in the office the appointment shall be to fill the vacancy. The said commissioner shall appoint a deputy commissioner. During the absence or inability to act of the commissioner, the deputy commissioner shall have and exercise all the powers of the commissioner. The commissioner and deputy commissioner shall each execute and file with the secretary of state a bond to the people of the state in the sum of five thousand and three thousand dollars respectively, with sureties to be approved by the secretary of state, conditioned for the faithful performance of their duties and to account for and pay over pursuant to law all moneys received by them in their office. The fish commissioner shall take and subscribe an oath to support the constitution and for the faithful performance of the duties of his office, which oath shall be filed with the bond. The deputy commissioner may be removed for cause by the commissioner, who may appoint his successor.

1907, c. 977. **The right of the general assembly to regulate fisheries, even on private property, is settled:** State v. Sutton, 139-574; State v. Gallop, 126-983, and cases there cited: Collins v. Benbury, 25-277.

2484b. Deputy in each county; compensation. The fish commissioner shall appoint inspectors (or deputies) in each county of the affected territory, who will assist at whatever time he may need their services. The said inspector may be the sheriff or his deputy in said county, and shall serve under the direction of the commissioner, receiving compensation not to exceed three dollars per day and necessary expenses while in actual service.

1907, c. 977, s. 2.

2484c. Office and clerical force. The fish commissioner shall have an office in some town conveniently located to the maritime fisheries, and he is authorized to employ such clerks as may be necessary for the proper carrying on of the work of his office.

1907, c. 977, s. 3.

2484d. Equipment. The fish commissioner is authorized, by and with the consent of the geological and economic survey board, to purchase or rent such boats, nets and other equipment as may be necessary to enable him and his deputies to carry out the duties of his office as specified in this subchapter.

1907, c. 977, s. 4.

2484e. Duties of commissioner. The fish commissioner shall have charge of the enforcement of all acts relating to all the fish and fisheries of North Carolina, except those relating to oysters, clams, scallop and other mollusca; he shall collect and compile statistics showing the annual product of the fisheries of the state otherwise than those specified above, of the capital invested and the apparatus employed; he shall prepare and have on file in his office maps based on the charts of the United States coast and geodetic survey of the largest scale published, showing as closely as may be the location of all fixed apparatus employed during each fishing season; he shall have surveyed and marked in a prominent manner those areas of the waters of the state in which the use of any or all fishing appliances are prohibited by law; he shall be responsible for the collection of all license fees, taxes, fines or other imposts upon fisheries, and shall receive all fines imposed for the infraction of the fishery laws, and shall pay same into the state treasury to the credit of the fish commission fund, to be drawn upon as directed by the geological and economic survey board; he shall carry on investigations relating to the migration and

habits of the fish in the waters of the State, and for this purpose he may employ such scientific assistance as may be authorized by the economic and geological survey board.

1907, c. 977, s. 5.

2484f. Power to arrest. The fish commissioner, deputy commissioner and inspectors shall have power, with or without warrant, to arrest any person violating any of the fishery laws.

1907, c. 977, s. 6.

2484g. Fish taken for scientific purposes. The fish commissioner and the United States bureau of fisheries may take and cause to be taken for scientific purposes, or for fish culture, any fish or other marine organism at any time from the waters of North Carolina, any law to the contrary notwithstanding.

1907, c. 977, s. 7.

2484h. Salaries of commissioner, his deputy, and clerks. The salary of the fish commissioner shall be nine hundred dollars per year and the expenses necessarily incurred by him in the discharge of his duties; that of the deputy commissioner shall be seven hundred dollars per year and the expenses necessarily incurred by him in the discharge of his duties. The salaries of clerk and of scientific assistants which may be employed from time to time are to be fixed by the geological and economic survey board.

1907, c. 977, s. 8.

2484j. Officers must not be interested in fish industry. The fish commissioner, deputy commissioner and inspectors shall not be interested in any fishing industry in North Carolina.

1907, c. 977, s. 9.

2484k. Revenue derived from licenses, fines, etc. All license fees, taxes, fines or other imports upon the fisheries or fines imposed for infractions of the fishery laws, in whatever manner collected, shall be paid to the state treasurer to the credit of the fish commission fund, to be drawn upon as directed by the geological and economic survey board, and shall constitute the revenue of the fish commission.

1907, c. 977, s. 10.

2484l. License for fishing. Each and every person, firm or corporation, before commencing or engaging in any kind of fishing in the state, shall file with the sheriff of the county in which he desires to fish, a sworn statement as to the number and kind of

nets, seines or other apparatus that is intended to use in fishing. Upon filing this statement the sheriff shall issue to the said party or parties a license as prescribed by law; said applicant shall pay to the sheriff a license fee equal in amount to the fee or tax prescribed by law and an additional fee of twenty-five cents for issuing said license and receiving said tax. This license shall extend through a period of twelve months from the date of its issue. Any person who shall wilfully use for commercial fishing purposes any kind of net whatever without having first complied with the provisions of this section shall be guilty of a misdemeanor and fined twenty-five dollars for each and every offense.

1907, c. 977, s. 11.

2484m. License reported monthly. The sheriff of each county in which licenses to fish are issued shall, on or before the tenth of each month, mail to the fish commissioner a statement showing all licenses issued during the preceding month, to whom issued and for what purpose. The commissioner shall have prepared and mailed to each inspector a list of all persons, firms or corporations to whom licenses have been issued, together with a statement as to the number and character of the nets said licenses are issued to use.

1907, c. 977, s. 12.

2484n. License fees paid to commissioner. All moneys collected by the sheriffs of the respective counties in which they serve, representing license taxes and fees for fishing privileges, shall be paid over to the fish commissioner on the first day of each month.

1907, c. 977, s. 13.

2484p. License tax. The following license tax is hereby levied upon the different fishing appliances used in the waters of North Carolina: Anchor gill-nets, ten cents per one hundred yards or fraction thereof; stake gill-nets, ten cents per one hundred yards or fraction thereof; drift gill-nets, ten cents per one hundred yards or fraction thereof; pound-nets, one dollar each; seine and drag-nets over three hundred yards and under one thousand yards, one dollar and twenty-five cents per one hundred yards or fraction thereof; seine and drag-nets over one thousand yards, one dollar and seventy-five cents per one hundred yards or fraction thereof; fyke-nets twenty-five cents each: Provided, this shall not apply to the counties of Currituck, Camden, Carteret, Hyde, New Hanover, Craven, Onslow, Brunswick, Pender, Pamlico and Beaufort.

1907, c. 977, s. 14.

CHAPTER 59.

PARTITION.

I. Procedure.

2485. As in special proceedings. The procedure in all cases for partition, under this chapter, shall be the same, in all respects, as prescribed by law in other special proceedings, except as modified herein.

Code, s. 1923; 1868-9, c. 122, s. 33. **Procedure same as in other special proceedings,** see Skinner v. Carter, 108-106; Capps v. Capps, 85-408.

This chapter does not apply to case where tenants in common have by contract agreed upon terms as to manner and extent of partition: Keener v. Den, 73-132.

Cases where partition by consent: Harrison v. Ray, 108-215; Carson v. Carson, 122-645; Camp Mfg. Co. v. Liverman, 123-7; Fort v. Allen, 110-183—**or where land partitioned according to provision of will,** Midgett v. Midgett, 117-8; McClure v. Taylor, 109-641; Hays v. Davis, 105-482; Cheatham v. Crews, 83-313.

2486. Venue. The proceedings for partition, actual or by sale, must be instituted in the county where the land lies. If the land to be partitioned lies in more than one county, the proceedings may be instituted in either of the counties.

Code, s. 1898; 1868-9, c. 122, s. 7.

2487. Petition filed; commissioners appointed. The superior courts on petition of one or more persons claiming real estate as tenants in common, shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common

Code, s. 1892; 1868-9, c. 122, s. 1.

WHO ARE PROPER PARTIES. Persons having reversionary interest in land are necessary parties in proceeding hereunder, as well as life tenant: Bell v. Adams, 81-118. **Every tenant in common must be made party, as the whole tract shall be partitioned or sold—though shares may be allotted to some of the tenants while a sale may be decreed as to others:** Brooks v. Austin, 95-474. **Contingent remaindermen, not represented either by guardian or by attorney, and not named in the process, pleadings of decree, are not bound by proceedings for partition instituted by the other remaindermen and life tenant:** Whitesides v. Cooper, 115-570. **Mother and only living children can not represent as a class a child en ventre sa mere in partition proceedings of lands on which father died seized, so as to pass inheritance of unborn child to purchaser:** Deal v. Sexton, 144-157. **Widow entitled to dower in land, and also administratrix of tenant in**

common is necessary party to petition for partition: Gregory v. Gregory, 69-522. Where there are contingent interests to be affected by partition proceedings, partition will be decreed if there is some one before the court to represent such interests: Overman v. Tate, 114-571.

AS TO THE PETITION. Allegation of possession not vitally essential to petition for partition: Alexander v. Gibbon, 118-796; overruling Alsbrook v. Reid, 89-151; but see Wood v. Sugg, 91-93—nor is averment of title, Graves v. Barrett, 126-267. Petition hereunder must give description of land and set forth that parties are tenants in common and in possession in order to give court jurisdiction: Alsbrook v. Reid, 89-151; McGill v. Buie, 106-242. It is not necessary to verify a petition: Lindsay v. Beaman, 128-189. Allegation in petition hereunder that defendant has an estate in certain number of acres of said land is insufficient: Baum v. Shooting Club, 96-310. Petition for partition which asks division of several separate and distinct tracts of land not held by same tenants in common is multifarious: Simpson v. Wallace, 83-477. While petition for partition is defective which does not set forth that petitioners are tenants in common and in possession of land, yet omission of allegation does not deprive clerk of jurisdiction hereunder: Godwin v. Early, 114-11. It is not necessary that a petition in partition should be verified to make it competent evidence: Lindsay v. Beaman, 128-189. As to sufficiency of demurrer to petition, see McGill v. Buie, 106-242.

WHERE PLEA OF "SOLE SEIZIN" ENTERED. In petition hereunder title not in issue unless defendant pleads sole seizin: Graves v. Barrett, 126-267. Effect of plea of sole seizin hereunder is practically to convert proceeding into action of ejectment and to bring into operation rules of proof and estoppel applicable to that action: Alexander v. Gibbon, 118-796; Honeycutt v. Brooks, 116-788; Hatcher v. Hatcher, 127-201; Shannon v. Lamb, 126-47; Cox v. Lumber Co., 124-80. One pleading sole seizin must have defense bond under rule to show cause: Copper v. Warlick, 109-672. If the plea of "sole seizure" is not put in before the order of partition is made, it will be considered as waived, and the parties to the proceeding will be taken to be tenants in common: Wright v. McCormick, 69-14.

GENERALLY. Where plea of sole seizin not set up, parties, for purpose of proceedings, are to be taken as tenants in common and only inquiry is as to interest owned: Graves v. Barrett, 126-267.

Where petitioner merely alleged ownership of five-eighths, evidence tending to show mutual mistake in deed under which defendant claimed, was properly excluded: Buchanan v. Harrington, 141-39.

In a proceeding for partition, petitioner might have alleged mutual mistake, by amendment in the superior court after case had been transferred, though it was not originally cognizable by clerk before whom proceeding was commenced: Buchanan v. Harrington, 141-39.

Tenants in common are entitled to partition as of right: Holmes v. Holmes, 55-334.

Deed conveying a tract of land (describing it) upon which there was a mineral spring, to several persons "one-eighth share of said mineral

waters'' each, and containing a provision that one of the vendees and his ''heirs and assigns are to have free access to said springs'' creates a simple estate in common of which partition may be made: Foreman v. Hough, 98-388.

In proceeding for partition it is erroneous to permit personal representative of ancestor of tenants in common to interplead and apply for license to sell lands for assets: Garrison v. Cox, 99-478.

Order appointing commissioners is interlocutory and not appealable: Navigation Co. v. Worrell, 133-93.

Parol partition can not be sustained where feme coverts and infants are interested: Camp Mfg. Co. v. Liverman, 123-7.

Ruling of trial court affirming clerk's order for actual partition of land is not reviewable: Navigation Co. v. Worrell, 133-93.

Effect of allotment between four out of six tenants in common: Carson v. R. R., 128-98.

Where defendant in partition fails to ask for jury trial until after clerk has ordered partition he thereby waives the right thereto: Navigation Co. v. Worrell, 133-93.

For annotations on statute of limitations barring tenants in common of land see section 384.

Where there has been ouster, or where defendant controverts plaintiff's title, cotenant may bring action for partition to term instead of before clerk: Harris v. Wright, 118-422; Jones v. Cohen, 82-75; Withrow v. Biggerstaff, 82-82.

No legal partition can be made between tenants in common without deed or writing: Rhea v. Craig, 141-602.

Where it appears to court in proceeding hereunder that it may become necessary to sell lands for assets, it should stay partition until personal representative can have reasonable opportunity to apply for license: Garrison v. Cox, 99-478.

Where land of ancestor partitioned within two years after letters of administration, same continues liable to payment of ancestor's debts: McArtan v. McLauchlin, 88-391.

Court will not adjudicate in proceeding for partition conflicting claim of title set up by defendant, so as to exclude him by estoppel: Simpson v. Wallace, 83-477.

As to rights of creditor of decedent against heirs, among whom real estate of deceased has been partitioned, see Hinton v. Whitehurst, 75-178; 73-157; 71-66.

2488. Separate partition of surface and mineral interests. When the title to the mineral interests in any land has become separated from the surface in ownership the tenants in common of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common of the surface may have partition of the same in manner provided by law, distinct from the mineral interests and without joining as parties the owner or owners

of the mineral interests. And in all instances where the mineral interests and surface interests have thus become separated in ownership the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interests be compelled to join in a partition of the mineral interests, nor shall the rights of either owner be prejudiced by a partition of the other interests.

1905, c. 90.

2489. Of homestead, at instance of judgment creditor. Whenever any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, and such judgment creditor may desire to lay off the homestead of the judgment debtor in said land and sell the excess, if any, to satisfy his judgment, said judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of said land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to said proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of said land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien.

1905, c. 429.

2490. Unknown persons interested, representative appointed. If upon the filing of a petition for partition it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to, and can not after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented

1887, c. 284.

2491. How commissioners summoned; their duty. The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. If there be any of the tenants in common whose names are not known or whose title is in dispute the share or shares of such person shall be set off together as one parcel.

Code, s. 1894; 1887, c. 284, s. 2; 1868-9, c. 122, s. 3. **Clerk should not be commissioner:** Evans v. Cullens, 122-55 (can not be now by statute, section 2513). **Where three commissioners are appointed to partition land, the action of any two of them is valid:** Thompson v. Shemwell, 93-222. **Where one tenant in common has improved part of land in good faith, he is entitled to have it allowed to him at a valuation made without regard to improvement:** Holt v. Couch, 125-456; Pipkin v. Pipkin, 129-161; Collett v. Henderson, 80-337; Pope v. Whitehead, 68-191.

Where two of three commissioners appointed to make partition met on the premises and in the presence of both parties to the action proceeded to fill vacancy occasioned by absence of third commissioner, neither party making objection thereto: Held that it is too late to except on that account after commissioners have partitioned land and filed report: Simmons v. Foscue, 81-86.

OWELTY OF PARTITION ALLOWED. In partition of land equality must be had by compensation in money for the deficiency, according to the value of the land at the time of the division. **The right to such compensation arises out of an implied warranty attaching to each share from all the others:** Cheatham v. Crews, 88-38. **It is a general rule that where a cotenant claims an equality of benefit, he must submit to an equality of burden, fairly incurred in good faith:** Holt v. Couch, 125-456. **The sum charged upon one share in favor of another share of less value, for equality in the division, is a charge in rem, and, if not paid, subjects the land charged to sale, whether in the hands of the owner or of his heirs, to whom it descends cum onere:** Powell v. Weathington, 124-40. **Owelty is not a mere debt secured by lien; debtor is tenant in common with holder of share in whose favor decree is entered to extent of charge, until same be satisfied:** In re Walker, 107-340. **Discharge in bankruptcy does not cancel charge of owelty against land of bankrupt:** In re Walker, 107-340. **Owelty of partition is not discharged by the execution of a note for the same; the land remains the primary debtor:** Dobbin v. Rex, 106-444. **Party acquiring land on which a charge rests for equality of partition takes same cum onere, and statute of limitations can not avail him as against purchases at sale made under a venditioni exponus duly ordered in partition proceedings:** Dobbins v. Rex, 106-444.

One of several children sold his estate of expectancy in his father's land to an outsider and when the father died the land was partitioned and the outsider entered into possession of his part and placed valuable improvements thereon; after this the one who had sold to the outsider entered proceedings for partition, denying the outsider's title to his share and pleading the statute of frauds in bar of contract with him. The contract was held void and partition decreed: Held, that the part allotted to the one who sold to outsider should be charged with the purchase money received from him, and also with its proportion of the enhanced value by reason of the betterments placed thereon: Tucker v. Markland, 101-422.

Where one lot is charged with the payment of owelty there is no law, except the section in reference to minors, suspending the payment until the lot falls into possession: Turpin v. Kelly, 85-399.

Equity is affected among tenants in common, either by assigning the improved part of the property to him who makes it, at its value before improvements are made; or if that can not be done, then by a reasonable allowance to the one who has enhanced the value of the property: Holt v. Couch, 125-456. If property is not susceptible of being divided, court will order an account before partition of proceeds of sale is made, and provide for a suitable compensation for improvements: Ibid. The law relating to betterments has no application to tenants in common, but is for protection of purchasers only of a supposed good title: Ibid.

Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come, and they are held to be affected by constructive notice: Ruffin v. Cox, 71-253.

OWELTY OF PARTITION ENFORCED. Proper remedy for enforcing owelty is by execution, formerly by venditioni exponas: Smith, ex parte 134-499, and cases therein cited. Execution will not be allowed to issue to satisfy owelty of partition until the confirmation of commissioner's report: In re Ausborn, 122-42. On motion for execution for owelty, plea of payment and counterclaim are issues, not questions of fact: Goode v. Rogers, 126-62.

A party to a proceeding in which a venditioni exponas is issued to sell land to pay a charge resting on it for equality of partition can not contest the validity of a sale made under such ven. ex.: Dobbin v Rex, 106-444.

The law postponing sale for owelty only in case where parties to proceeding are infants does not apply where share, after division, descends to infant heirs of owner: Powell v. Weathington, 124-40.

In an action to collect owelty defendant may set up as counterclaim any damage he may have sustained by having been evicted from a part of his share in the land by a superior title: Huntley v. Cline, 93-458.

A proceeding for leave to issue execution on a judgment charging land with owelty in partition is an "action" within the meaning of the statute of limitations: Smith, ex parte, 134-495. The issuing of an execution on a decree charging owelty in partition is barred within ten years: Ibid. The statute of presumptions barred in ten years claims for owelty charged prior to 1868. Herman v. Watts, 107-646.

It is not admissible for the creditor to obtain a personal judgment

against debtor for the sum charged as owelty in partition: Halso v. Cole, 82-161; Waring v. Wadsworth, 80-345. Where creditor obtained personal judgment against debtor for owelty in partition and, after debtor's death, issued execution and sold part of the land in possession of one of the heirs (same having been partitioned), but without notice to his heirs or personal representatives: Held, that purchaser at such sale acquired no title: Halso v. Cole, 82-161.

Where land is sold under several executions, some for personal debts and others to enforce owelty of partition, latter claims have priority in distribution of proceeds: Thompson v. Peebles, 85-418.

The widow of the party upon whose land the charge is placed is not necessary party to an action brought to recover the sum charged: Ruffin v. Cox, 71-253.

The dower in the land charged with the payment of a certain sum can not be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third assigned for dower is insufficient to pay off the incumbrance of owelty: Ibid.

2492. Oath of commissioners. The commissioners shall be sworn by a justice of the peace, or other person authorized to administer oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability.

Code, s. 1893; 1868-9, c. 122, s. 2.

2493. Commissioners may employ surveyor. The commissioners are authorized to employ the county surveyor, or in his absence, or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners.

Code, s. 1895; 1868-9, c. 122, s. 4.

2494. Report; contents; impeached, when. The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk, and if no exception thereto be filed within twenty days, the same shall be confirmed: Provided, that any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1896; 1868-9, c. 122, s. 5. Commissioners in their report should state affirmatively that allotments, in their opinion, are equal in value: Skinner v. Carter, 108-106.

Two commissioners signing the report is sufficient: Thompson v. Shemwell, 93-224; Simmons v. Foscue, 81-86.

When commissioners to partition land make and file their report their duties are ended, and they are functi officio, unless they act under a new order of the court: Clinard v. Brummell, 130-547.

Clerk has jurisdiction to correct mistakes in partition proceedings where no equitable ingredient involved: Wahab v. Smith, 82-229.

As to remedy for the correction of a mistake in running a dividing line after final judgment in partition has been entered, see Thomson v. Shemwell, 89-283.

Allotment can not be changed by commissioners after confirmation: Clinard v. Brummell, 130-547.

As to owelty of partition, see section 2491.

EXCEPTIONS TO REPORT; HEARING AND CONFIRMATION. Exceptions to report of commissioners appointed to make partition of land must be filed witin twenty days after report is filed: Floyd v. Rook, 128-10.

Exceptions to commissioner's report, backed by affidavits of inequality in division upon which a motion for redivision is based, do not raise issues of fact for trial by jury, but questions of fact to be determined by court: McMillan v. McMillan, 123-577.

Where commissioners appointed were ordered to report evidence taken before them and their findings of fact and failed to do so, it was error to confirm their report as to division of lands in the face of an exception thereto on the ground that they ignored order of court: Pipkin v. Pipkin, 120-161.

Exceptions of fact to the report are to be tried by judge, not jury: McMillan v. McMillan, 123-577; Beckwith, ex parte, 124-111.

The omission by the commissioners to state affirmatively that allotments in their opinion, were equal in value, affects the substantial rights of the parties; and clerk or judge may set it aside with directions either that commissioners make a reallotment or that others be appointed to do so: Skinner v. Carter, 108-106.

On hearing exceptions to report of commissioners, court should hear evidence impeaching fairness of partition and set same aside if evidence sufficient: Simmons v. Foscue, 81-86.

Refusal of court to hear affidavits upon motion to confirm report is a matter of discretion and not reviewable: Skinner v. Carter, 108-106. And appeal from an order setting aside report will not be dismissed as premature: Skinner v. Carter, 108-106. An order of clerk setting aside report and ordering redivision is applicable to the judge, and if no error in law is committed, decision of judge can not be reversed: McMillan v. McMillan, 123-577; Simmons v. Foscue, 81-86.

Case where claimed wrong land was divided: Wright v. McCormick, 69-14.

ATTACKING THE PROCEEDINGS. As to attacking partition proceedings for irregularity, see Rose v. Davis, 140-269.

Where infant defendants are served with summons in proceedings for partition and guardian ad litem is appointed, judgment affirming sale can not be set aside in collateral proceeding for alleged fraud or irregularity: Smith v. Gray, 116-311.

In an action to set aside partition proceedings it was held that as no fraud was alleged to have taken place in such proceedings and as the facts alleged as ground for setting aside should have been known at time of proceedings, plaintiffs are estopped, and equity will not aid them, although some of present plaintiffs, at time of partition, were infants, and some femes covert: Grantham v. Kennedy, 91-148.

Decrees set aside for inequality at instance of defendant served by publication: Rhodes v. Rhodes, 125-191.

Where proceedings had been begun and guardian ad litem appointed for infants and all steps had been taken except the signing of the final decree, the aforesaid infants, having come of age in the meantime, could not reopen the cause: Williams v. Williams, 94-732.

A direct proceeding to attack a judgment in partition for fraud can be brought by a motion in the cause: Murray v. Southerland, 125-177; Rhodes v. Rhodes, 125-193; Tuttle v. Tuttle, 146-484.

A decree in partition proceedings reciting that it was rendered on the merits will not be construed to be a judgment of nonsuit because it orders that petition be dismissed: Weeks v. McPhail, 129-73.

2495. Confirmation; effect; where registered. Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns.

Code, s. 1897; 1868-9, c. 122, s. 6. All parties to a partition petition are estopped by a decree therein, Weeks v. McPhail, 129-73.

Report of commissioners dividing land, when filed, approved, confirmed, recorded and registered, becomes muniment of title, and commissioners, without the order and approval of court, have no right to alter or change same: Clinard v. Brummel, 130-547.

No title passes by decree: Lindsay v. Beaman, 128-189; Carter v. White, 131-16; Harrington v. Rawls, 131-39—only unity of possession is dissolved and title vests in severalty, common source of title resting undisturbed: Carter v. White, 131-16; Lindsay v. Beaman, 128-189.

When land is incorporated and assigned in a decree in partition with knowledge and consent of parties thereto, administrator of one party is estopped from denying that land was not originally included in petition: Lindsay v. Beaman, 128-189.

Judgment in partition is binding on parties thereto as against an after-acquired title: Carter v. White, 134-466.

Where partition of estate of ancestor between heirs, tenants in common, they take by descent and not by purchase: Carson v. Carson, 122-645 Harrison v. Ray, 108-215.

Where, after confirmation of sale of land for partition, purchase was ordered distributed to those entitled, but commissioner failed to pay plaintiff's wife her part and failed to make deed to purchaser, and purchaser later executed his note to plaintiff for his wife's share, expressly reciting that, upon payment of note, commissioner would execute a deed: Held, that original proceeding was ended and action on note could not be dismissed upon the ground that plaintiff's remedy was by motion in the original proceeding: Holmes v. Davis, 122-268, distinguishing Council v. Rivers, 65-54.

A decree in partition proceedings reciting that it was rendered on the merits, will not be construed to be a judgment of nonsuit because it orders that petition be dismissed: Weeks v. McPhail, 129-73.

One who joins an infant in petition for partition is bound by judgment, though it is not approved by judge of court: Lindsay v. Beaman, 128-189.

Record of partition proceedings is admissible in evidence though not recorded as required by statute: Ibid.

Record of partition proceedings is color of title and possession for seven years thereunder gives good title: Ibid.

2496. Owelty bears interest. The sums of money due from the more valuable dividends shall bear interest until paid.

Code, s. 1899; 1868-9, c. 122, s. 8. For annotations as to owelty of partition and how to enforce payment, see section 2491. See Turpin v. Kelly, 85-389.

2497. Owelty charged against minors, when payable. When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian shall have assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure.

Code, s. 1900; 1868-9, c. 122, s. 9. Section 2497 postpones collection of owelty only where parties to proceedings are infants; it does not apply where share, after division, descends to infant heirs of owner: Powell v. Weathington, 124-40.

Section referred to in Jones v. Cameron, 81-154; Turpin v. Kelly 85-399.

2498. Delay by commissioner. If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner.

Code, s. 1901; 1868-9, c. 122, s. 10.

II. Lands in Two States.

2499. Procedure. Whenever on the death of any person his lands in this state, and in another state, shall descend or be devised to several persons, who, by the law of this and the other state, shall hold in the lands undivided estates as tenants in common, or by any other undivided tenancy, and such heirs or devisees can not, without suit, have partition for want of consent, or because of inability in any of the cotenants, then, if such deceased person shall have been at the time of his death, a resident of the state, or not then a resident of any of the states, in which his lands lie, and in the last case the most valuable part of such lands shall lie in this state, such heir or devisee, or any person claiming under him, may file a petition in the superior court for the county where the deceased resided at his death, or where any part of the land lies in this state, setting forth all the lands in which the plaintiff has an undivided estate, without and within the state, described by their names and boundaries, or by the adjoining tracts, and also the estate the deceased had in them, and the supposed value of the lands in each state, and the share, in severalty, to which the plaintiff and each of his cotenants is entitled under the laws of the several states, and praying for partition to be made of all the tracts, according to their respective interests, and the material facts set forth in the petition shall be verified by the affidavit of the plaintiff or his guardian, or other person, at the discretion of the court; and all persons concerned in interest in the lands shall be made parties, according to the practice of the superior court in this state.

Code, s. 1911; 1868-9, c. 122, s. 20.

2500. When court may decree partition. On the hearing of the petition, the court may decree a partition; and shall allot in severalty to each tenant his just share of the lands, according to the value of his interest in the same, by the laws of the several states in which they are situated.

Code, s. 1912; 1868-9, c. 122, s. 21.

2501. Commissioners appointed, when; their duty; final decree; deed compelled; effect of decree. The court making such decree shall issue a commission to three respectable freeholders in this or any state where any part of the land may lie, unconnected by blood or interest with the parties, directing them or a majority of them, to make partition between the cotenants, plaintiffs and defendants in said petition, and to assign each his respective share in

the value, in severalty, in any tract or tracts, in any or all the states; and before making the allotment the commissioners shall make a valuation of all the lands held by the cotenants in all the said states; and where they can not, without injury to the value of some shares, make an exact division of the lands, they shall charge the more valuable dividends with money to be paid to the tenants of a less valuable dividend to make equality of partition, and they shall report their proceedings as they may be directed, and the report shall contain a valuation of all the estate in this and the other states, and the division among the cotenants according to such valuation; and the court may confirm such report, or on sufficient cause shown, may correct and alter, or set it aside and order a new commission; and where any sum is charged upon a more valuable dividend, the court may direct, if the tenant taking such a dividend be an infant, that the sum charged shall not be paid till a future day, and the same shall bear interest at a rate not greater than allowed in this state: Provided, that the tenant of the larger dividend may discharge himself from accruing interest by paying the whole amount due at any time; and the sum due from the greater dividend shall be a charge on the land into whose hands soever it may come, although it may be taken without notice; and the court shall, upon the confirmation of any report of the commissioners, make a final decree. And where all the parties are within the jurisdiction of this court, the court shall, by the usual proceedings, direct and compel the parties to execute and deliver deeds and assurances, sufficient, by the laws of this state and the other states, to give the partition full force and validity in all the states; and in case any of the parties are under such disabilities that they can not execute such assurances, or are without the jurisdiction of the court, then the court, upon receiving evidence from the plaintiff that, by a law of the other state in which lie the parts of the lands described in the petition to be without this state, the decree can have effect thereon, shall direct the decree to be enrolled, and a copy of it shall be registered in the registerer's office of all the counties within this state where any of the lands lie; and a copy shall also be furnished to the plaintiff or other party interested duly certified, to the end that, as to the lands without this state, it may be carried into effect in the state in which the said lands may be, in such manner as said state may direct; and on satisfactory evidence being made to the court in this state that the decree may have full effect by the law of such other state, the court in this state shall by its decree declare the partition in the land in this state to be final and conclusive; and the decree shall be firm and irreversible, as hereinafter provided; and shall, on registration as aforesaid, pass to the tenants the title in severalty to the lands in this state in the same manner

as if all the land mentioned in the decree were situate within this state.

Code, s. 1913; 1868-9, c. 122, s. 22.

2502. When decree of another state enforced. Where real estate may be partly in this state and partly in another state, and the deceased person from whom it was derived by descent or devise was, at the time of his death, a resident of some other state, or was a resident of none of the states in which he held lands, and in this last case, the lands of which he was seized in this state were of less value than the lands of which he was seized in any other state, the courts of the state in which such deceased person had his residence at his death, or in which he held lands of greater value than those he held in this state, shall have full power and authority, under any law passed by the legislature of such state, substantially in accordance with the provisions herein made on this subject, to decree partition of the lands in this state, together with those within such other state, in the same manner as if the whole real estate were within the jurisdiction of such court and in the same manner as the courts in this state are directed and authorized to do by the preceding section, as to the lands of deceased persons resident here at their death, or leaving lands of greater value here than in any other state; and in case any person having an interest in the final decree, made as aforesaid in another state, as to lands in this state, shall, within twelve months after the same may be entered up in the courts of said state, produce the records and proceedings of such courts of record duly certified to a superior court of any county in this state, where any of the lands of this state lie, the court, on petition ex parte in such case, shall order such proceedings to be entered of record in the court of this state, and order that the said decree shall be of the same force and validity as if it had been a decree of the court in this state in which the petition is filed, upon a petition and regular proceedings had thereon, and the decree of the court of such other state, and the proceedings on it by petition in the superior court in this state confirming it and giving it validity, being enrolled in the said court of this state and registered in all the counties where the lands lie in this state, shall pass the lands in this state, according to the decree, and shall vest estates in severalty therein declared, as to said lands, in the same manner and with the same effect in law as if the lands in this state had been so allotted on a petition for partition, according to the provisions of the former sections of this chapter.

Code, s. 1914; 1868-9, c. 122, s. 23.

2503. Decree in another state, how validity passed on. Where a copy of a decree and proceedings of a suit in any other state shall be produced, as in the preceding section, and also when it is necessary for a superior court to be certified that its decree of a partition of lands without this state and within the territory of another state, can have effect herein, it shall be competent for the judge of the superior court before which the existence of a law in such other state is to be proved, to decide whether any act of the legislature of such state has been passed.

Code, s. 1915; 1868-9, c. 122, s. 24.

III. Personal Property.

2504. How made. When any persons entitled as tenants in common of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment, to divide such property as nearly equal as possible among the tenants in common.

Code, s. 1917; 1868-9, c. 122, s. 27.

Remedy of a tenant in common to recover his interest in specific goods is by partition: Powell v. Hill, 64-169; Grim v. Wicker, 80-344.

One tenant in common, or joint owner of personal property, can not maintain action against other tenant or owner to recover exclusive possession of property: Thompson v. Silverthorne, 142-13, and cases cited.

If, pending a proceeding for partition of personalty, defendant threatens destruction or removal of property, court on application might enjoin him, or appoint receiver: Ibid.

2505. Commissioners to report; exceptions; confirmation. The commissioners shall report their proceedings under the hands of any two of them, and file their report in the office of the clerk of the superior court within five days after the partition was made, and if no exception thereto be filed within twenty days, the same shall be confirmed: Provided, that any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1918; 1868-9, c. 122, s. 28. **Section referred to** in Best v. Dunn, 126-560; Clement v. Ireland, 129-222.

IV. Sale of Land.

2506. Part sold and part divided. In all proceedings under this chapter actual partition may be made of a part of the land

sought to be partitioned and a sale of the remainder, or a part only, of any land held by tenants in common may be partitioned and the remainder held in common.

1887, c. 214, s. 1.

2507. Sale of mineral interests. In case of the partition of mineral interests, in all instances where it shall be made to appear to the court that it would be for the best interests of the tenants in common of such interests to have the same sold, or if actual partition of the same can not be had without injury to some or all of such tenants in common, then it shall be lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear.

1905, c. 90, s. 2.

2508. Expectancy may be sold. The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate.

1887, c. 214, s. 2. **A statute giving to remaindermen right to have partition of land held in remainder vested before the passage of such statute is remedial, and, instead of impairing, enlarges vested rights:** Gillespie v. Allison, 115-542.

Sale for partition will not be decreed where there are contingent remainders or other future conditional interests, unless all persons who may by any possibility be interested unite in asking for such decree, this section not apply to such contingent estates and interests: Aydlett v. Pendleton, 111-28; see section 1590.

The right of sale of land for partition has been extended by act of 1887 to remainderman and revisioners: Gillespie v. Allison, 115-549.

Where land to which an estate during widowhood attached was sold for partition and proceeds are in custody of court below, they can not be divided between widow and remaindermen, against will of remaindermen, but will remain real estate until partition can be made at termination of estate durante viduitate: Gillespie v. Allison, 117-512.

2509. Life tenant and remainderman may sell; life estate valued. In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely.

1887, c. 214, s. 3.

See also, section 2517. This section does not apply to an estate durante viduitate: Gillespie v. Allison, 117-512.

Fact that one of tenants seized of estate for life only and others seized in fee simple, is no bar to action for partition: McEachern v. Gilchrist, 75-196.

2510. Timber trees may be sold; life tenant's estate valued. Whenever two or more persons shall own, as tenants in common, or coparceners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, on which there may be standing timber trees, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law.

1895, c. 187.

2511. Disputed ownership of one share; sale ordered, and ownership reserved. If in any partition proceeding two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding.

1887, c. 284, s. 4.

2512. When sale ordered; terms. Whenever it appears by satisfactory proof that an actual partition of the lands can not be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof, to be made by some person appointed by the court, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned, and, on the coming in of the report of sale and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made

parties to the proceeding, the court may grant an order for possession. And the deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common had.

Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31. **Right to actual partition only exists where such partition can be made without injury to parties interested:** Gillespie v. Allison, 115-548—**and if the land is not susceptible of division without injury to one or more of the parties interested, the court shall order a sale:** Bragg v. Lyon, 93-153; Holt v. Couch, 125-456.

Case where actual partition could not be made without impairing value of some shares, and court ordered sale made: Gregory v. Gregory, 69-522; see also Trull v. Rice, 85-327.

As to whether actual partition should be had or a sale for the purpose, is a question of fact to be decided by the clerk or the judge on appeal: Ledbetter v. Pinner, 120-455.

On appeal to judge from a judgment in partition proceedings, judge may either render judgment himself or remand proceedings to clerk with direction to enter proper order for sale: Ledbetter v. Pinner, 120-456.

A resale will be ordered where first sale made is accompanied by circumstances calculated to arouse suspicion of court: Camp Mfg. Co. v. Liverman, 123-7.

Judgment on purchase money note can be had by motion in the original cause: Lord v. Beard, 79-5.

Where commissioner ordered to make deed to purchaser when purchase money paid, it means when the money is actually paid, not when it is secured by note: Macay, ex parte, 84-59.

The absence of the word "commissioner" after signature of the commissioner to deed to the purchaser does not impair the force and operation of the deed in transferring the estate: McLean v. Patterson, 84-429.

Where land is ordered to be disposed of at a judicial sale, it is in custodia legis until title has been made to purchaser under sanction and direction of court: Kemp v. Kemp, 85-491; Lord v. Meroney, 79-14.

Where land was sold for partition and purchaser complied with terms of sale and title was made to his wife and registered, he having, however, never assigned the bid: Held, that in absence of fraud or pre-existing indebtedness of husband, wife will not be declared trustee for her husband so as to subject land to payment of his debts: Evans v. Cullens, 122-55.

A payment made by purchaser of lands hereunder to the guardian of one of the tenants in common is proper: Howerton v. Sexton, 104-75.

Where there is petition to sell land for partition and one defendant is a widow entitled to dower and the other defendants are infants, dower should be assigned before land sold: Seaman v. Seaman, 129-293.

A petition to sell lands for assets amounts to notice to a purchaser under a proceeding by heirs for sale for partition: Harris v. Davenport, 132-697.

2513. Who may sell; confirmation; impeachment. The court may authorize any officer thereof, or any other competent person, to

be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. Such officer or person shall file his report of sale giving full particulars thereof, within ten days after the sale, in the office of the clerk of the superior court, and if no exception thereto is filed within twenty days, the same shall be confirmed: Provided, that any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1906; 1899, c. 161; 1868-9, c. 122, s. 15. **See section 2494. A court of equity will set aside a judicial sale for division when it appears that the commissioner to make the sale sold for cash instead of on credit as he was directed by the court to do, and that there was a grave mistake as to the area of the land, common to all parties:** Blue v. Blue, 79-69. 148-439

A judgment confirming the report of a commissioner selling for division, rendered without notice to the parties in interest to come in and oppose the same if so advised, is an irregular judgment and may be vacated on motion: Ibid.

A purchaser at a sale of land for division is under no obligation to disclose his opinion that the area of the land is greater than it is described to be at sale: Ibid.

If in partition proceedings the interest of a next friend is adverse to that of the infant, the decree therein will not on that account be disturbed unless fraud or collusion be established: Ivey v. McKinnon, 84-651.

A tenant in common suing to partition the premises controlled by him as agent for cotenants can not, on being appointed commissioner to sell the premises, purchase them at the sale, nor procure anyone to do it for him, and he can not speculate for his own benefit, or do any act detrimental to the interest of his cotenant: Tuttle v. Tuttle, 146-484.

Where infants, after reaching their majority, with knowledge of facts rendering sale of land voidable for irregularity, receive residue of purchase price, they ratify sale: Smith v. Gray, 116-312.

As to setting aside sale for partition on ground of fraud, see Tuttle v. Tuttle, 146-484; Blue v. Blue, 76-69.

Section 441 cures irregularity in a partition sale of land of minors: Smith v. Gray, 116-311.

Where an order of sale has been made and property sold and sale confirmed, judgment is final and can only be set aside in a direct proceeding for that purpose: Smith v. Gray, 116-311—**and by a motion in the cause,** Murray v. Southerland, 125-175; Rhodes v. Rhodes, 125-196; Tuttle v. Tuttle, 146-484.

2514. How sale advertised. The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriff under execution.

Code, s. 1905; 1868-9, c. 122, s. 14.

2515. Confirmation of report in sale for division. Upon confirmation of the report, the court shall secure to each tenant in common his ratable share in severalty of the proceeds of sale

Code, s. 1921; 1868-9, c. 122, s. 31.

2516. How proceeds of sale secured to infants, etc. When a sale is made under this chapter, and any party to the proceedings be an infant, a married woman, non compos mentis, imprisoned, or beyond the limits of the state, or when the name of any tenant in common is not known, it shall be the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representatives.

151-123

Code, s. 1908; 1887, c. 284, s. 3; 1868-9, c. 122, s. 17. **Proceeds arising from sale of a feme covert's lands for division made by an order of court, retain the character of realty until converted by some act of owner:** Hall v. Short, 81-273.

Administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to ward sold under a decree of court for partition: Allison v. Robinson, 78-222.

2517. Land partitioned or sold subject to dower; dower sold. When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six per cent. on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds.

Code, s. 1909; 1893, c. 341; 1868-9, c. 122, s. 18. **Where there is a petition to sell land for partition, and one of the defendants is a widow entitled to dower and the other defendants are infants, the dower should be assigned before the land is sold:** Seaman v. Seaman, 129-293.

Practice in partition where widow entitled to dower in the land: Winstead and Pass, ex parte, 92-703.

Widow entitled to dower in land, and also administratix of tenant in common is necessary party to petition for partition: Gregory v. Gregory, 69-522.

V. Sale, Public Use.

2518. Land required for public use, how sold. When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands, or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof; whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. And the expenses, fees and costs of this proceeding shall be paid in the discretion of the court

Code, s. 1907; 1868-9, c. 122, s. 16. See sections 1798, 1800, 2590.

VI. Sale of Personalty.

2519. When ordered; how made. If a division of personal property owned by any persons as tenants in common can not be had without injury to some of the parties interested, and a sale thereof be deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person, who shall file his report of sale in the office of the clerk of the court within ten days after sale, and if no exception thereto be filed within twenty days, the same shall be confirmed: Provided, that any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1919; 1868-9, c. 122, s. 29.

2520. How sale advertised; terms. The sale shall be made after twenty days' notice, by advertisement in three or more public places in the county, and shall be on such terms as the court may direct.

Code, s. 1920; 1868-9, c. 122, s. 30.

CHAPTER 60.

PARTNERSHIP.

I. Limited Partnership.

2521. For what purposes formed. Limited partnerships for the transaction of any mercantile, manufacturing or mechanical business within the state may be formed by two or more persons, upon the terms and with rights and powers and subject to the conditions and liabilities in this chapter; but its provisions shall not be construed to authorize any such partnership for the conducting of a banking or insurance business, other than writing or soliciting insurance

Code, s. 3088; 1860-1, c. 28. See Johnson v. Bernheim, 76-139; 86-339.

Where liability of defendant, sued in a justice's court as a general partner of a partnership indebted to plaintiff, depended upon legal sufficiency of articles of limited partnership and matters connected with their registration and publication, and their being no equities to adjust, justice had jurisdiction: Davis v. Sanderlin, 119-84.

2522. General and special partners joined; liability of special. Such partnerships may consist of one or more persons, who are general partners, and are jointly and severally responsible as partners are now by law, and of one or more persons, who contribute in actual cash payments a specific sum as capital to the common stock, who are called special partners, and who are not liable for the debts of the partnership beyond the funds so contributed to the capital.

Code, s. 3089; 1860-1, c. 28, s. 2.

2523. Must make certificate; what to contain. The persons desirous of forming such partnership must make and severally sign a certificate containing: First, the name or firm under which such partnership is to be conducted; second, the general nature of the business to be transacted; third, the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence; fourth, the amount of capital which each special partner has contributed to the common stock; fifth, the period at which such partnership is to commence and terminate.

Code, s. 3090; 1860-1, c. 28, s. 3.

2524. Registration of certificate. The certificate must be acknowledged or proved before some one competent to take the pro-

bate of deeds and ordered registered in the same manner as provided for deeds, and must be registered in the county in which the principal place of buisness of such partnership is situated. If the partnership has places of business in different counties, a transcript of the certificate and acknowledgment certified by the register must be registered and filed in the register's office of each of such counties.

Code, ss. 3091, 3092; 1860-1, c. 28, ss. 4, 5.

2525. Affidavit of payment of cash. At the time the certificate is ordered to be registered an affidavit of one or more of the general partners shall be made before the officer taking such acknowledgment, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually in good faith paid in cash, and the said affidavit so made shall be registered with the original certificate.

Code, s. 3093; 1860-1, c. 28, s. 6.

2526. Registration essential. No such partnership shall be deemed to have been formed until such certificate and affidavit have been made, acknowledged or proven and registered as required in the preceding sections.

Code, s. 3094; 1860-1, c. 28, s. 7.

2527. False statement, all general partners. If any false statement is made in such certificate or affidavit, all the persons interested in such partnership shall be liable as general partners.

Code, s. 3095; 1860-1, c. 28, s. 8.

2528. Publication of terms of. The terms of the partnership must be published immediately after its formation for six successive weeks, in at least one newspaper in the same county or near the place of said partnership business, and if such publication be not made, the partnership shall be deemed general.

Code, s. 3096; 1860-1, c. 28, s. 9. **Publication of terms of partnership in a newspaper is indispensable in order to constitute a limited partnership; if such publication be omitted the partnership is general:** Davis v. Sanderlin, 119-84.

2529. Affidavits of publication filed. Affidavits of such publication, made by the proprietor of such newspaper in which the same is published, may be filed with the clerk of the superior court of the county in which such business is conducted, and shall be evidence of the fact.

Code, s. 3097; 1860-1, c. 28, s. 10.

2530. Renewals and continuances. Every renewal or continuance of such partnership beyond the time originally fixed for its duration must be certified, acknowledged and registered, and an affidavit of a general partner made and filed, and notice given by publication as required for its original formation, and every such partnership which is otherwise continued must be deemed a general partnership: Provided, the affidavit herein required may state that the amount of cash therein specified had been originally paid in good faith, and that it is represented by goods or merchandise then on hand and has not been impaired in the course of trade.

Code, s. 3098; 1860-1, c. 28, s. 11.

2531. Alteration in names, etc., a dissolution. Every alteration which is made in the names of the partners, in the nature of the business, in the capital or shares thereof or in any other matter specified in the original certificate must be deemed a dissolution of the partnership; and any such partnership which is in any manner carried on after such alteration has been made must be deemed a general partnership, unless renewed as a special partnership, according to the preceding sections.

Code, s. 3099; 1860-1, c. 28, s. 12.

2532. Name of firm. The buisness of the partnership must be conducted under a firm, in which the names of the general partners only are inserted, without the addition of the word "company" or any other general term, except the word "limited"; and if the name of any special partner is used in the firm with his privity, he shall be deemed a general partner.

Code, s. 3100; 1899, c. 75; 1860-1, c. 28, s. 13.

2533. Actions as in general partnership. Suits in relation to the business of the partnership may be brought and conducted by and against the general partner in the same manner as if there was no special partner.

Code, s. 3101; 1860-1, c. 28, s. 14.

2534. Special stock not withdrawn. No part of the sum which any special partner has contributed to the capital stock must be withdrawn by or paid to him in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of such capital; and if, after the payment of such interest, any profits remain to be divided, he may receive his portion of such profits.

Code, s. 3102; 1860-1, c. 28, s. 15.

2535. Depleted capital made good, when. If it appears by the payment of interest or profits to any special partner that the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital without interest.

Code, s. 3103; 1860-1, c. 28, s. 16.

2536. Rights of special partner. A special partner may from time to time examine into the state and progress of the partnership concern; may advise as to its management and act as attorney at law, but must not transact any other of the partnership business, nor be employed for that purpose as agent or otherwise; and if he interfere contrary to this section he is deemed a general partner.

Code, s. 3104; 1860-1, c. 28, s. 17.

2537. Accounting inter se. The general partners are liable to account to each other, and to the special partners for their managements of the partnership, as other partners.

Code, s. 3105; 1860-1, c. 28, s. 18.

2538. Effect of insolvency. In case of the bankruptcy or insolvency of the partnership, no special partner, under any circumstances, is to be allowed to claim as a creditor until the claims of all the other creditors of the partnership are satisfied.

Code, s. 3107; 1860-1, c. 28, s. 20.

2539. Dissolution. No dissolution of such partnership by the acts of the parties must take place before the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of its dissolution has been registered in the register's office in which the original certificate was registered, and published once a week for four successive weeks in the nearest newspaper to each of the places where the partnership transacts its business.

Code, s. 3108; 1860-1, c. 28, s. 21.

II. Surviving Partners.

2540. Inventory by, in sixty days; copy to personal representative. When a member of any partnership dies the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inven-

tory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner.

This subchapter is not retroactive: Bank v. Hodgin, 129-247.

1901, c. 640. **Death of a partner, in absence of any stipulation in an agreement to the contrary, works an immediate dissolution, and title to assets vests in surviving partner, impressed with a trust to close up partnership business, pay debts, and turn over to his personal representative the share of deceased partner:** Walker v. Miller, 139-448.

After dissolution of firm by death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all concerned: Calvert v. Miller, 94-600; Hodgin v. Bank, 128-110.

An arrangement between distributees and legatees to permit their property, with consent and co-operation of personal representatives of deceased partners, to remain in common and to be used for their joint benefit, adopting name of old firm, constitutes a partnership: Walker v. Miller, 139-448.

Surviving partner who assigns partnership property of insolvent firm to pay his own debts pro rata with those of firm, can not be allowed to testify that he did not thereby intend to defraud firm creditors: Commission Co. v. Porter, 122-692.

Where one of the members of a firm was constituted as general managing agent by the articles of partnership, and upon the death of one partner, his executor consented to a continuance of the business: Held, that manager became agent of the executor, as well as of the other surviving members: Patterson v. Lilly, 90-82.

In an action for goods sold to a firm, the testimony of one partner, who admitted his ability by failing to answer that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the executor of the deceased partner or as against the firm: Moore v. Palmer, 132-969; Fertilizer Co. v. Rippy, 124-643.

Notice of dissolution is not necessary to prevent liability for future contracts attaching to estate of deceased or surviving partner: Bank v. Hollingsworth, 135-556.

Where an administrator of one alleged to have been a partner in a certain concern is sued upon a partnership obligation, the surviving partner is incompetent to testify that defendant's intestate was a partner: Moore v. Palmer, 132-969; Fertilizer Co. v. Rippy, 124-643; 123-656; Lion v. Pender, 118-147; Sykes v. Parker, 95-232.

2541. On refusal of, personal representative may take inventory; receiver appointed, when. If the surviving partner neglect or refuse to have said inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of the preceding section. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such

personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for said partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law.

1901, c. 640, s. 2. **An assignment by a surviving partner of an insolvent firm for an indefinite term, assignee to have right to employ servants and to replenish stock and out of proceeds to pay firm debts and also to pay individual debts of survivor pro rata, is fraudulent as against creditors:** Commission Co. v. Porter, 122-692.

Assignee is chargeable with interest on moneys of a partnership collected by him for the surviving partner and kept after twelve months from the time he assumed the trust until he disbursed it: Weisel v. Cobb, 118-11.

Where surviving partner conveyed assets to assignee to settle estate, it was duty of assignee, notwithstanding a contrary custom in the town where the business had been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of partnership, and is liable to surviving partner for his failure to do so: Weisel v. Cobb, 118-11.

In case of danger of misapplication by surviving partner of partnership funds, courts would certainly, in behalf of representatives of a deceased partner, interefere and restrain by injunction surviving partner from such acts or grant other proper relief: Hodgin v. Bank, 128-111.

Where surviving partner is appointed receiver of firm, he can not maintain an action against one whom, as surety, and for accommodation of deceased partner, endorsed latter's note, which was dicounted by the firm, if it appear that the assets of the partnership are sufficient to pay its debts and leave a surplus, against deceased partner's share of which the note can be charged: Patton v. Carr, 117-176.

As to compensation of assignee of a surviving partner appointed to settle partnership, see Weisel v. Cobb, 118-11.

Where assignment was made by surviving partner of insolvent firm and assignee was empowered to continue business for an indefinite term, receiver might be appointed to administer partnership funds, though deed was not set aside: Commission Co. v. Porter, 122-692.

2542. Notice to creditors. Every surviving partner within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from date of first publication of said notice. The notice shall be published once a week for four weeks in a newspaper (if there be any) published in the county where the partnership existed. If there should be no newspaper published in the county, then the said notice shall be posted at the courthouse and four other public places in the county.

1901, c. 640, s. 3.

2543. Debts without lien paid pro rata. All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership.

1901, c. 640, s. 4. Claim of surviving partner upon proceeds of sale of deceased partner's half of real estate (here mill property) to reimburse him to the amount of half the expenditures incurred in the conduct of joint business and improvements put upon the property, constitute a prior incumbrance, and must be paid to the postponement of creditors of the deceased partner: Mendenhall v. Benbow, 84-646.

Creditors advancing money to surviving partner, in good faith, to enable him to finish work, and use up raw material, are entitled to pay out of partnership assets: Calvert v. Miller, 94-600; see Howell v. Mfg. Co., 116-806.

Surety of a deceased partner on a debt due to the partnership has the right to compel the application of such deceased partner's share of assets in the hands of surviving partner to payment of debt in exoneration of such surety's liability: Patton v. Carr, 117-176.

While a surviving partner can not enter into contracts or create liabilities which will bind estate of deceased partner, yet he is not bound to sacrifice the interest of the firm, and if he contract debts, bona fide, for the interest of the common property, he may pay them out of the common fund: Calvert v. Miller, 94-600.

In a suit by a surviving partner for a firm debt, a personal debt of such survivor may be pleaded as a set-off: Hogg v. Ashe, 2-471; Norment v. Johnston, 32-90—but a debt of the deceased partner can not be so pleaded, Norment v. Johnston, 32-89.

A bank can not apply deposit standing in name of surviving partner to the payment of partnership debts: Hodgin v. Bank, 125-503.

Note executed by a member of a partnership to a third party who, as surety and for the accommodation of the maker, endorses it and receives no benefit from it, can not be subject of an action at law against endorser by the firm, nor, in case of death of maker of note, can surviving partner maintain an action on note against accommodation endorser, unless firm be solvent: Patton v. Carr, 117-176.

A surviving partner, who, more than two years after dissolution of firm, endorsed a note in firm name for renewal of notes oustanding similarly endorsed, was individually liable on such endorsement, though it did not bind firm: Bank v. Hollingswirth, 135-556.

2544. Action on claim not presented in twelve months. In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner.

1901, c. 640, s. 5.

2545. Appraisal for purchase by surviving partner; when he can not purchase; approval of clerk. The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out, under oath, a full and complete inventory and appraisement of the entire assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner, and shall also deliver a copy to the executor or administrator. The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of said deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets. In case such surviving partner shall avail himself of the privileges of purchasing said interest as provided for in this section, he shall give bond to said executor or administrator with surety for the payment of the debts and liabilities of said partnership, and for performance of all contracts for which said partnership is liable: Provided, that when the original articles of copartnership in force at the death of any partner or the will of a deceased partner makes the provisions for the settlement of such deceased partner's interest in said partnership, and for a disposition thereof different from that provided for in this chapter, the interest of such deceased partner in such partnership shall be settled and disposed of in accordance with the provisions of such articles of copartnership or of said will. In case of such sale of the real estate belonging to the partnership, the title to such real estate so purchased shall not pass until said sale of real estate is reported to and confirmed by the clerk of the superior court in the county in which said partnership was located, in a special proceeding in which the widow, heirs at law or devisees of such deceased partner are duly made parties.

1901, c. 640, s. 6.

2546. Accounting in twelve months; time extended; commissions. In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the death of the deceased partner, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent., out of the share of the deceased partner.

1901, c. 640, s. 7. **In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business:** Worthy v. Brower, 93-344; Taylor v. Taylor, 6-70.

Where the surviving partner acts in good faith in his fiduciary character he can not be charged with loss: Thompson v. Rogers, 69-357.

In stating an account between an executor and surviving partner of testator, it is not error to charge surviving partner with the value of a note, due testator of plaintiff individually, if such note arose from or grew out of the business of the copartnership: Royster v. Johnson, 73-474.

A surviving partner has no power, after dissolution, to renew or endorse a firm note in the name of the firm: Bank v. Hollingsworth, 135-556.

Surviving partner of insolvent firm is not entitled to have his personal property exemption paid out of partnership assets: Commission Co. v. Porter, 122-692.

2547. Accounting compelled. In case any surviving partner fail to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators.

1901, c. 640, s. 8.

CHAPTER 61.

RAILROADS.

I. Creation.

2548. How chartered; number of incorporators; name, and route of company stated; amount of capital stock; where filed. Any number of persons, not less than six, at least one of whom shall be a citizen and resident of this state, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of six directors of the company, at least one of whom shall be a citizen and resident of this state, upon whom legal process may be served, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the succeeding section, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations by this chapter.

Code, s. 1932; 1871-2, c. 138; 1905, c. 187; 1907, c. 472, ss. 1, 2.

As to formation and powers of private corporations, see chapter Corporations (annotations may be of service).

Existence of railroad corporation can not be attacked collaterally or questioned in action brought by it to condemn land: R. R. v. Lumber Co.,

114-690—**but where articles of incorporation are upon their face void, trial court will so declare:** Railroad v. Stroud, 132-413.

Filing and recording by secretary of state of articles of association of proposed railroad company, if not such as required by law, is a nullity: Railroad v. Stroud, 132-413.

Letters of incorporation are evidence, but not the only evidence, to prove fact of incorporation: Carolina Iron Co. v. Abernathy, 94-545; Marshall v. Bank, 108-639; see section 2550.

Railroad corporations can only be created by compliance with statutory provisions, but sections 1932 to 1934 of Code (Revisal sections 2548-2550) do not apply to method of continuing their existence: Bradley v. R. R., 119-927 (Appendix).

Articles of association must show compliance with provisions of statute as to amount of capital stock subscribed and paid in Railroad v. Stroud, 132-413.

Persons associated shall be corporation from time of filing certificate in office of secretary of state: Street Rwy. v. Railroad, 142-433.

2549. Stock subscribed before articles filed; affidavit of directors; organization fee paid secretary of state. Such articles of association shall not be filed and recorded in the office of the secretary of state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent. paid thereon in good faith, and in cash, to the directors named in said articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay the taxes and fees provided for in section one thousand two hundred and thirty-three and one thousand two hundred and thirty-four.

Code, s. 1933; 1871-2, c. 138, s. 2; 1905, c. 168. **Filing and recording articles of association by secretary of state not in compliance with this section is a nullity:** R. R. v. Stroud, 132-413.

2550. Copy of articles filed and recorded presumptive evidence of incorporation. A copy of any articles of association filed and recorded in pursuance of this chapter and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

Code, s. 1934; 1871-2, c. 138, s. 3. **Records themselves are also competent evidence:** Iron Co. v. Abernathy, 94-545. **Certified copy of letter of incorporation prima facie evidence of incorporation and organization:** Marshall v. Bank, 108-639. **Charter of foreign corporation, how proved:** Barcello v. Hapgood, 118-712.

2551. When and how subscription books opened. When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in said articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed.

Code, s. 1935; 1871-2, c. 138, s. 4.

2552. Number of directors; term of office; vote by shares; qualification of officers; how purchaser of railroad to become incorporated. There shall be a board of six directors, one of whom shall be elected president, of every corporation formed under this chapter to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall

thereupon be a new corporation with all the powers, privileges and franchises, and be subject to all the provisions of this chapter.

Code, s. 1936; 1871-2, c. 138, s. 5. **For annotations as to powers and duties of directors of corporations generally,** see under section 1147.

Railroad is not in all respects a highway publicis juris, but it is the subject to private property, and in that character is liable to be sold unless sale be forbidden by legislature; not franchise, but land itself constituting the road: State v. Rives, 27-297.

On foreclosure of mortgage given by railroad company, purchaser takes rights that company had acquired in relation to its rights of way under its charter: Barker v. R. R., 137-214.

Railroad corporation is not dissolved by sale of its road: State v. Rives, 27-297.

Another corporation must be provided before sale shall have effect of dissolution: James v. R. R., 121-523. **Purchase of Western North Carolina Railroad by Southern did not result in dissolution of former road,** Ibid.

See Julian v. Trust Co., 193 U. S., 93.

2553. What officers and agents president and directors may appoint. The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws.

Code, s. 1937; 1871-2, c. 138, s. 6.

2554. Stock may be paid for by instalments; nonpayment forfeits. The directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in such manner and in such instalments as they may deem proper. If any stockholder shall neglect to pay any instalment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or by depositing the same in the postoffice, properly directed to him at the postoffice nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made.

Code, s. 1938, 1871-2, c. 138, s. 7.

See section 1172. Subscription must be paid in money or money's worth: Hobgood v. Ehlen, 141-352; Foundry Co. v. Killian, 99-506.

2555. Capital stock, when and how increased. In case the capital stock of any railroad company is found to be insufficient for

constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same, properly folded and directed to him, at the postoffice nearest his usual place of residence, in the postoffice at least twenty days prior to such meeting. Such notice must state the time and place of the meeting and its object and the amount to which it is proposed to increase the capital stock. The proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company aforesaid.

Code, s. 1939; 1871-2, c. 138, s. 9.

2556. Liability of stockholders; how stockholders made liable; when execution issues against. Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholder. Before such laborer or servant shall charge such stockholders for such thirty days' service he shall give them notice in writing within twenty days after the performance of such service that he intends to hold them liable and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation in ratable proportion to the amount of the stock they shall respectively hold with himself.

Code, s. 1940; 1871-2, c. 138, s. 10.

2557. Liability of trustee, guardian or executor holding stock. No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name.

Code, s. 1941; 1871-2, c. 138, s. 11.

II. Municipal Subscriptions.

2558. Counties may aid railroads. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of the county may have an interest.

Code, s. 1996; 1868-9, c. 171, s. 1.

For issuance of bonds by cities and towns, see chapter Towns.

For election on issuance of bonds, see sections 2559, 2560.

For collection of taxes with which to pay bonds, see section 2562.

Act of general assembly authorizing county to take stock in railroad, and to determine question by popular vote, and tax themselves to pay for it, is constitutional: Hill v. Comrs., 67-367; Alexander v. Comrs., 67-332; Caldwell v. Justices, 57-323.

Adoption of new constitution, with restrictions as to issue of municipal bonds, annulled all special powers remaining unexecuted and not granted in strict conformity with its requirements: Comrs. v. Payne, 123-432; Comrs. v. Call, 123-308.

An act of the general assembly authorizing levy of requisite taxes to pay municipal bonds and in force when bonds are issued, enters into and becomes part of contract under which bonds are delivered and taken, and can not be annulled by subsequent legislation: McCless v. Meekins, 117-34.

Stock owned by county not subject to execution to satisfy debt of an individual: Hughes v. Comrs., 107-598.

Competent for legislature, by a retrospective statute, to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute, where no contract is impaired and the rights of third persons are not injuriously affected: Belo v. Comrs., 76-489.

Words "majority of the members elect" or "majority of the qualified voters" are used in constitutions and laws to take the exercise of a particular power out of general rule, and make assent of majority of whole number necessary: Cotton Mills v. Comrs., 108-678.

The people, and not the legislature, have power to contract a debt to aid in the construction of a railroad: Galloway v. Jenkins, 63-147; University R. R. Co. v. Holden, 63-410.

Taxpayer, for sufficient cause, can intervene, in apt time, and enjoin the issuing of municipal bonds, but this must be done before bonds are issued and negotiated and pass into circulation as commercial securities: Belo v. Comrs., 76-489.

An act "authorizing and empowering" county commissioners to issue bonds is mandatory: Jones v. Comrs., 137-579; overruling Jones v. Comrs., 135-218; Bank v. Comrs., 135-230.

When authority to issue municipal bonds upon the performance of certain conditions precedent is conferred by statute upon a particular tribunal, such tribunal has the sole power to determine if the conditions have been performed: Belo v. Comrs., 76-489.

VALIDITY OF BONDS. For cases involving validity of municipal indebtedness and as to whether constitutional provisions as to legislative authorization complied with, see line of cases cited in Appendix of this Revisal under Art. 2, section 14 of Constitution of North Carolina; see also Wilkes Co. v. Coler, 190 U. S., 107; Stanly Comrs. v. Coler, 190 U. S., 437.

Legislation authorizing creation of county indebtedness must conform to constitutional requirement: Graves v. Comrs., 135-49; Comrs. v. Call, 123-308; Rodman v. Washington, 122-39; Charlotte v. Shepard, 120-411; 122-602; Comrs. v. Snuggs, 121-394; Bank v. Comrs., 119-214—such requirements being mandatory, Comrs. v. Snuggs, 121-394.

If amendment in a material matter is made to bill, amended bill should be read over again three times in each House, with yea and nay vote on second and third readings entered on journals: Glenn v. Wray, 126-730.

Every act of general assembly levying a tax shall state special object to which it is to be applied: McCless v. Meekins, 117-34.

In trial of action to declare invalid bonds of county issued in pursuance of authority of an act of general assembly, it is competent to introduce in evidence Journal of House or Senate to show that such act was not passed in conformity with requirements of constitution, and when such Journal shows affirmatively that act authorizing creation of indebtedness, or imposition of tax, was not passed with formalities required by section 14, Art. 2, of constitution, such Journal is conclusive as against not only printed statute published by authority of law, but also against duly enrolled act, and such act is invalid so far as it attempted to confer power of creating debt or levying tax (Bank v. Comrs., 119-214, followed and Carr v. Coke, 116-223, distinguished): Comrs. v. Snuggs, 121-394.

Where recitals in railroad bonds are that they were issued under a particular act of the legislature, burden of validating them as made under section 1996 (Revisal section 2558) is on party alleging their validity: Graves v. Comrs., 135-49.

It is essential to validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships and other municipal organizations, that proposition shall have first had assent of majority of qualified

voters in territory affected, to be duly ascertained by election regularly held for that purpose: Railroad v. Comrs., 109-159; Claybrook v. Comrs., 114-453; see annotations under section 2559.

Records showing that proposition to issue bonds was submitted after 30 days' notice, and that a majority of qualified registered electors voted in the affirmative, are conclusive evidence that will of majority was so expressed: Bank v. Comrs., 116-339.

It is not valid defense that county issued its own bonds to pay subscription to railroad stock instead of negotiating a loan, as empowered to do by the act: Street v. Comrs., 70-644.

A general act authorizing counties to issue bonds for railroad purposes would be invalid, especially when it is necessary to exceed constitutional limitation to pay interest or principal: Comrs. v. Payne, 123-432.

If bonds issued were invalid, new bonds in renewal are equally invalid: Ibid.

County has no power to issue bonds and levy a tax for their payment in aid of a railroad not begun before adoption of constitution of 1868: Comrs. v. Snuggs, 121-394—they being limited to "aid in the completion of any railroad," etc., Ibid; Comrs. v. Call, 123-308; but see Stanly v. Comrs. v. Coler, 190 U. S., 437 (note the present Revisal section 2558 has amended the Code section by using the word "construction" in place of "completion").

Although contracts made, based upon subscription, validity of election can be contested: Goforth v. Construction Co., 96-535.

Where legislature authorized issue of bonds in aid of railroad, and provided for payment by taxation, but did not provide for election and election was held in conformity to existing election laws relating to borrowing of money by municipalities, bonds issued pursuant to such election are valid in hands of bona fide owner: Bank v. Comrs., 116-339.

As to whether funding bonds can be issued without a vote of the people, see Asheville v. Webb, 134-72; McCless v. Meekins, 117-34.

PURCHASER OF BONDS; DILIGENCE REQUIRED OF HIM: Purchaser of municipal bonds which, upon their face, refer to statute under which they are issued, is bound to take notice of statute and all its requirements: Claybrook v. Comrs., 114-453; Comrs. v. Call, 123-308—and where there is an inherent constitutional defect in statute authorizing issue of bonds or in proceedings under which they are issued, a purchaser takes with notice, and there can be no such thing as an innocent holder: Claybrook v. Comrs., 114-453.

It is incumbent upon purchasers of state, county and municipal bonds to ascertain whether authority to issue them has been granted according to requirements of constitution: Comrs. v. Snuggs, 121-394; Bank v. Comrs., 116-339; and cases therein cited.

Purchaser of municipal bonds for railroad subscription is not required when inquiring into the election to go further than to find, from certificate of registrar, that a majority of qualified voters of municipality had voted for subscription: Claybrook v. Comrs., 117-456.

County bond stating on its face the act under which it is issued is

notice to holder, and estops him from controverting statement: Comrs. v. Call, 123-308.

TOWNSHIP BONDS. County commissioners are not authorized to issue bonds on credit of a township for construction of a railroad: Graves v. Comrs., 135-49.

General assembly may empower a township, with sanction of its qualified voters, to aid in construction of railroad by levying taxes and contracting debt to raise money for that purpose: Brown v. Comrs., 100-92.

Act of assembly directing that county taxes, which might be levied upon property and franchise of railroad company in certain township, should be applied, as far as necessary, to payment of interest on bonds issued by such township in aid of railroad, is constitutional: Brown v. Comrs., 100-92—as is also act requiring county commissioners to set apart the taxes derived from such railroad property to be used in building roads, bridges, etc., in such township (bonds being paid off) until township is repaid amount it has expended, Jones v. Comrs., 143-59.

Action to declare void an election held to allow certain townships to subscribe stock to a railroad company, on account of irregularities, could be brought, being equitable in its nature, even though no remedy was given by statute; and while no statute of limitation is applicable, still such action should be brought within reasonable time, and before rights of innocent third parties have intervened: Jones v. Comrs., 107-248.

Where township has voted bonds in aid of a railroad to be constructed on a designated line, and subsequently legislature enacts that company "may" change its route, and that, upon petition by taxpayers of township an election shall be held on question whether or not bonds previously issued shall be used in aid of the construction of new route, county commissioners will be enjoined from ordering such election where it appears that company has contracted for construction of road upon original route and is pushing work to completion: Railroad v. Comrs., 108-56.

ESTOPPEL. Payment of interest from year to year on bonds is not an estoppel, and does not validate them: Comrs. v. Payne, 123-432; Glenn v. Wray, 126-730.

Fact that, after void election, the county, township or other municipal organization, in which election was held, appointed an agent, who made a subscription of stock on behalf of his principal, that organization acted and was recognized as a stockholder in corporation in aid of which bonds were to be issued, and that latter made contracts with third parties, relying upon validity of transaction, will not operate as an estoppel, such acts being ultra vires: Railroad v. Comrs., 109-159.

By a compromise the town was released from liability for one-half of its subscription in consideration of its issuing the other half, and is estopped from denying validity of bonds issued in pursuance of compromise decree, and such estoppel is as effectual in favor of purchaser of bonds in a suit to compel payment of coupons as it would be if action were brought by railroad company: Bank v. Comrs., 116-339.

County bond stating on its face the Act under which it is issued is notice to holder, and estops him from controverting statement: Comrs. v. Call, 123-308.

Fact that action to impeach validity of bonds on ground of irregularity in election was brought and failed is no estoppel to a second action to impeach their validity on ground that act authorizing election was not properly passed: Glenn v. Wray, 126-730.

In action by bona fide purchaser for value against county, upon a bond issued by former county court, under an act of legislature, records of such court are conclusive upon county and constitute an estoppel in pais: Belo v. Comrs., 76-489.

2559. How made. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them, and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company: Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

Code, s. 1997; 1868-9, c. 171, s. 2. **The fact that petitioners styled themselves "voters and taxpayers," while special act required a petition by "resident taxpayers," was immaterial:** Claybrook v. Comrs., 114-453.

Where legislature provides no election machinery for town bond election under special act, general laws relating to such elections are applicable: Bank v. Comrs., 116-339.

Where question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition at same election and on same ballot: Goforth v. Construction Co., 96-535.

For discussion of proper method of conducting election and declaring result under Laws of 1887, ch. 87, to incorporate Roanoke and Southern Ry., see Claybrook v. Comrs., 114-453, 117-456—**of conducting election under Laws of 1887, ch. 89,** see Railroad v. Comrs., 116-563.

Where law declared that those in favor should vote "Subscription," and those opposed "No subscription," it is immaterial that electors voted "For subscription" and "Against subscription:" Claybrook v. Comrs., 114-453.

Fact that county commissioners canvassed returns of election second day thereafter, instead of third, as provided by statute, is immaterial: Ibid.

Election is not vitiated by fact that, through mistake, another date for it was copied in minutes of county commissioners: Ibid.

Where returns of such election ascertained only that "a majority of votes cast was in favor of subscription," and declaration to that effect was made by county commissioners, constitutional requirement had not been observed: Railroad v. Comrs., 109-159; Glenn v. Wray, 126-734, and cases cited.

Statement by county commissioners that "after due canvass, the foregoing returns of election are correct and said board hereby approve said returns" is not a declaration that a majority of qualified voters favored the subscription: Claybrook v. Comrs., 114-453.

Where power is conferred to open, conduct and declare result of an election, action of those charged therewith in that respect is final and conclusive until it is reversed by some proper action brought to impeach it; and courts will not interfere by injunction to prevent them from ascertaining and promulgating result: Bynum v. Comrs., 101-412; see Norment v. Charlotte, 85-387; Simpson v. Comrs., 84-158.

WHO ARE "QUALIFIED VOTERS" HEREUNDER. Registration list is prima facie evidence of who are qualified voters: Clark v. States, ville, 139-490. **A qualified voter is one who is entitled to register as a voter, and who is also qualified to vote after such registration:** Railroad v. Caldwell, 72-492, 493—**a registered voter being one who has lawfully registered and paid his poll tax,** Pace v. Raleigh, 140-65. **Voter must register anew, when so required, in order to be a qualified voter:** Clark v. Statesville, 139-490. **Other cases on the subject are:** Harris v. Scarborough, 110-232; Smith v. Wilmington, 98-343; Wood v. Oxford, 97-233; McDowell v. Construction Co., 96-514; Markham v. Manning, 96-132; Duke v. Brown, 96-127; Southerland v. Goldsboro, 96-49.

2560. Election for, held. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners who shall make a record of the same.

Code, s. 1998; 1868-9, c. 171, s. 3. **For annotations as to election, see under section 2559.**

2561. How interest on bonds paid. In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent., when the prinicpal on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of paying the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

Code, s. 1999; 1868-9, c. 171, s. 4. **Action to enjoin payment of interest on county bonds by treasurer, complaint defective:** Comrs. v. Williams,

135-660. **Payment of interest from year to year on bonds is not an estoppel and does not validate them:** Comrs. v. Payne, 123-432; Glenn v. Wray, 126-730.

Cases referring to but not construing section: Comrs. v. Call, 123-308; Comrs. v. Snuggs, 121-395. **See also annotations under section 2558.**

2562. How taxes for bonds collected. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as other state taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter.

Code, s. 2000; 1868-9, c. 171, s. 5.

Taxpayer, for himself and other taxpayers, can enjoin collection of an unconstitutional tax: Galloway v. Jenkins, 63-147; London v. Wilmington, 78-109.

Equation and limitation of taxation established by constitution applies only to taxes levied for ordinary purposes of state and counties, and as to levies of taxes for such purposes, it must be observed: Jones v. Comrs., 107-248.

A county, when it contracts a debt, pledges its faith, or loans its credit, must levy taxes necessary to raise revenue for such purposes upon all property in the same, except such property as is exempted from taxation: Ibid.

Taxpayer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute: without restoring to bona fide holders of bonds the consideration paid therefor: Graves v. Comrs., 135-49.

Where neither declaration of result of election by commissioners nor recitals in bonds show that a majority of voters of town voted in favor of subscription, purchasers of bonds, though bona fide and for value, will not be protected in a suit by taxpayers to restrain collection of taxes to pay same, unless jury shall find that question in affirmative: Claybrook v. Comrs., 114-453.

Validity of a special railroad tax can not be questioned, in action on sheriff's bond for failure to account for it, especially when it has been collected. If statute authorizing tax were unconstituional, or otherwise invalid, sheriff could not be permitted to retain money illegally collected under color of his office: McGuire v. Williams, 123-349.

Cases referring to, but not construing section: Comrs. v. Snuggs, 121-395; Comrs. v. Payne, 123-432; Comrs. v. Call, 123-308.

III. Charter Forfeited.

2563. By preference to shippers. In the event of any contract having been entered into by any railroad company in this state with any person or company, whereby preferences or exclusive rights

of transportation, either in priority or in arrangements, are given to such person or company, the attorney general is hereby instructed in institute proceedings against such railroad company for a forfeiture of its charter.

Code, s. 1969; 1865-6, resolution ratified December 14, 1865.

2564. By failure to begin in two years or to complete in ten. If any railroad corporation shall not within two years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and expend thereon ten per cent. of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease.

Code, s. 1980; 1871-2, c. 138, s. 43. See annotations under section 1196-1198.

Failure of railroad company to organize under act of incorporation within two years prescribed does not prevent valid organization thereafter, unless forfeiture has been declared in proceedings instituted by state: Railroad v. Olive, 142-257.

If legislature, with knowledge of grounds of forfeiture, by act remits penalty and continues its existence or deals with corporation as lawfully existing, such conduct is waiver of forfeiture: Atty. General v. R. R., 28-469.

Attorney general can not of his own motion bring action to vacate charter: Atty. General v. R. R., 134-481.

Existence of railroad corporation can not be attacked collaterally or questioned in action brought by it to condemn land: Railroad v. Lumber Co., 114-690—but where articles of incorporation are upon their face void, trial court will so declare, Railroad v. Stroud, 132-413.

2565. Company dissolved, owner or purchaser a corporation. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law.

Code, s. 2005. For reorganization after judicial sale, etc., see sections 1238, et seq.

For effect of sale prior to enactment, see State v. Rives, 27-297.

Corporate property and franchise must be sold together: James v. R. R., 121-527; Bradley v. Rwy., 119-927 (Appx.); Pipe and Foundry Co. v. Howland, 111-625; Gooch v. McGee, 83-59. Sale of railroad under second mortgage, and conveyance thereunder subject to first mortgage, does not extinguish corporate existence of company: James v. R. R., 121-523—nor release corporation from liability to public for manner in which railroad operated, Ibid—and in order that sale should work dissolution, another corporation must take the place, and assume obligations of old corporation,

Ibid—though, when this is done, corporation will be domestic corporation, Ibid. See also Julian v. Trust Co., 193 U. S., 93. Upon foreclosure of mortgage of railroad, purchaser takes rights acquired by company in relation to right of way under charter: Barker v. R. R., 137-214; Hendrick v. R. R., 101-617.

Effect of sale of the Western North Carolina Railroad company franchises and property under second mortgage, subject to first mortgage which was assumed by purchaser, was to place purchaser (the Southern Railway Company) in place of mortgagor in its relation to trustee of first mortgage, with right to run and operate road as agent of mortgagor, but old corporation was not extinguished but is still in existence and liable for damages caused by mal-administration of agent which liability can be enforced against property which it allows the "Southern," to use: James v. R. R., 121-523.

Sale and conveyance of property and franchises of Western North Carolina railroad company made by a special master to Southern Railway Co., a foreign corporation, under decree of foreclosure of second mortgage, subject to an existing first mortgage, did not ipso facto, under section 1238 of this Revisal, make the purchaser a domestic corporation, nor did such sale and purchase make Western North Carolina railroad an integral part of the Southern Railway corporation: Ibid.

IV. Corporate Powers.

2566. This chapter applicable to all railroads. All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. And his chapter shall govern and control, anything in any special act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, especially repealed.

Code, ss. 701, 1982; 1871-2, c. 138, s. 45. It is the policy of the legislature that the provisions of this chapter shall not in any material particular be repealed by implication; therefore the charter of a railroad company using such words as "this company shall be allowed to condemn land under the same rules and regulations as the N. C. Railroad Co." does not alter the effect of this section: Railroad v. Railroad, 106-16; Livermon v. R. R., 109-52.

Case referring to, but not construing, section: Rumbough v. Imp. Co., 106-461.

2567. General powers. Every railroad corporation shall have power:

1. Entry on lands; surveys.

To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

As between two companies, the first location belongs to the first one which defines and marks its route and adopts same for its permanent location by authoritative corporate action: Street Rwy. v. Railroad, 142-430, and cases cited.

For right of entry upon land and condemnation of same, see section 2575, et seq.

2. Voluntary grants.

To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

3. Holding property.

To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

See section 2575, et seq.

4. Grade of road

To lay out its road, not exceeding one hundred feet in width, and to construct the same, and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this chapter for lands taken for the use of the company.

For acquiring right of way by condemnation proceedings and compensation for timber used, etc., see subchaper Eminent Domain.

Railroad company can change grade of its roadbed or can remove it to any point on its right of way: Brinkley v. R. R., 135-654.

5. Obstructions not allowable.

To construct its road across, along, or upon any stream of water, watercourse, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch, but the com-

pany shall restore the stream or watercourse, street, highway, plankroad and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstructions across, in, or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon, or across any streets in any city without the assent of the corporation of such city.

150-312

For duty of railroad to construct bridges and maintain same which it has necessitated building, see section 2700—to construct and maintain draws in bridges, see section 2701—to provide new highways when old one interfered with, see sections 2568, 2569—to provide cattle guards, see sections 2601, 3753.

Penalty for failure to maintain crossing, see section 3753—to keep up certain bridges, see section 3775.

Railroad must make crossing as safe and convenient as if railroad had not been built: Raper v. R. R., 126-563.

Railroad may make change in county road that does not necessarily impair its usefulness: Brinkley v. R. R., 135-654.

''Highways'' might include any road used by the public as a mill or church road and in going to town: Goforth v. R. R., 144-570.

If railroad crossing over neighborhood road is kept in dangerous condition, causing mule to fall and injure plaintiff, he is entitled to recover: Ibid.

6. Crossing, intersecting, etc., of railroads.

To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. And every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in this chapter in respect to acquiring title to real estate.

Where railroad empowered to connect with another railroad at a certain city, the word ''at'' does not necessarily mean ''in'' the city: Purifoy v. R. R., 108-100.

One road can not enter on right of way of another for purpose of connecting therewith without previous agreement or condemnation proceedings: Railroad v. Railroad, 104-658.

Parol agreement to allow one railroad company to extend its track on right of way of another, for purpose of connecting therewith, is a mere license, revocable at will of licensor, and will not operate as an estoppel although licensee has entered and made valuable improvements: Ibid.

7. Right to carry persons and property.

To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

Charter of company conferring right to transport passengers and freight, and giving power to "farm out" right of transportation, authorizes company to execute valid lease of its property and franchises to another railroad company: Hill v. R. R., 143-539.

8. Erection of necessary buildings.

To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

9. Borrow money on mortgage.

From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the prinicpal due or owing thereon into stock of said company at any time under such regulations as the directors may see fit to adopt.

Railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, that is, to make and issue its bonds: Comrs. v. R. R., 77-289. **As to interest; usury,** see Ibid; also chapter Interest.

10. May lease rails and remove at end of term.

Any railroad, person or company may lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

11. May aid in the construction of connecting roads or branch lines; exception.

Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad

in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law.

12. May acquire or guarantee stocks or bonds of connecting line.

Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or an adjoining state connecting with it directly or indirectly.
in this or an adjoining state connected with it directly or indirectly, or an adjoining state connecting with it directly or indirectly. But no railroad or other transportation company or its officers shall acquire, hold or guarantee the bonds or stock of, or lease or be leased to, or purchase or buy or consolidate with or be merged into, any parallel or competing railroad or transportation company, nor shall any railroad or other transportation company or its officers sell any of its stock or bonds to any holding or voting company or its officers, whereby such consolidation or merger may be effected, and any such purchase, contract, merger or sale shall be void.

Where lessor railroad company is sued jointly with lessee company for damages, caused by alleged negligence of lessee, and after verdict lessor moves for judgment upon verdict, but makes no motion for new trial, and both motions are refused, and both defendants appeal from judgment rendered against them: Held, that effect of granting new trial to lessee is to vacate judgment as to both defendants: Tillett v. R. R., 115-662.

Where lease of property of railroad company extends beyond time fixed by charter for corporate existence of lessor, such lease is valid for period of corporate life of lessor, and will extend beyond that period if charter is renewed, and lessor's corporate existence is thereby extended, and by this process it may endure for the full term: Hill v. R. R., 143-539.

Lessor of railroad is liable for negligence of lessee in operation of road: Harden v. R. R., 129-354; Raleigh v. R. R., 129-265; Perry v. R. R., 128-473; Pierce v. R. R., 124-93; Benton v. R. R., 122-1009; Norton v. R. R., 122-937; Kinney v. R. R., 122-961; James v. R. R., 121-528; Tillett v. R. R., 118-1043; Logan v. R. R., 116-940; Aycock v. R. R., 89-321; Smith v. R. R., 130-344; Brown v. R. R., 131-455.

13. May establish hotels.

To purchase, lease, hold, operate or maintain eating-houses, hotels and restaurants for the accommodation of the traveling public along the line of their respective roads.

Code, s. 1957; 1885, c. 108; 1887, c. 341; 1889, c. 518; 1871-2, c. 138, s. 29; 1908, c. 119.

2568. Highways crossed. Whenever the track of a railroad constructed by a company shall cross a railroad, a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, the said company may take such additional lands for the construction of such road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors. Unless the lands so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in this chapter for acquiring title to real estate, and duly made by said corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highways, turnpike or plankroad may be held for highway purposes.

Code, s. 1954; 1871-2, c. 138, s. 26. **For liability of railroad, etc., to keep up bridges and crossings, see sections 2700, 2701.**

Railroad must make crossing as safe and convenient as if railroad had not been built: Raper v. R. R., 126-563. **By negligent construction is meant such an improper construction of crossing, whether arising from negligence, indifference or motives of economy, as unnecessarily increases danger of using public highway:** Edwards v. R. R., 129-79; Raper v. R. R., 126-563.

Railroad company may make a change in a country road that does not necessarily impair its usefulness: Brinkley v. R. R., 135-654.

"Highways" might include any road used by the public, as a mill and church road and in going to town: Goforth v. R. R., 144-570.

If railroad crossing over neighborhood road is kept in dangerous condition, causing mule to fall and injure plaintiff, he is entitled to recover: Ibid.

Crossing which the public have been habitually permitted to use is treated as a public highway crossing, and it is competent to prove the custom of defendant and the public in using it: Bradley v. Rwy. Co., 126-735.

One is warranted in assuming that railroad company has discharged its duty to the public by keeping crossing in safe condition: Tankard v. R. R., 117-560; Denmark v. R. R., 107-185; McAdoo v. R. R., 105-140; Scott v. R. R., 96-428.

2569. Not to obstruct roads or ways. Whenever, in their construction, the works of any of said corporations shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same.

Code, s. 1710; R. C., c. 61, s. 30; 1874-5, c. 83. **"Established roads or**

ways'' means ''recognized and customarily used roads and ways, less than highways:'' Goforth v. R. R., 144-569. **Road crossing kept negligently, plaintiff injured, entitled to recover:** Ibid.

Cases referring to, but not construing, section: State v. Lumber Co., 109-860; Bass v. Navigation Co., 111-455.

2570. When company may turn roads. In order to prevent the frequent crossing of such roads or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient.

Code, s. 1711; R. C., c. 61, s. 31; 1874-5, c. 83. **Railroad company may make change in a country road that does not necessarily impair its usefulness:** Brinkley v. R. R., 135-654.

2571. Damages paid, when road turned. For any injury done to the lands of persons by taking them under the preceding section, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands for railroads as in this chapter provided.

Code, s. 1712; R. C., c. 61, s. 32; 1874-5, c. 83.

2572. Established roads not impeded until new roads made. Before any part of an established road or way shall be impeded by any of said corporations, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change.

Code, s. 1713; R. C., c. 61, s. 33; 1874-5, c. 83.

2573. Route changed. The directors of every company may by a vote of two-thirds of their whole number at any time alter or change the route or any part of the route of their road if it shall appear to them that the line can be improved thereby, and shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; and no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of said city or town; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. And when any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or

material contributed to the construction of the road-bed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route.

Code, s. 1953; 1871-2, c. 138, s. 25; 1889, c. 391; 1893, c. 396, s. 3. **Variations in route do not affect identity of the corporate body, and right to exemption from taxation is retained:** Railroad v. Comrs., 88-519.

Vote of two-thirds of corporate authorities is not required when change of route ordered by corporation commission: Dewey v. R. R., 142-392. **Right to change route of railroad need not be given in charter; it may be given by special enactment or by the general railroad law:** Ibid.

A railroad company has a right to change grade of its roadbed or to remove it to any point on its right of way: Brinkley v. R. R., 135-654.

For changing route to go to union depot, see section 1097, subsection 3.

2574. Merger of; certificate to secretary of state; effect. Any railroad corporation or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely and without charge or diminution as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights

of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section. Provided, that no railroad or transportation company or its officers, now or hereafter doing business in this state, shall purchase, lease, absorb, take over, buy stock in, merge with or in any way secure an interest in a competing line of railroad or transportation company, nor shall any railroad or transportation company or its officers enter into any contract agreement or understanding with a competing line of railroad or transportation company calculated to defeat or which may defeat or lessen competition in this state, and any violation of this section shall make the corporation or persons so offending guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court, and all such contracts, purchases or sales shall be void. Neither this proviso nor subsection twelve of section two thousand five hundred and sixty-seven shall prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property.

Code, s. 1994; 1871-2, c. 138, s. 57; 1908, c. 119.

Law forming new corporation out of two existing corporations governs and controls its corporate functions and rights: Railroad v. Comrs., 88-519.

Act authorizing consolidation of railroad companies upon vote of majority of stockholders, allowing actual value for stock in lieu of stock in consolidated company, is valid: Spencer v. R. R., 137-107.

Under Act 1901, ch. 168, authorizing consolidation of certain railroads, the rights and powers of the several companies vested in the consolidated corporation: Railroad v. Olive, 142-257; Thomason v. R. R., 142-318.

For discussion of right of railroad to lease property, reguation of meetings for that purpose and rights of stockholders, see Hill v. R. R., 143-539; see also section 2567, subsec. 12.

V. Eminent Domain.

2575. What companies may exercise; land for union depots, double tracks, etc.; enforceable in state courts. Every railroad, street railway, plankroad, tramroad, turnpike, and canal company, for the purpose of constructing their road or canal, or any person operating an electric light plant, for the purpose of constructing and erecting wires or other necessary things, may at any time enter upon the lands through which they may desire to conduct their road or canal, and lay out the same as they may desire; and they may also enter on such contiguous land along the route as may be necessary for depots, warehouses, engine-sheds, workshops, water-

stations, toll-houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land, so entered on, such sum as may be agreed on between them. Telegraph, telephone, electric power or lighting, public water supply, flume and incorporated bridge companies, or persons operating or desiring to operate electric light plants may exercise the right of eminent domain under the provisions of this subchapter. Whenever any railroad company operating a line of railroad in North Carolina shall find it necessary to occupy any land for the purpose of getting to a union depot which has been ordered by the corporation commission, or for the purpose of maintaining, operating, improving or of straightening its line or of altering its location, or of constructing double tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, such company shall have the power to condemn all lands needed for such purpose under the provisions of this subchapter: Provided, however, that this power to condemn land shall be enforceable, and matters arising in regard thereto shall be tried only, in the courts created by or under the constitution of this state.

Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783. For right of eminent domain enjoyed by telegraph, telephone, electric street railway, electric power and electric light companies, see sections 1571-1577. For right of mill owners, see sections 2122, 2123. For right of canal companies, see sections 3983-3985a, 3990, 4008. For condemnation of land to build roads, see sections 2685, 2686, 2689.

Although there is no clause in constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although clause to that effect in constitution of United States applies only to acts by United States, and not to governments of states, yet principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina: Johnston v. Rankin, 70-550; State v. Glen, 52-321; Cornelius v. Glen, 52-512; Railroad v. Davis, 19-451.

Right of eminent domain can be exercised only in mode pointed out in statute conferring it: Allen v. R. R., 102-381; see annotations under section 2579.

Right of state to take private property under power of emient domain rests upon ground that there is a public necessity for such taking, and can only be exercised when law provides means of giving adequate compensation to owner: Dargan v. R. R., 113-596.

Title to a right of way can only be acquired by condemnation and compensation in manner provided by law or by formal deed of conveyance from owner; or by performance of some act or payment of some consideration by virtue of an executory agreement enforceable in equity; or by completing road over lands, and thereby exposing corporation to liability for

compensation, when such right and liability are provided by statute: Beattie v. R. R., 108-425.

Prohibition upon taking private property without compensation is no part of constitution, but is principal of natural equity: Johnston v. Rankin, 70-550.

Due process of law as applied to judicial proceedings, instituted for purpose of taking private property for public use, means such process as recognizes right of owner to just compensation for property taken, whether taken directly or indirectly: Phillips v. Tel. Co., 130-513; Dargan v. R. R., 113-596; Staton v. R. R., 111-278—and such compensation must be full, measured by its actual market value, Brown v. Power Co., 140-333.

Interest of land owner is preserved by payment into court of full assessed value of strip of land condemned, which is required before corporation can enter upon premises: Railroad v. Newton, 133-133.

Right of entry granted railroad company under this section is only for purpose of marking out route and designating building sites to end that parties may come to an intelligent agreement as to price: State v. Wells, 142-590.

LEGISLATIVE AUTHORITY OVER RIGHT OF. Method of taking land for public use is within exclusive control of legislature limited by organic law, and courts can not help injured land owner, where statute has been strictly followed, until question of compensation is reached: Durham v. Rigsbee, 141-128.

The question, what is a public use, is always one of law. Deference will be paid to legislative judgment as expressed in enactments providing for appropriation of property, but it will not be conclusive: Cozard v. Hardwood Co., 139-283.

Whenever a power is given by statute, everything necessary to make it effective or requisite to attain the end is inferred: Dewey v. R. R., 142-392.

Section giving to railroads, subject to order of corporation commission to build union depot, the express power to condemn lands, is a valid exercise of legislative power: Ibid.

In taking private property for use of public, as for public highway, legislature is not restricted to a mere easement in the property, but may take entire interest of individual, if, in the opinion of legislature, public exigency requires it: R. R. v. Davis, 19-451.

Legislature can authorize taking, levying assessment and payment of compensation to be made subsequently: Ibid.

TO WHOM RIGHT GRANTED. Railroad company is a private corporation, its outlays and emoluments being private property; but road constructed by them will be a public highway, and consequently they may, upon paying a fair compensation therefor, take private property, under sanction of legislature, for use of company, as being for public use: R. R. v. Davis, 10-451.

The Carolina Central Railroad has the power to institute procedings for condemnation of land necessary for uses of company: R. R. v. Carolina Central, 83-489.

While legislature has no power to authorize condemnation of private property for use of purely private corporations, nevertheless, where corporations, otherwise private, are clothed with powers and charged with duties which are in their nature public, they become quasi public corporations, and may, with legislative permission, exercise right of eminent domain: Bass v. Navigation Co., 111-439.

Land can not be condemned for use of private lumbering railroad: Cozard v. Hardwood Co., 139-283; Bass v. Navigation Co., 111-439.

Corporation organized for the transaction of business except railroad business, and empowered by its charter to build and operate "tramways or other roads, not meaning railway," has no power to build or operate a railroad, and has no capacity to take and use an easement for that purpose: Beasley v. R. R., 145-272.

Powers conferred upon railroad company by its charter must be exercised "in a lawful way," that is, in respect to those who suffer damage, with due regard for their rights: Thomason v. R. R., 142-300.

Railroad company has no right to enter on land for purpose of constructing its road until it has acquired right to do so by agreement with owner or by paying into court amount awarded by commissioners in condemnation proceedings duly had: Fayetteville Street Rwy. v. R. R., 142-423.

See also sections 1571-1577, 2122, 2123, 3983-2985a, 3990, 4008.

CORPORATIONS ENJOYING RIGHT, SUBJECT TO CONTROL. Where corporation has benefit of right of eminent domain, it is affected with a public use and must, to extent of public interest therein, submit to be controlled by public: Griffin v. Water Co., 122-206.

Though railroad companies fall within classification of private corporations, they are quasi-public and have no more authority to rid themselves of responsibility for performance of duties imposed upon them as inseparable from the privileges given them than they have to sell any property which is necessary for corporate purposes: Logan v. R. R., 116-940.

NATURE OF RIGHT ACQUIRED BY DEED OR CONDEMNATION. Generally right which railroads acquire in lands condemned or purchased for their ight of way amounts to an easement only and not to a purchase of estate of owner therein: Railroad v. Sturgeon, 120-225.

Railroad companies by condemnation proceedings acquire only an easement over lands condemned with right to use so much as is necessary for operation of its road: Phillips v. Tel. Co., 130-513.

Railroad company acquires, by statutory method, either of condemnation or by presumption, no title to land, but an easement to subject it to uses prescribed: Railroad v. Olive, 142-257.

A deed to right of way gives a railroad no more rights than it would have acquired by condemnation: Shepard v. R. R., 140-391.

Where a railroad enters on the land of another and builds its road, and pays the compensation fixed for an injury to the land in an action by the owner thereof, railroad acquires easement to use land to same extent as if it had acquired it by condemnation: Beasley v. R. R.,

Right of transporting persons or things over land of another for toll is but an easement united with a franchise, and is not distinguishable from other franchises: State v. Rives, 27-297.

Title of railroad to right of way once acquired can not be lost by occupancy as to any part of it by lapse of time: Purifoy v. R. R., 108-100; Railroad v. McCaskill, 94-746.

While mere nonuser of easement may not defeat or impair claim of railroad company to right of way for an unfinished line, yet, when such nonuser is accompanied by such acts of dominion for a long period by owner of servient lands as are inconsistent with nature of easement, and as indicate an intention to abondon it, easement will be lost and owner of fee will regain title: Beattie v. R. R., 108-425.

Party granting right of way to railroad upon consideration of benefits, with provision that if failure or neglect for five years to construct line, it should revert to grantor, right of defendant is restricted to time fixed: McDowell v. R. R., 144-721; Thomas v. R. R., 144-729—and where time limit has expired, defendant is confined to condemnation proceedings under statute: McDowell v. R. R., 144-721.

On foreclosure of mortgage given by railroad company, purchaser takes right that company had acquired in relation to its rights of way under its charter: Barker v. R. R., 137-214.

Where railroad company entered upon and constructed its road upon a street, thereby reducing width of latter, and it does not appear that it entered under any statutory authority, but only by license of city, abutting property owner who is endangered thereby may maintain a common law action for damages, to be assessed up to time of trial, or may sue for permanent damages inflicted by location and construction of road and, by so doing, confer upon defendant an easement to occupy street, as far as such abutter is concerned: White v. R. R., 113-610.

Railroad corporation having right to use land, or right of way over land, may maintain an action for its possession: R. R. v. McCaskill, 94-746.

Any subsequent use by owner of land condemned for right of way is subject to the after necessity of the use of the land by company for purposes granted under charter: Dargan v. R. R., 131-623; Thomason v. R. R., 142-318.

Grant of easement does not preclude grantor from such use of his land himself or permitting same to others, which is not in conflict therewith Lumber Co. v. Hines Bros., 126-254.

A railroad company may, if necessary to meet demands of its enlarged growth, cover its right of way with tracks and, in absence of negligence, operate trains upon them without incurring, in that respect, additional liability either to owner of land condemned or others: Thomason v. R. R., 142-318.

Railroad company, having acquired right of way of tramway and using it for railroad purposes, is liable to owner of fee for fair compensation and when this is paid, railroad will acquire same rights as by condemnation: Beasley v. R. R., 145-272.

A railroad company is entitled to so much of right of way as may be necessary for purposes of company, and denial by person in possession of a portion of right of way that portion in controversy is necessary for purposes of company does not raise an issue of fact to be determined by

a jury, as company is judge of necessity and extent of such use: Railroad v. Olive, 142-257.

Acquisition of right of way does not carry with it privilege of throwing stones, or other material, by blasting, to a distance of two hundred yards or more on lands of adjacent proprietor, whereby family of latter is exposed to danger while engaged in domestic duties: Blackwell v. R. R., 111-151.

A deed conveying to one a perpetual right of entry, right of way, and easements to locate, build a road, etc., over a strip of land, conveys an easement only in the strip, and the title, subject to the easement; remains in the owner: Beasley v. R. R., 145-272.

Contract in this case does not convey an easement, but, at most, only constitutes an executory contract to convey an easement whenever road should be located on and completed through lands, provided that result was produced within reasonable time: Beattie v. R. R., 108-425.

Railroad can not acquire title to easement by prescription: Narron v. R. R., 122-856.

GRANT OF EASEMENT PRESUMED. Where railroad company enters upon and constructs its track on land and owner does not institute an action therefor within two years, railroad will be presumed to have acquired an easement: Barker v. R. R., 137-214; R. R. v. Sturgeon, 120-225.

Presumption of a conveyance arose from act of possession and building road and owner's failure within two years to take steps to have his damages ascertained: R. R. v. McCaskill, 94-746.

Presumption of grant to railroad raised by its charter can not apply where deed from owner to railroad is executed within two years after location of road: Hickory v. R. R., 137-189.

Under statute raising presumption of grant to railroad two years after location of its track, burden of showing when track was located is upon defendant: Ibid.

Where charter of railroad provided that, in absence of contract with owner, it should be presumed that land over which road runs, with space of 100 feet on each side, has been granted to corporation, and corporation took deed for less than 100 feet within two years after its completion, this prevented limitation in charter from applying, and corporation got no title to land lying outside of deed, but within 100 feet of track, by lapse of two years: Dargan v. R. R., 113-596.

When charter provides that, in absence of any contract, corporation acquires title to 100 feet on each side of track, and if no claim for damages is brought in two years from completion of that part of road it is barred, the corporation has a valid title to right of way as its track is completed: Purifoy v. R. R., 108-100; Railroad v. McCaskill, 94-746.

BURDEN ADDITIONAL TO ORIGINAL EASEMENT, OWNER COMPENSATED. Condemnation for the purpose of building and operating a railroad did not deprive plaintiff of use of land except to extent that it was necessary for operation of road. For any additional burden she was entitled to compensation to be measured with reference to limited easement of railroad: Brown v. Power Co., 140-333, and cases cited on page 347.

Telegraph line along railroad and on right of way thereof is an additional burden upon land, for which land owner is entitled to just compensation: Hodges v. Tel. Co., 133-225; Phillips v. Tel. Co., 130-513—and evidence that it was necessary to the operation of road is immaterial, Hodges v. Tel. Co., 133-225.

A railroad company, owning an easement for trackage and similar purposes over plaintiff's lot, leased its entire road to defendant. Defendant had four other roads meeting at G, the town where plaintiff's lot was located: Held, that defendant was not entitled to use its easement for trackage or warehouse purposes for any traffic in which the lessor road had no part or interest without making compensation to plaintiff as for an additional burden on his land, but that additional traffic over lessor road, though originating on defendant's other roads, was not a subject of compensation: McCulloch v. R. R., 146-316.

Running of street cars over a bridge already constructed by railroad company within city limits and sufficient for ordinary uses of public, imposes an additional servitude upon bridge for which street railway company must render compensation by contributing to expense of maintenance and by providing necessary conveniences at intersection, as required by law: Railroad v. Street Rwy. Co., 120-520.

Additional burden placed upon street, right of abutting owner: Brown v. Electric Co., 138-533.

Construction of street-car track does not impose any additional servitude upon property fronting on street so occupied so as to necessitate condemnation proceedings against the owners: Hester v. Traction Co., 138-288; Merrick v. Street Rwy., 118-1081—provided the railway track is so constructed as not to shut abutter out or off with embankment, Merrick v. Street Rwy., 118-1081.

PRIORITY AS BETWEEN COMPANIES SEEKING SAME LOCATION. Property which has been appropriated to public use, railroad or other, may, under lawful authority and procedure, be condemned and so appropriated to another public use. But such second appropriation is entirely inconsistent with first, or practically destroys it, such power can only be exercised by reason of legislative authority given in express terms or by necessary implication: Fayetteville Street Rwy. v. R. R., 142-423.

Land acquired by one railroad company under right of eminent domain and unnecessary for exercise of its franchise or discharge of its duties, is liable to be taken for use of another railroad company: R. R. v. Carolina Central, 83-489.

Where grants to railroad companies are indefinite, leaving exact route to be selected by company, prior right will attach to that company which first located line; and, in absence of statutory regulations to contrary, first location belongs to company which first defines and marks its route and adopts same for its permanent location by authoritative corporate action: Fayetteville Street Rwy. v. R. R., 142-423.

Where priority of right has been secured by priority of location, it can not be defeated by rival company agreeing with owners and purchasing property: Ibid.

Making of a preliminary survey by an engineer of railroad company, never reported to company or acted upon, will not prevent another company from locating on same line: Ibid.

One road can not enter on right of way of another for purpose of connecting therewith without previous agreement, or condemnation proceedings: Railroad v. Railroad, 104-658.

Parol agreement to allow one railroad company to extend its track on right of way of another, for purpose of connecting therewith, is a mere license, revocable at will of licensor, and will not operate as an estoppel although licensee has entered and made valuable improvement: Ibid.

A provision in charter giving railroad company specific right to condemn old and abandoned road-beds does not apply to an old and abandoned roadbed over which another railroad has established a prior right of appropriation and which has become a part of the latter's right of way: Fayetteville Street Rwy. v. R. R., 142-423.

INJUNCTIVE RELIEF AGAINST INTERFERENCE WITH RIGHT OF WAY. A railroad company is entitled to injunctive relief against interference with right of way, without regard to solvency of persons interfering therewith: Railroad v. Olive, 142-257.

Court will in this case protect plaintiff's right to exclusive use of roadbed, by injunctive relief, as against defendant's claim to appropriate it for its own right of way: Fayetteville Street Rwy. v. R. R., 142-423.

Fact that one railroad occupies land which is claimed by another road as its right of way is not in itself an irreparable tort which will justify restraining defendant from using land until question of title can be tried, especially when it is not alleged that defendant is insolvent, and where it appears that there is room on disputed territory for construction of both roads: R. R. v. Mining Co., 112-661.

Before a railroad company is entitled to invoke injunctive power of court, it must show clearly that it has a right of way over lands in controversy; the extent of such right; and that defendants are obstructing or threaten to obstruct its use: Railroad v. Olive, 142-257.

ADDITIONAL RIGHTS UNDER UNION DEPOT ACT. Union depot statute was intended to apply to all cities and towns in state, where, in legal discretion of commissioners, the move is practicable, etc.: Dewey v. R. R., 142-392. It confers on railroads the incidental right to make such changes in their line and route as are necessary to accomplish purpose designed and to make depot available and accessible to traveling public as contemplated by act: Ibid.

Where corporation commission selects union depot site, railroads will not be enjoined, at instance of citizens and property-owners, from erecting depot, either on ground that city is being sidetracked or that their property will be damaged by proposed change: Ibid.

2575a. Power to condemn does not abridge state's right to control. No rights granted or acquired under the provisions of section two thousand five hundred and seventy-five for the condemnation of land for the purpose of getting to a union depot which has been

ordered by the corporation commission, or for the purpose of maintaining, operating, improving or of straightening its line or of altering its location, or of constructing double tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, shall in any way destroy or abridge the rights of the state to regulate or control such railroad company or to exclude foreign corporations from doing business in this state.

1907, c. 458.

2575b. Law giving additional powers of condemnation to railroads for double tracks, etc., construed as entirety. Chapter four hundred and fifty-eight of the Public Laws of one thousand nine hundred and seven, granting to railroads additional powers to condemn land and declaring the powers granted not to destroy or abridge the rights of the state to regulate and control such railroads and providing that the power to condemn land therein granted shall be enforceable, and matters arising in regard thereto shall be tried, only in the courts created by or under the constitution of this state, shall be construed as an entirety and if any part thereof be declared to be unconstitutional the entire chapter shall be void.

1907, c. 458.

2576. May take material from adjacent lands. For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the company may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, water or earth, which may be deemed necessary: Provided, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees.

Code, s. 1702, R. C., c. 61, s. 22; 1874-5, c. 83; 1907, c. 39, s. 2. **In constructing crossing, railroad company might appropriately and reasonably use plank, timber, earth, etc., to make same such as statute allows and intends, and as public ease, convenience and safety require. It might lawfully use such things in forming and securing incline on each side of railroad track, so as to provide an easy and safe passway across it for carriages, wagons, horses, etc.:** State v. Lumber Co., 109-862.

Owner of land is entitled to compensatory damages for cutting of crossties on land not included in right of way, and negligent filling of ditches, instead of building bridges over them, in constructing roads necessary to remove timber, and for breaking down fences: Waters v. Lumber Co., 115-648.

Fact that railroad company supervised cutting of timber and issued orders which contractor was bound to obey showed affirmatively a state of subjection on contractor's part that made him, in law, servant of railroad: Waters v. Lumber Co., 115-649.

2577. How material paid for. If for the value of the damages done to the owner by reason of the acts in the preceding section mentioned, the parties may be unable to agree, the same shall be valued in the manner hereinafter provided.

Code, s. 1703; R. C., c. 61, s. 23; 1874-5, c. 83.

2578. Dwelling-house, burial grounds, etc., can not be condemned. No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground. No yard, garden or dwelling-house shall be condemned under the provisions of chapter four hundred and fifty-eight of the Public Laws of one thousand nine hundred and seven relating to union depots and establishment of terminals, unless the corporation commission, upon petition filed by the railroad seeking to condemn, shall, after due inquiry, find that the railroad company cannot make the desired improvement without condemning the yard, garden or dwelling-house, except at an excessive cost.

Code, s. 1701; R. C., c. 61, s. 21; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, c. 458. **Charter of Western N. C. Railroad Company does not give it right to enter upon and appropriate a yard, garden or dwelling-house for purposes of road; and when such entry or appropriation is made, owner may maintain civil action for trespass, and is not compelled to resort to statutory remedy provided for condemnation of lands; nor will a recovery in such action vest in the corporation any easement or property in the premises:** Fore v. R. R., 101-526.

When provision in charter or deed granting right of way prohibited it from entering upon yard, garden, burial-ground, etc., of defendants, but no portion of right of way was so used at date of acquisition, right of company would not be interfered with by fact that it has been appropriated to such use since: Railroad v. Olive, 142-257; Dargan v. Railroad, 131-625.

A house located on the right of way does not become property of company: Shields v. R. R., 129-1.

2579. Proceedings when parties can not agree. If any company possessing by law the right of eminent domain in this state is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this chapter.

Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1901, cc. 6, 41, s. 2; 1899, c. 64; 1903, cc. 562, 159, s. 16; 1871-2, c. 138, s. 13. **This and the next succeeding sections have taken away the common-law remedy of "trespass quare clausum fregit," and the damages sustained by the owner of land must be assessed in manner prescribed in this subchapter:** Holloway v. Railroad, 85-452; see also Railroad v. McCaskill, 94-746, construing to like

effect act incorporating Carolina Central R. R. Co.; also Allen v. Railroad, 102-381.

In case parties can not agree, then company may proceed to condemn land, and company does not acquire the right to enter for purpose of constructing road until amount of appraisement has been paid into court: State v. Wells, 142-590; Railroad v. Newton, 133-133.

Statutory method of condemning right of way can be exercised only when parties are unable to agree upon terms of acquirement: Allen v. R. R., 102-381.

Statutory remedy for compensation for land taken for right of way supersedes common law remedy: Dargan v. R. R., 131-623.

Railroad company may dispense with assessment of damages by commissioners for passing over land of proprietor, by promising to settle and to pay it without assessment, and land owner may recover upon special promise: Plott v. R. R., 65-74.

Where charter of railroad contains provision as to manner of condemning land for right of way, method pointed out by such provision, and not that prescribed by general law, must be followed: R. R. v. Ely, 95-77.

Where land was conveyed to trustee for separate use of married woman, latter and her husband can not convey to railroad company right of way over land: Narron v. R. R., 122-856.

No one can grant an easement in land who can not convey fee simple: Ibid.

DECISIONS OF INTEREST UNDER SPECIAL ACTS. Statutory provision allowing private property to be taken under right of eminent domain must be strictly pursued, and right of owner to obtain compensation depends on whether corporation has obtained a vested right: Dargan v. R. R., 113-596.

Stipulation in charter of railroad that all claims for damages for land taken by corporation must be made within two years, is a positive statute of limitations, and bars all claims not made within that time, when parties are sui juris: R. R. v. McCaskill, 94-746.

Where corporation, having alone power to institute proceedings for assessment of damages and benefits resulting from its exercise of eminent domain, fails and refuses, on demand of owner, to do so, owner may treat corporation as a trespasser and sue in ejectment, if he elect to do so; otherwise appropriate remedy is by mandamus to compel corporation to assess damages as provided by its charter: McDowell v. Asheville, 112-747.

Railroad company has right to enter upon and take possession of land before payment to owner, which is needed in building of its road, when it is authorized by its charter to do so: R. R. v. McCaskill, 94-746.

Action against telegraph company for erection of poles on land of plaintiff, if brought within three years of trespass, is not barred by limitation: Hodges v. Telegraph Co., 133-225.

An interest in entire right of way does not vest in corporation unless it takes actual possession in exercise of privilege granted it; but it seems that, where corporation enters, its constructive possession extends to boundary of right of way given in charter: Dargan v. R. R., 113-596.

Section limiting actions for damages for occupation of land by railroad company to five years and exempting from its operation companies chartered prior to 1868, is not in violation of fourteenth amendment of constitution of United States, prohibiting any state from denying to any person the equal protection of the laws: Narron v. R. R., 122-856.

Where a company has constructed railroad between termini named in its charter and amendments thereto, fact that it is building sidetracks does not prevent bar of landowner's claim: Railroad v. Olive, 142-257.

Where enjoyment of easement by railroad in lands of land owner has effect of injuring adjoining lands of owner, damages are recoverable for such injury: Liverman v. R. R., 114-692.

Permanent damages may be awarded a land owner who is injured by putting of telegraph poles on his land: Phillips v. Tel. Co., 130-513.

Fact that method prescribed for assessing damage caused by taking land for construction of sewage plant was illegal is not ground for restraining construction of plant: Vickers v. Durham, 132-880.

Where remedy is given to land owner in charter of company for getting compensation to land taken for use of company under its charter, landowner must pursue this remedy, as statutory remedy by implication takes away that at common law: R. R. v. McCaskill, 94-746; Jones v. Comrs, 130-452; Dargan v. R. R., 131-623; McIntire v. R. R., 67-278.

Provisions of general railroad act are applicable to Durham and Northern Railroad company, notwithstanding its charter prescribes that it shall have power to condemn land under the "same rules and regulations as are prescribed for the North Carolina Railroad company:" Railroad v. Railroad, 106-16.

2580. Petition filed; contains what; copy served. For the purpose of acquiring such title such company or persons operating an electric light plant or system, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state that the company is duly corporated, and that it is the intention of the company or person in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land or that the land is desired for the purpose of operating an electric light plant; that the land described in the petition is required for the purpose of conducting the proposed buiness, and that the company has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the company or the owner of the land, must also state the names and places of residence of the

parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, or as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or incumbrances on said real estate as the company or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court.

Code, s. 1944; 1893, c. 396; 1871-2, c. 138, s. 14; 1907, c. 783, s. 3. **Petitioner must allege that it has "surveyed the line or route of its proposed road, and make a map or survey thereof, by which such route or line is designated, and that it has located its said road according to such survey, and filed certificates of such localities, signed by a majority of its directors, in the clerk's office," etc., as required by this section, otherwise proceeding will be dismissed:** Railroad v. Railroad, 106-16.

148-69

Statement required that plaintiff has not been able to acquire title to land, and reason of such inability, is the allegation of a preliminary jurisdictional fact, not triable by jury, a question of fact for decision of clerk: Durham v. Rigsbee, 141-128.

Not essential that particular language of statute be used, if facts alleged plainly show that petitioner has been unable to acquire title, and reason why: Ibid.

Not necessary that petition filed by landowner shall state that petitioners and company have failed to come to an agreement as to sum to be paid, such averment being necessary only when railroad company is actor in such proceedings: Hill v. Mining Co., 113-259; Allen v. R. R., 102-381.

Burden of showing that company intended in good faith to construct road and had complied with requirements prescribed by law for condemnation of rights of way, is on the petitioner: Railway Co. v. Lumber Co., 132-644.

A special proceeding for purpose of condemning land for railroad purposes must be begun by issuance of summons: Railway Co. v. Lumber Co., 132-644.

The court may allow an amendment to the complaint by the introduction of a better profile: Railroad v. Newton, 133-132.

Fact that cotenant of land has granted right of way to railroad company will not prevent another owner from instituting proceedings for assessment of damages sustained by him, nor will such fact prevent cotenant, who has made such grant, from becoming party to proceeding, and having his rights adjusted thereunder: Hill v. Mining Co., 113-259.

Where petition in proceeding for assessment of damages for right of way of railroad enumerates various owners of land, and such owners voluntarily made themselves parties, a demurrer by defendant company that there was defect of parties when petition was first filed is untenable: Ibid.

Petition, whether filed by owner or by company, should state names of all persons interested, and all should be in court before commissioners are appointed: Ibid.

Where charter of railroad provided it might condemn land by proceeding before court of record having common law jurisdiction: Held, that clerk of superior court has jurisdiction: Railroad v. Railroad, 106-16.

2581. How process served. The summons and a copy of the petition shall be served in the same manner as in special proceedings.

Code, s. 1944; 1871-2, c. 138, s. 14. **Proceedings hereunder are special proceedings and must be commenced by summons:** Rwy. Co. v. Lumber Co., 132-644, **overruling** Click v. R. R., 98-390.

Failure to serve a map and profile with the summons in condemnation proceedings as required by section 2599 of this Revisal may be cured by amendment: State v. Wells, 142-590.

Cases referring to section: Railroad v. Newton, 133-132; Railroad v. Platt land, 133-266; Phillips v. Tel. Co., 130-526; Hill v. Mining Co., 113-261.

2582. Service where parties unknown. If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and can not by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situate, one in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in said county, then in a newspaper printed in the city of Raleigh.

Code, s. 1944, subsec. 5.

2583. When court may direct how papers to be served. In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings.

Code, s. 1944, subsec. 7.

2584. Answer to petition; hearing; commissioners appointed. On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of

the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners.

Code, s. 1945; 1871-2, c. 138, s. 15 **Order appointing commissioners to assess damages is interlocutory, and no appeal to supreme court until after final judgment upon report of commissioners:** Railroad v. Bailey, 143-380; Railroad v. Newton, 133-136; Hendrick v. R. R., 98-431; Comrs. v. Cook, 86-18; Tel. Co. v. Railroad, 83-420; Railroad v. Warren, 92-620.

Judge of court may appoint appraisers either in term or vacation, while clerk can do so only in vacation, and then only as representing court: Click v. R. R., 98-390.

A writ of prohibition will not be granted to prevent clerk of court from hearing application for condemnation of right of way for railroad: Railroad v. Newton, 133-136.

Where articles of incorporation of railroad company are upon their face void, trial court will so declare in proceding to condemn land by right of eminent domain claimed thereunder: Railroad v. Stroud, 132-413.

In fixing question of compensation to land owner for right of way condemned to use of railroad, commissioners do not invade province that, under the ancient law, belonged exclusively and peculiarly to jury: R. R. v. Parker, 105-246; State v. Jones, 139-613; Railroad v. Davis, 19-451.

As to trial by jury of issues raised before clerk, where same demanded before commissioners appointed, see Railroad v. Parker, 105-246; Railroad v. Newton, 133-133.

2585. Powers and duties of commissioners. The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpœnas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet except by the appointment of the court or pursuant to adjournment, they shall cause ten days' notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, of any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days.

Code, s. 1946; 1871-2, c. 138, ss. 16-18; 1891, c. 160. Damages caused by diversion of water are not covered by statute providing for acquirement of right of way by railroad companies: Ward v. R. R., 112-168.

Where land is taken under section 2567 of this Revisal, commissioners are not only to fix amount of compensation, but they must determine, in event of disagreement, "the points and manner" of physical connection which is sought to be made: Railroad v. Railroad, 104-665; Railroad v. Love, 81-434.

Finding of commissioners that land taken for railroad purposes received no special benefit is conclusive: Railroad v. Platt Land, 133-266.

An injunction will not lie to restrain railroad company from entering upon land before appraisement of damages and payment thereof: Railroad v. Newton, 133-132.

This section has no references to trespasses committed outside of the right of way in building the road, and for such trespasses the corporations are liable in civil action for damages: Bridgers v. Dill, 97-222.

ARRIVING AT COMPENSATION. Owner of land condemned is entitled, by way of compensation, to its actual market value: Brown v. Power Co., 140-333—and the market value of property is the price which it will bring when offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it, Ibid. All the capabilities of property and all the uses to which it may be applied or for which it is adapted may be considered and not merely condition it is in at time and the use to which it is then applied by owner: Ibid. Water power on the river must be considered as an element of value: Ibid. If a tract of which whole or part is taken for public use possesses a special value to owner, which can be measured by money, he is entitled to have that value considered: Ibid.

Rule for assessment of damages with regard to benefit to land arising from construction of road, as settled in this state, is: Jury shall not deduct from, or set off against, damages special to land, part of which is taken, any benefits arising from railroad under construction, which are common to owner and all other persons in vicinity, but may deduct or set off any benefit peculiar to land: Railroad v. Wicker, 74-220; Railroad v. Smith, 99-131; Railroad v. Platt Land, 133-266.

In condemnation proceedings there can be no recovery of damages incident to entry, such as for destruction of crops and the like, nor for use and occupation before plaintiff acquired title: Liverman v. R. R., 114-692; Hodges v. Tel Co., 133-225; but see Haislip v. Railroad, 102-376.

In estimating benefits to owner of land on line of road, he is to have benefit, without charge, of all advantages common to others in community: Haislip v. R. R., 102-376.

Landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which railroad is constructed: Hendrick v. R. R., 101-617.

Owner is entitled to recover for expense of additional fencing of cultivated lands made necessary by reason of construction of road; but, as he is not required by law to fence uncleared or uncultivated land, and ex-

pense of fencing such, should it at any future time be cleared or cultivated, is too remote and uncertain to be estimated, same should not be taken into consideration: R. R. v. Wicker, 74-220.

Where a railroad condemns the whole of a dedicated street, abutting owner is entitled to compensation for full value of land taken less value of any benefits arising therefrom peculiar thereto: Railroad v. Land Co., 137-330.

Sum assessed against owner of land for benefits arising from railroad can not exceed that which may be assessed in his favor for damages: Railroad v. Smith, 99-131.

Damages to land caused by erection of waterway by railroad company, if skilfully constructed, are included in compensation for, and pass by grant of, easement, but grantee of easement shall not inflict unnecessary injury upon servient owner: Adams v. R. R., 110-325.

Tax list is not admissible to show the value of the land: Railroad v. Land Co., 137-330.

As to how damages to church property assessed in condemnation proceedings, see R. R. v. Church, 104-525.

Evidence to show value of land by its location and surroundings is admissible: Railroad v. Land Co., 137-330.

2586. Report of commissioners, form of. When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows.

To the Clerk of the Superior Court of ..... County:

We, ..., commissioners appointed by the court to assess the damages that have been and will be sustained by ....., the owner of certain land lying in the county of....., which the.....company proposes to condemn for its use, do hereby certify that we met on..... (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the works of the company, and all other inconveniences likely to result to the owner. we have estimated and do assess the damages aforesaid at the sum of $.....

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of $.....

Given under our hands, the ..... day of....., A. D. .....

Code, s. 1700; R. C., c. 61, s. 17; 1874-5, c. 83. **Not necessary that commissioners appointed to assess benefits and damages should set forth in their award particulars in which they consisted:** R. R. v. Smith, 99-131.

Report of commissioners is not invalid because it does not contain description of land, as that can be ascertained by reference to location of roadbed and right of way: Hanes v. R. R., 109-490; but see R. R. v. Land Co., 137-336.

2587. Exceptions to report; hearing; appeal; when title vests; restitution, when. Within twenty days after filing the report the company or any person interested in the said land may file exception to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said company may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the company, and upon the payment by said company of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the company aforesaid. A certified copy of such judgment under the seal of the court shall be registered in the county where the land is situated, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings, as deeds for land are now allowed to be read in evidence. All real estate acquired by any company under and pursuant to the provisions of this chapter, for the purpose of its incorporation, shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to said company. And the company shall have no right to hold said land not condemned, but shall surrender the possession of the same on demand to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such exceptions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings.

Code, s. 1946; 1893, c. 148. 148-57

Finding of commissioners that land taken for railroad purposes received no special benefit is conclusive: Railroad v. Platt Land, 133-266.

Nothing to contrary appearing, it will be presumed that commissioners acted upon proper rules in estimating assessments: R. R. v. Smith, 99-131.

Where report excepted to and clerk sets aside appraisement it seems that he may fix the compensation: Durham v. Rigsbee, 141-128.

No appeal from clerk to judge at chambers on exceptions to report of commissioners: Railroad v. Stewart, 132-248.

Formerly payment of the compensation was not required before entry. Code section 1946 changed this as to railroads, by requiring the company to pay into court sum assessed before entry on the right of way: Railroad v. Newton, 133-133; State v. Wells, 142-590.

Railroad company acquires, with lands condemned for purposes of construction and operation of road, all rights and privileges which appertain to it at time of condemnation: Willey v. R. R., 98-263.

Motion to file exceptions to report nunc pro tunc may be allowed in discretion of court: Rwy. Co. v. King, 125-454—and an order allowing such motion is interlocutory, and an appeal is premature, Ibid.

Indictment for wilful trespass will lie against employee of railroad company for entry after being forbidden on land which company is seeking to condemn, entry being for purpose of constructing road and before an appraisement has been made, although restraining order against such trespass would be refused: State v. Wells, 142-590.

While judge can not, upon exceptions filed to report of commissioners appointed to assess damages caused by location and construction of railway, alter report by inserting different amount as damages, or annul order appointing commissioners and submit matter to a jury, yet he has discretionary power to confirm or set aside such report, and may recommit question to same, or other commissioners, and in aid of this power he may hear affidavits: Hanes v. R. R., 109-490; but see Durham v. Rigsbee, 141-128.

On removal of proceeding before clerk to superior court, objections may be raised on trial in superior court that were not raised before clerk: Railroad v. Stroud, 132-413.

Judgment should definitely fix the land over which the road is located and width of right of way: Beal v. R. R., 136-298.

Legislature has power to provide that neither party shall appeal from award of commissioners appointed under charter to assess damages to land for right of way, and if charter does provide for an appeal, it must be taken within time and in manner therein provided: R. R. v. Ely, 95-77.

Appeal in this case carries up only question of compensation and defendant can go forward with improvements: Johnston v. Rankin, 70-550.

2588. Jury trial on exceptions to report, when. In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded.

1893, c. 148. See Durham v. Rigsbee, 141-133; Railroad v. Newton, 133-134. Trial de novo: Phifer v. Railroad, 72-433.

2589. When benefits exceed damage, company pays costs. In any case where the benefits to the land caused by the erection of the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant are ascertained to exceed the damages to the land, then the said company shall pay the costs of the proceedings except as provided in section one thousand two hundred and sixty-nine, and shall not have a judgment for the excess of benefits over the damage.

1891, c. 160.

2590. Title of infants, persons non compos, and trustees without power of sale, acquired. In case any title or interest in real estate required by any company for the purpose of its corporation shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such company for the purpose of its incorporation, on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same.

Code, s. 1956; 1871-2, c. 138, s. 28. See also sections 1798, 1800, 2518.

2591. Rights of claimants of fund determined. If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.

Code, s. 1947; 1871-2, c. 138, s. 19. **Where proceedings are infra vires, condemnation and appropriation to public use must stand, and the question as to who is entitled to damages awarded can not be raised in an action for land itself:** Harkins v. Asheville, 123-636.

2592. Attorney for unknown parties appointed pleadings amended; new commissioners appointed. The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse, neglect to serve or be incapable of serving.

Code, s. 1948; 1871-2, c. 138, s. 20. **Counsel fees authorized to be taxed in proceedings to condemn lands for railway uses can only be taxed in cases where court is directed to appoint an attorney to represent party in interest who is unknown or whose residence is unknown:** R. R. v. Goodwin, 110-175.

2593. Court may make rules of procedure in. In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts.

150-99

Code, s. 1949; 1871-2, c. 138, s. 21.

2594. Change of ownership pending proceeding. When any proceedings of appraisal shall have been commenced, no change of ownership by volunary conveyance or transfer of the real estate or any interest therein or of the subject matter of the appraisal, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made.

Code, s. 1950; 1871-2, c. 138, s. 22. **[There are no decisions within the scope of the law of this section. The annotations appearing here are so placed simply for the lack of a more appropriate place to put them.]**

A purchaser of land subsequent to taking as right of way may recover

permanent damages for easement taken and company thereby acquires easement and right to maintain its line thereon: Phillips v. Tel. Co., 130-513; Beal v. R. R., 136-298.

Purchaser, at mortgage sale, of land over which railway has secured right of entry from mortgagor in possession, while not entitled to damages incident to act of entry, might recover compensation for land appropriated to use of company: Livermon v. R. R., 109-52.

Conduct of company in relation to right of way has been such as to justify belief on part of plaintiff, when he bought in 1869, that purpose of completing road had been abandoned: Beattie v. R. R., 108-425.

As plaintiff had no notice of contract signed by C., his bargainor, fact that grading had been done on land did not preclude plaintiff from claiming damage when grading should be completed: Beattie v. R. R., 108-425.

Until a purchase or condemnation, corporation's occupation is without title, and conveyance of land will pass to vendee right to compensation for damages: Livermon v. R. R., 109-52.

Damages incident to act of an unlawful entry upon land by a railway corporation are personal to owner of land and do not pass by his subsequent conveyance of premises: Livermon v. R. R., 109-52.

Where plaintiff owns lot subject to right of way conveyed to railroad company by plaintiff's grantor, railroad company holds only right to use so much of right of way as is necessary for its purpose, and, though company or its lessee can not be barred by statute of limitations in case it should become necessary to occupy more of right of way for purposes incident to use of road, statute is no protection in occupying more land, though within limits of right of way, for trackage, etc., for other purposes: McCulloch v. R. R., 146-316.

2595. Defective title, how cured. If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency, and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the company delays or omits to prosecute the same.

Code, s. 1951; 1871-2, c. 138, s. 23.

2596. Title to state lands acquired. The secretary of state shall have power to grant to any railroad company any land belonging

to the people of this state which may be required for the purposes of its roads, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon.

Code, s. 1955; 1871-2, c. 138, s. 27. **For condemnation for water supplies, see sections 3060, 3061, 3062.**

2597. Widths which may be condemned for certain purposes. 1. *Right of way of railroad.*—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. *Plankroads, etc.*—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike; or greater width than sixteen feet for the use of any flume.

3. *Depot or station.*—No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike, flume or canal shall be condemned at one place for a depot or station; provided that more than two acres may be condemned by a railroad company for yard or terminal facilities if required for due operation of the railroad.

Code, ss. 1707, 1708, 1709; R. C., c. 61, ss. 27, 28, 29; 1852, c. 92; 1874-5, c. 83; 1907, c. 39, s. 3; 1907, c. 458.

When railroad company acquires right of way it becomes invested with power to use it, not only to extent necessary to meet present needs but such further demands as may arise from increase of its business and proper discharge of duty to public: Railroad v. Olive, 142-257; Thomason v. R. R., 142-318; Railroad v. Sturgeon, 120-225; Phillips v. Tel. Co., 130-513.

Grant of easement does not preclude grantor from such use of his land himself or permitting same to others which is not in conflict therewith: Lumber Co. v. Hines Bros., 126-254.

Right of way of specified width must be located and constructed in order to be exclusive: Lumber Co. v. Hines Bros., 126-254.

Railroad company is not negligent in failing to cut down bushes or weeds on right of way beyond portion over which it is exercising actual control for corporate purposes; but it is required to keep right of way clear of such growth to outside of side ditches on either side of tracks: Ward v. R. R., 109-358.

While land included in right of way of railroad company, not necessary for purposes of company, may be cultivated by servient owner, crop

must not be of such inflammable or combustible nature, when matured or maturing, as to endanger safety of company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from company's engines, for, in such case, company will have right to enter and remove such crops: Railroad v. Sturgeon, 120-225.

Where complaint in ejectment by railroad to recover right of way fails to allege that necessity for it exists, action should be dismissed: Railroad v. Sturgeon, 120-225; see R. R. v. McCaskill. 94-746.

Under charter of Wilmington & Weldon Railroad Co., upon payment of damages assessed for right of way, land covered by road, and sixty-five feet from base of road on each side, becomes vested in company in fee simple: Haislip v. R. R., 102-376.

Negligence to permit inflammable material to remain near company's track and liable to ignite from emitted sparks: Aycock v. R. R., 89-321.

Where charter provided that title to condemned land should remain in corporation as long as it was used by such corporation, but when it ceased to be used it should revert: Held, that, under charter, corporation was not required to use every part and parcel of condemned land at once, and a permissive use of a portion of such land does not deprive corporation of right to take possession of land when needed for purposes of corporation: R. R. v. McCaskilll, 94-746.

2598. No railroad, etc., to be established unless authorized by law. If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported. This section shall not apply to any narrow-guage railroad or tramroad nor toll roads made and established and maintained solely by the owners of the lands upon which said roads may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad.

Code, s. 1717; R. C., c. 61, s. 37; 1874-5, c. 83; 1901, c. 282; 1907, c. 531.

VI. Construction.

2599. Map or route served with petition. Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the

heights of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways.

Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; 1871-2, c. 138, s. 24. **Failure to serve a map and profile with the summons in condemnation proceedings as required by section 2599 of this Revisal may be cured by amendment:** State v. Wells, 142-590.

2600. Map of railroad made and filed. Every railroad corporation shall, within a reasonable time after their road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and file the same in the office of the corporation commission. Every such map shall be drawn on a scale and on paper to be designated by the corporation commission, and certified and signed by the president or engineer of such corporation.

Code, s. 1977; 1871-2, c. 138, s. 41. **The filing of a map and profile of route of railroad and of land condemned for its use with corporation commission is for information of that body and is not required as part of a correct and completed location:** Fayetteville Street Rwy. v. R. R., 142-423.

Profile required to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned: Railroad v. Stroud, 132-413.

Where line of railroad is clearly defined by existence of old roadbed which is entered on and staked out by agents of company, and route so marked is approved and adopted by directors as its premanent location, in such case a survey by engineer is not essential: Fayetteville Street Rwy. v. R. R., 142-423.

Where railroad was completed through locus in quo prior to act of 1872, it was not necessary to validity of location that map of route should be filed: Purifoy v. R. R., 108-100.

2601. Cattle guards; plantation roads. Every incorporated company owning, operating or constructing, or which shall thereafter own, operate or construct, or any company which shall hereafter be incorporated, and shall own, operate or construct any railroad passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall, at its own expense, construct and constantly maintain in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from said enclosed land, and they shall also make and keep in constant repair crossings to any plantation road thereupon. Every such corporation which shall fail to erect and constantly maintain such cattle guards and crossings shall be liable to an action for damages to any party aggrieved.

Code, s. 1975; 1883, c. 394, ss. 2, 3. **See annotations under section 2568. Railroad companies must maintain a safe and convenient crossing at**

roads and streets, making it, as far as they can, as safe and convenient to the public as it would have been had railroad not been built: Raper v. R. R., 126-563.

2602. When two companies may jointly construct a line. Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed.

Code, s. 1983; 1871-2, c. 138, s. 46.

2603. When may be constructed partly in another state. Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought o be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors, and the sections of said railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state.

Code, s. 1984; 1871-2, c. 138, s. 47.

VII. Servants and Police.

2604. Conductors and other employees to wear badge, when on duty. Every conductor, baggage master, engineer, brakeman, or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property.

Code, s. 1958; 1871-2, c. 138, s. 30.

2604a. Conductors and station agents have police power; company liable for their unlawful acts. All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of the state of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall only have such power on board of their respective trains or their railroad right-of-way, and the agents at their respective stations; and said conductors and agents may cause any person or persons so arrested by them to be detained and delivered to the proper authority for trial as soon as possible, Nothing contained herein shall operate or have the effect to relieve any such railroad company from any civil liability now existing by statute or under the common law for the act or acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred.

1907, c. 470, ss. 3, 4.

2605. May apply to governor to appoint police. Any corporation operating a railroad on which steam or electricity is used as the motive power, or any electric or waterpower company or construction company may apply to the governor to commission such persons as the said corporation may designate to act as policemen for said corporation.

Code, s. 1988; 1871-2, c. 138, s. 51; 1907, c. 128.

2606. Governor may appoint, and issue commission. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to such person or persons so appointed a commission to act as such policemen.

Code, s. 1989; 1871-2, c. 138, s. 52.

2607. Oath and powers of special policemen. Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath; such oath, with a copy of the commission, shall be filed with the corporation commission and a certificate thereof by its clerk shall be filed with the clerk of each county through or into which the railroad for which such policeman is appointed may run or in which the said company may be engaged in work and in which it is intended he shall act, and such policeman shall severally possess within the limits of the county all the powers of policemen in the several towns, cities and villages in which they shall be so authorized to act as aforesaid: Provided, that every policeman appointed under this and the two preceding

sections shall, before entering upon the duties of his office, enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his said office, with good and sufficient surety, to be passed upon and accepted by and filed with the corporation commission.

Code, s. 1990; 1871-2, c. 138, s. 53; 1907, c. 128, s. 2.

2608. Police to wear badge when on duty. Such railroad police shall, when on duty, severally wear a metallic shield with the words "Railway Police" and the name of the corporation for which appointed inscribed thereon, and said shield shall always be worn in plain view except when employed as detectives.

Code, s. 1991; 1871-2, c. 138, s. 54.

2609. Compensation of police. The compensation of such police shall be paid by the companies for which the policemen are respectively appointed as may be agreed on between them.

Code, s. 1992; 1871-2, c. 138, s. 55.

2610. Dismissal of police; notice where filed. Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the several offices in which notice of such appointment was originally filed, and thereupon the power of such officer shall cease and be determined.

Code, s. 1993; 1871-2, c. 138, s. 56.

VIII. Operation of Trains.

2611. Trains to run on schedule; schedule published; must transport freight and passengers. Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freight for that train, and shall take, transport and discharge such pssengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the property aggrieved, in any action for damages, for any neglect or refusal in the premises.

Code, s. 1963; 1871-2, c. 138, s. 35. **Railroad company has a right, and it is its duty, to establish and enforce reasonable rules for government and direction of trains; and of such passenger must inform himself and**

conform thereto: Britton v. R. R., 88-536; McRae v. R. R., 88-526.

Defendant company is liable for consequences of mismanagement of train in charge of employees of another company using its track with defendant's knowledge and consent: Aycock v. R. R., 89-321.

Corporation commission may require railroad to have train arrive at certain station on road at certain schedule time so as to connect with train of another company: Corporation Com. v. Railroad, 137-1.

Regulation that person purchasing tickets for an excursion shall travel upon train provided for that special purpose, and not upon a regular train, is reasonable regulation: McRae v. R. R., 88-526.

A rule that passengers desiring to travel in coach attached to freight train shall enter car at point other than station or place where persons traveling in ordinary passenger trains are received is not an unreasonable regulation, provided a way by which passenger is required to pass from place tickets are furnished to point of embarking is kept in proper condition: Browne v. R. R., 108-34.

Railroads have reasonable control over their waiting-rooms and right to establish regulations for opening and closing of same; they are not lodging places: Phillips v. R. R., 124-123.

A regulation which requires the opening of wating-rooms not less than thirty minutes before arrival of trains, and their closing after departure of trains, is a reasonable regulation for accommodation of passengers; the case of delayed trains and through passengers might form exceptions to rule: Phillips v. R. R., 124-123.

Railroad company is responsible for injury caused by wrongful act of its employee, while acting in the scope of his employment, in the discharge of duties assigned him, and that, whether such act is wilful, wanton and malicious, or merely negligent: Pierce v. R. R., 124-83; see cases in paragraphs below.

One who enters a railroad passenger car is not guilty of contributory negligence because he fails to rush into first seat he reaches, although he knows the train is about to be coupled: Tillett v. R. R., 118-1031.

Passengers who are injured while getting on or off moving trains can not recover for such injuries: Brown v. R. R., 108-34.

Act of getting off moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that peculiar circumstances of case justified him in such course: Browne v. R. R., 108-34.

It is contributory negligence for passenger to enter car before it has been coupled and moved to point designated by conductor after conductor has warned him: Tillett v. R. R., 115-662.

Where defendant undertook to furnish plaintiff transportation on its log train to and from "quarters" it was its duty to see that such transportation was rendered as reasonably safe as character of it would admit: Tanner v. Lumber Co., 140-475.

As to inviting passenger to alight from train, see Cable v. R. R., 122-892.

WHO ARE PASSENGERS. It is coming to the station within a reasonable time, with intention to take next train, and not the purchase of a ticket

(which is merely evidence of intention), that creates relation of passenger and carrier: Phillips v. R. R., 124-123.

Where passenger comes upon premises of railroad company, at station, with a ticket, or with purpose of purchasing one, he becomes a passenger: Tillett v. R. R., 115-662; Seawell v. R. R., 132-856, 133-515.

One who gets aboard a car for purpose of becoming a passeger is entitled to rights of passenger, and carrier is liable to him as such whether he pays his fare before or after an accident by which he is injured: Tillett v. R. R., 118-1031.

Contract of carriage by common carrier begins when passenger comes upon carrier's premises or conveyance with purpose of buying ticket within resonable time, or, after having purchased ticket, and relation once constituted continues until journey contracted for is concluded, and passenger has left or has had reasonable time to leave such premises: Hansley v. R. R., 115-602.

A section master, riding from his place of work to his home, is not a passenger: Wright v. R. R., 122-852.

PASSENGER ENTITLED TO PROTECTION. A carrier of passengers is not an insurer, as is a carrier of goods. His liability is based on negligence, and not on a warranty of passenger's freedom from all accidents and vicissitudes of journey: Marable v. R. R., 142-557.

Conduct of employee of carrier inflicting violence on passenger, though act be outside of scope of his authority or even wilful and malicious, subjects carrier to liability in damages just as fully as if carrier had encouraged commission of act: Williams v. Gill, 122-967.

Not prejudicial to defendant, in action for assault of employee upon passenger, to change an issue first framed and submitted as follows: "Did the defendant through conductor and other agents or servants unlawfully assault," etc., by substituting the disjunctive "or" for the conjunctive "and:" Ibid.

Fact that brakeman struck a passenger instantaneously upon latter's using a vile epithet to him, and before conductor could interfere, will not relieve railroad company from its liability for assault: Williams v. Gill, 122-967.

Company owes to every passenger duty of protecting him from violence and assaults of his fellow passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when same might have been foreseen and prevented by exercise of proper care: Britton v. R. R., 88-536.

Passenger is entitled to recover punitive damages for insult or mistreatment on the part of any employee of the common carrier: Hutchinson v. R. R., 140-126; Strother v. R. R., 123-197; Williams v. Gill, 122-970.

Rotten eggs thrown at passenger company liable: Seawell v. R. R., 132-856; 133-515.

FAILING TO TAKE ON OR PUT OFF PASSENGER. When the refusal to take on or discharge a passenger, where he is entitled to be received or discharged, is reckless and wanton, punitive damages may be recovered: Hutchinson v. R. R., 140-127; Purcell v. R. R., 108-417; Hansley v. R. R., 117-570; Coleman v. R. R., 138-355.

Where plaintiff purchased ticket at regular station before time advertised for arrival and departure of trains at that place, and was in readiness to get aboard, but train ran by, making no effort to stop, although it had room in its cars for plaintiff, he would be entitled to punitive damages, in absence of sufficient excuse shown by defendant: Purcell v. R. R., 108-414.

Where no agent present at flag station and engineer failed to see plaintiff's signal and train did not stop, defendant is liable for actual damages: Thomas v. R. R., 122-1005.

Common carrier of passengers is under no obligation to delay departure of trains, or to look after safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by invitation or command of persons in charge of trains, attempts to get on or off while cars are in motion: Browne v. R. R., 108-34.

It is only when railway engineer actually sees signal of an intending passenger at a flag station and wifully passes him by that punitive damages will be allowed in action for damages, and burden of showing reckless disregard of plaintiff's rights is upon latter: Thomas v. R. R., 122-1005.

Right of passenger to recover against carrier for its neglect to carry him to his destination rests not only upon contract, but duty so to carry him is imposed by law and for a breach of it he may recover in tort: Puett v. R. R., 141-332.

Having received plaintiff into train, without objection, with ticket calling for regular station, as her destination, and nothing on its face to show it was not good on that train, and she not knowing that train did not stop there, it was duty of defendant to stop train at that point for her: Hutchinson v. R. R., 140-123.

ACTION FOR BREACH OF CONTRACT OF CARRIAGE. Rule is that when passenger is delayed or carried contrary to agreement, so as to lead to failure to accomplish object of trip, he is entitled to recover, in all cases, at least sum paid for ticket, with interest thereon, together with compensation for whole of time lost in trip and, in some instances, reasonable cost of reaching his destination by means of some other conveyances: Hansley v. R. R., 115-602—such rule obtains whether passenger sues for breach of contract or in tort for disregard of duty of carrier to public, unless it appear that, in addition to expense, loss of time, etc., some personal injury accrues directly from wilful failure to transport him according to schedule time, or some indignity is sustained by such failure: Ibid.

Amount recoverable for breach of contract of carriage is limited to damage supposed to have been in contemplation of parties and actually caused by such breach, and measure of damage is ordinarily not materially different whether defendant fails to comply with contract through inability or wilfully disregards it: Ibid.

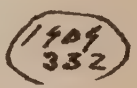
Punitive damages will not be awarded against a railroad company where, by reason of defective equipments, it failed to carry a person, to whom it had sold excursion ticket, back to his starting point, when only injuries complained of were inconveniences, delay and disappointment, and there was no proof of bad motive on part of defendant: Hansley v. R. R., 115-602, overruling Purcell v. R. R., 108-414 on that point.

Person who has sustained injuries by reason of failure of railroad company to furnish proper means of transportation or operate its trains as required by statute may bring an action on contract, or in tort, independent of statute: Purcell v. R. R., 108-414.

2612. How cars arranged in passenger train. In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes.

Code, s. 1971; 1871-2, c. 138; 1893, c. 331; 1895, c. 212.

2613. What trains may run on Sunday. No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad, except in case of accident and except such as may be run for the purpose of transporting the United States mails and passengers with their baggage, and ordinary express freight in express cars exclusively, and except such as shall be run for the purpose of transporting fruits, vegetables, live stock and perishable freights. Where there are not sufficient cars of live stock or other perishable freights to make a complete train, or section of a train, the company may add other cars to complete the same: Provided, the word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset; and trains in transitu having started on Saturday, may, in order to reach the terminus or shops, run until nine o'clock a. m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops.



Code, s. 1973; 1879, cc. 97, 203; 1885, c. 92; 1897, c. 126; 1901, c. 444. **Running of trains and shifting of cars on Sunday, at time of regular church services held on premises near railroad freight and passenger terminal, does not per se constitute a nuisance; it must further appear that the same was done in an unreasonable or improper manner:** Taylor v. R. R., 145-400.

This section will remain valid unless and until it shall be superseded by an act of congress, which has right to replace all state legislation affecting interstate commerce by express congressional enactment affecting all railways engaged in interstate commerce: State v. R. R., 119-814.

As to constitutionality of section preventing railroads running trains on Sunday, see Ibid.

While state may not interfere with transportation into or through its territory, "beyond what is absolutely necessary for self protection," it is authorized, in exercise of police power, to provide for maintaining domestic order and for protecting health and morals of its people: Ibid.

Authorities of railway company should have ordered this train to a siding at a time early enough to preclude all possibility of a necessity for violating the statute: Ibid.

As to defenses to charge of running trains on Sunday, see Ibid.

2614. Fast mail trains authorized; one train a day in each direction required. The corporation commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall only stop at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train said railroad shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday.

1893, c. 97. **It is a reasonable regulation of defendant that certain trains shall not stop at all stations, provided there are enough to serve purposes of local travel:** Hutchnson v. R. R., 140-123.

2615. Vestibule fronts on street railway cars. All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for use of vestibule fronts. The corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary.

1901, c. 743.

2616. Street railways to have fenders in front of passenger cars. All street passenger railway companies shall use practical fenders in front af all passenger cars run by them. The corporation commission is hereby authorized to make exemptions from the provision of this section in such cases as in their judgment the enforcement of this section is unnecessary.

1901, c. 743, s. 2. **Failure of street railway company to use fenders in front of its cars, if required by statute or ordinance, is evidence of negligence:** Henderson v. Traction Co., 132-779.

In an action for killing of dog by street car, it is not competent to show condition of fenders on particular cars other than the one by which dog was killed, it being shown that fenders were different on different cars: Moore v. Electric Co., 136-554.

A statute which requires all street railway companies to put fenders in front of cars and provides that corporation commission may "make ex-

emptions'' does not authorize an exemption of all street railway companies as this amounts to a suspension of statute: Henderson v. Traction Co., 132-779.

2617. May seize and use fuel. If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of coal, wood or other fuel not its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking, giving date of such taking, and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for said coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. as above provided, within thirty days after converting the same to its own use it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of such appropriation of said fuel, or their failure to pay for the same, and five dollars for each day thereafter in which they shall fail to notify such consignee or pay for the same.

1903, c. 590, s. 4; 1907, c. 467.

IX. Passengers.

2618. Rates charged for transporting; certain railroads excepted; corporation commission no power over. No railroad company doing business as a common carrier of passengers in the state of North Carolina shall charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its road in North Carolina, a rate in excess of two and one-half cents per mile; and for transporting children under twelve years and over five years, one-half of the rate above prescribed; and for transporting children under five years of age, accompanied by any person paying fare, no charge whatever shall be made: Provided, that where the amount of the ticket at the prescribed rate would amount to any figure between two multiples of five, the price of the ticket shall be the multiple of five which is nearest the price of the ticket at the rate above mentioned; or, in the event that the amount is equidistant between the multiples of five, the price charged for the ticket shall be on the basis of the higher of those two multiples of five: Provided further, that no charge less than ten cents shall be required: Provided further, that independ-

ently owned and operated railroad companies in North Carolina, whose mileage of road in said state is one hundred miles or less, may charge a rate not exceeding three cents per mile: Provided further, that independently owned and operated railroad companies in North Carolina, whose mileage of road in said state is ten miles or less, may charge the same rate which is now in existence on said roads. This provision shall not extend to branch lines of railroad companies controlling over one hundred miles of road, whether chartered in or out of the state. Also, that newly constructed railroads, or the portion of railroad which may be newly constructed, be exempt from the operations of this section for two years after completion, to the extent that they may charge a rate in no case to exceed three cents per mile. A charge of fifteen cents may be added to the fare of any passenger when the same is paid on the train, if the ticket might have been procured within a reasonable time before the departure of the train. In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in the state, the rate for carrying passengers thereon as prescribed by this section shall be determined for the said railroad company by the rate prescribed by this section for the railroad company which owns, controls or operates the same. The corporation commission of North Carolina shall have no power to change, alter, modify or in any way affect the enforcement of or operation of any of the provisions hereof, or of chapter two hundred and sixteen of the Public Laws of North Carolina of one thousand nine hundred and seven, except as the same shall be therein specifically authorized, or the enforcement of any penalties for violating the provisions thereof.

1908, c. 142. **For annotations as to who is a passenger and as to his rights, etc., see under section 2611.**

For decision in famous passenger-rate case wherein state sought to enforce the provisions of chapter 216 of the laws of 1907, see State v. Southern Rwy., 145-496.

2619. Separate accommodations for different races. All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms, and also on all trans and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the corporation commission. Provided, that this shall not apply to relief trains in cases

of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported.

1899, c. 384; 1901, c. 213; 1907, c. 850. **Right of railroad company to assign white and colored passengers to separate, though not unequal, accommodations, is recognized by courts:** Britton v. R. R., 88-536.

Company can not relieve itself of responsibility for injuries received by passenger where it was shown that such rules were not enforced, but their observance left discretionary with passenger: Britton v. R. R., 88-536.

152-281

2620. Corporation commission may exempt certain roads and trains. The corporation commission is hereby authorized to exempt from the provisions of the preceding section steamboats, branch lines and narrow-gauged railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-gauge, branch lines or mixed trains.

1899, c. 384, s. 2; 1901, c. 213.

2621. When two races put in same coach. When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race.

1899, c. 384, s. 3.

2622. Penalty for failing to provide separate cars. Any railroad company failing to comply in good faith with the provisions of the three preceding sections shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat in only a car or compartment with a person of a different race in violation of law.

152-281

1899, c. 384, s. 5.

2622a. Street car companies must provide for separation of races. All street, inter-urban and suburban railway companies, engaged as common carriers, in the transportation of passengers for hire in the state of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of said car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to each occupy the respective parts of such car so set apart for them, as specified in the next section.

1907, c. 850.

2622b. Street cars; where passengers shall sit. Any white person entering a street car for the purpose of becoming a passenger thereon shall, if necessary to carry out the purposes of the law separating the races, occupy the first vacant seat or unoccupied space in the aisle nearest the front of said car, and any colored person entering said car for like purpose shall occupy the first vacant seat or unoccupied space in the aisle nearest the rear end of said car: Provided, however, no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time, unless or until all of the other seats in said car shall be occupied.

1907, c. 850, s. 2.

2622c. Street car passengers required to conduct themselves decently. It shall be unlawful for any passenger to expectorate upon the floor or any other part of any street car, or to use, while thereon, any loud, profane or indecent language, or to make any insulting or disparaging remark to or about any other passenger or person thereon within his or her hearing; and it shall likewise be unlawful for any passenger to wilfully stand upon the front platform, fender, bumper, running-board or steps of such car while the same is in motion, whether such passenger has or has not paid the usual fare for riding on such car.

1907, c. 850, s. 3.

2622d. Street cars; passengers riding upon rear platform assume all risks. Any passenger who shall ride upon the rear platform of any street car in motion, when there is room for such passenger to either sit or stand inside the car, shall be deemed to have assumed all the risks of being injured while so riding, as the result of any act of the street car company: Provided, said company shall make it appear that such passenger would not have been injured had he been on the inside of said car: Provided, further, before any street,

inter-urban or suburban railway shall be allowed to invoke the provisions of this section it shall have copies of this section printed and framed and one copy hung in each end of all cars operated on its lines, and shall further have a placard hung in a conspicuous place on the rear of such cars, which shall read as follows: "Passengers are warned not to ride on this platform," and a placard hung on each side of open cars in a conspicuous place, which shall read as follows. "Passengers are warned not to ride on the running-board."

1907, c. 850, s. 4.

2622e. Street cars; jim-crow law does not apply to colored nurses of white children. The provisions of law regarding the separation of races on street, inter-urban and suburban railway cars shall not apply to colored nurses of white children, while in attendance upon such children then in their charge, or a colored attendant in charge of a sick or infirm white person.

1907, c. 850, s. 7.

2622f. Street cars; no liability incurred for mistake in ordering person to seat in. No street, suburban or inter-urban railway company, its agents, servants or employees, shall be liable to any person on account of any mistake in the designation of any passenger to a seat or part of such car set apart for passengers of the other race.

1907, c. 850, s. 8.

2623. Must check baggage; liable for loss. A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of such corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and if such check be refused on demand the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train, and on producing said check, if his baggage shall not be delivered to him, he may, by an action, recover the value of said trunk or baggage.

Code, s. 1970; 1871-2, c. 138, s. 36. **For annotations, see section 2624.**

2624. Baggage handled carefully. All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for

any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control; and upon proof of injury to baggage or freight in the possession or under the control of any such company, it shall be presumed that the injury was caused by the negligence of the company.

151-207

1897, c. 46. **Common carrier can not contract with passenger against loss of baggage by its negligence:** Thomas v. Rwy. Co., 131-590.

While obligation of carrier of passengers is limited to ordinary baggage, yet if it knowingly permits passenger, either with or without payment of extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault: Trouser Co. v. R. R., 139-392.

If railroad receives for carriage, from passenger, trunks containing merchandise or atricles other than personal baggage of passenger, with knowledge of their contents, it is liable on its contract as an insurer for any loss of, or damage to, the property not resulting from act of God or public enemy: Ibid.

Although carrier has no knowledge of contents of trunks, which contain samples, yet some care at least should be taken of trunks after they arrive at destination, and it has no right to leave them for three days on platform of depot exposed to weather: Ibid.

When baggage has arrived at destination and has been deposited at customary place of delivery and kept there sufficient time for passenger to claim and remove same, company's liability as common carrier ceases, and it is thereafter liable only as warehouseman, and bound to use of ordinary care: Ibid.

2625. Ticket to intoxicated man refused. The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated.

1885, c. 358.

2626. May prevent intoxicated person from entering. The conductor, captain or other person in charge of any railroad car, steamboat, or other conveyance for the use of the traveling public, shall at all times have power to prevent any intoxicated person from entering such car, boat or other conveyance.

1885, c. 358, s. 2. **Refusal to allow person with ticket to board train because he was intoxicated subjects railroad company to exemplary damages if such refusal was made with malice, undue force, or insult:** Story v. R. R., 133-59.

There is in this action sufficient evidence of insult or other aggravating circumstances to be submitted to jury on question of punitive damages: Ibid.

In action for damages for refusal to allow person with ticket to board

train, trial court properly refused to instruct that conductor, in refusing, might consider that same person had given him trouble at other times: Ibid.

2626a. Must keep statute against public drinking posted. It shall be the duty of all railway companies to have posted a copy of section three thousand seven hundred and fifty seven (a) relating to public drinking on passenger coaches in each passenger coach used for transporting passengers within the state.

1907, c. 455.

2627. Unused tickets to be redeemed. When any round-trip ticket is sold by a railroad or transportation company it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and transportation companies shall redeem all mileage tickets known as five-hundred, thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, in money, when as much as fifty per centum of such ticket has been used by the purchaser, by paying the same price per mile paid for it, or shall allow the original holder to ride it out. 151-207

1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418.

2628. Injury to passengers on platform, etc. In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside the passenger cars then in the train, such company shall not be liable for the injury: Provided, said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers. 147-315

Code, s. 1978; 1871-2, c. 138, s. 42. Railroad company has a right, and it is its duty, to establish and enforce reasonable rules for goverment and direction of trains; and of such, passenger must inform himself and conform thereto: Britton v. R. R., 88-536.

By virtue of this section, a rule of railroad company prohibiting passengers from going on platform while train in motion is given, when statute complied with, the force and effect of law of state: Shaw v. R. R., 143-312.

An instruction that this section does not apply if plaintiff entered upon platform in bona fide belief that train was not moving, and if reasonably prudent person under similar circumstances would have so believed and acted, was erroneous: Ibid.

Persons who are old and decrepit are not more culpable for failing to provide against carelessness of carrier's servants than those who are vigorous and active: Tillett v. R. R., 118-1031.

2629. Refusing to pay fare, may eject. If any passenger shall refuse to pay his fare, or violate the rules of the corporation, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling-house, as the conductor shall elect, on stopping the train.

Code, s. 1962; 1871-2, c. 138, s. 34. It is not error to refuse to charge that a railroad owes no duty to a trespasser except not to injure him wantonly or wifully: Perry v. R. R., 128-471.

152-66

A trespasser's wrongful act in getting on a car does not justify his being put off in a manner calculated to cripple or kill: Pierce v. R. R., 124-83.

Regulation of carrier is reasonable which requires passengers to procure tickets before entering car, and where this requirement is duly made known and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from train or by requiring payment of higher rate than ticket fare: Ammons v. R. R., 138-555.

If, without having afforded reasonable opportunity to passenger to provide himself with ticket, carrier should elect him upon his refusal to pay additional charge for carriage without ticket, when he is ready and offers to pay his fare at ticket rate, his expulsion will be illegal, and he may recover damages for trespass and his right of recovery can not be made to depend upon conductor's knowledge or ignorance of fact that agent had no tickets for sale: Ammons v. R. R., 138-555.

Conductor of railroad train is authorized to expel without using unnecessary force one who refuses to pay regular fare, provided that ejected person is not wilfully and wantonly exposed to danger of life and limb: Roseman v. R. R., 112-709.

Conductor requiring intoxicated man to leave train for nonpayment of fare does not render carrier liable for death of man from exposure, where conductor did not have reasonable ground to believe that man was unable to find his way or walk to nearest house or to railroad station, or even to his own father's house, which was not far away: Ibid.

As to when conductor can reasonably suppose drunken passenger he puts off capable of caring for himself, see Ibid.

Evidence that passenger was drunk at 3:45 in afternoon is inadmissible to corroborate evidence that he was drunk at 11 o'clock in forenoon: Raynor v. R. R., 129-195.

Evidence of drunkenness of plaintiff is not admissible where answer simply denies wrongful ejection alleged in complaint: Ibid.

To entitle a passenger to punitive damages, his expulsion from train must be attended by such circumstances as tend to show rudeness, insult, aggravating circumstances calculated to humiliate him: Ammons v. R. R., 140-196; Tomlinson v. R. R., 107-327.

Opinion of a witness that no unnecessary force was used in ejecting the passenger is incompetent: Raynor v. R. R., 129-195.

One who boarded a train, and upon offering ticket to station at which train was not scheduled to stop and refusing to pay fare to next station, beyond, at which train would stop, was ejected from train, can not recover punitive damages where ejection was done without insolence or undue force: Allen v. R. R., 119-710.

Person who gets on a blind baggage car, though having a ticket, but not having told conductor that he had it, and conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off train by conductor: McGraw v. R. R., 135-264.

When passenger without ticket gets off at regular depot and gets ticket, this constitutes new contract, and will entitle him to passage, with a tender of the money due for passage up to that point, and, according to some authorities, without it: Pickens v. R. R., 104-312.

Case where manner of expulsion of passenger would not entitle to damages: Rose v. R. R., 106-168.

A conductor may refuse fare of passenger, and put him off if he puts train force to trouble of stopping before he makes tender: Pickens v. R. R., 104-312.

Passenger leaving car, struck by valise of another passenger entering, company not liable: Fritz v. R. R., 132-829.

Passenger shot while leaving car by person engaged in an altercation outside: Penny v. R. R., 133-221.

Arm struck by mail pouch on crane: McCord v. R. R., 134-53.

2629a **Passenger cars cleaned; toilet rooms.** Every person or railroad company, whether incorporated or not, engaged in the regular business of carrying passengers on its railroad cars in this state, shall have their passenger-cars on their roads cleaned, brushed, dusted, and the windows washed, if needed, at least once each day, and shall in each car, in which male and female passengers are carried, have therein a toilet-room for each sex, and have the same kept clean and decent.

1907, c. 474.

X. Freight.

2630. Freight rates posted. It shall be the duty of all railroad and other transportation companies to keep posted in a conspicuous place in their depots or places where freight is received for shipment a list of its charges for carrying freight, specifying name of place, class of freight and charge for carrying the same. Such charges shall not be increased without giving fifteen days' notice, and the company represented by any agent refusing to comply with this section shall be liable to a penalty of not less than fifty nor more than one hundred dollars.

Code, s. 1965; 1879, c. 182, s. 2.

2631. Penalty for failure to receive. Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or workhouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment.

Code, s. 1964; 1903, cc. 444, 693. Words "whenever tendered" can only be qualified by supplying the ellipsis, "within the usual hours adopted by the public for the transaction of such business at the place where tender is made:" Alsop v. Express Co., 104-278.

149-423
180-753
150-575
150-612
152-822
152-279
152-70
153-490

In an action for damages caused by delay in shipment of goods it is immaterial whether action is brought in assumpsit, upon breach of contract or in case for violation of a common law duty, or on a tort based on a contract: Parker v. R. R., 133-335.

When article refused to be received and forwarded as freight is cattle, a separate penalty of $50 for each head may be recovered, and if the aggregate of penalties exceeds $200, superior court has jurisdiction: Carter v. R. R., 126-437.

Each day's refusal to receive freight is a separate offense: Ibid.

Where plaintiff delivered freight for shipment at defendant's station on January 27, and tendered charges, and agent received freight for storage, but refused to give bill of lading because he did not know freight rates, and kept freight until February 8, held that there was a refusal "to receive for transportation:" Twitty v. R. R., 141-355.

Carrier liable for penalty for refusal to receive car loaded with lumber for transportation, notwithstanding car was to be shipped out of state: Currie v. R. R., 135-535.

Complaint alleging tender on a specified day, and that defendant on two following days "failed and refused to receive the same" is sufficient allegation of tender for last two days: Ibid.

When goods are delivered to carrier for shipment, presumption is that they are received for shipment and not for storage, and burden is upon company to show that it received goods as a warehouseman and not as carrier: Berry v. R. R., 122-1002.

Regulation of express company that money would be received for shipment only on morning before train on which it was to be transported passed,

would not protect company in an action brought to recover penalty incurred by violation of section: Alsop v. Express Co., 104-278.

Section is operative upon freights to be shipped to points outside state as well as those to be delivered within its territory; and is not in conflict with federal constitution: Bagg v. R. R., 109-279.

"REGULAR STATION" AND "AGENT" CONSTRUED. The terms "a regular depot" or "station," in this section contemplate fixed and established places on line of railroad, or other transportation company, equipped with suitable buildings and furnished with necessary officers and servants for the regular transaction of business, for the receipt and delivery of freights, and the comfort and convenience of passengers: Land v. R. R., 104-48.

Where it was shown that train had been in habit of stopping at certain locality to deliver mails; that it received such passengers there as might wish to embark, and that it had also been accustomed to receive and deliver freights for accommodation of patrons in vicinity; that place was designated as a station on its tariff schedule, but that it had no agent, office, warehouse, or other facility for the transaction of business: Held, not to constitute "a regular depot" or "station" within meaning of statute: Ibid.

Where engineer and conductor of railroad train occasionally stopped train to take on freight at points along line, not regular stations: Held, that such acts did not constitute engineer and conductor receiving and forwarding agents of railroad company within terms of section 1964 of Code: Kellogg v. R. R., 100-158.

House and platform on side of track of railroad, at which freight is occasionally received and discharged by company, but at which no agent's office or books are kept, or bills of lading or receipts given, is not a "regular depot or station," within meaning of section 1964 of Code: Kellogg v. R. R., 100-158.

2632. Failure to transport in reasonable time; reasonable time defined; forfeiture. It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this state to omit or neglect to transport within a reasonable time any goods, merchandise or articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper or unless same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina corporation commission. Each and every company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day: Provided, the

146-218
146-153
147-407
147-593
147-53
147-61
147-66
147-68
152-665

forfeiture shall not be collected for a period exceeding thirty days. In reckoning what is reasonable time for such transportation it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations; and a delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which said freight is to be transported shall not be charged against such transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. This section shall not be construed to refer only to delay in starting the freight from the station where it is received, but in addition thereto shall be construed to require the delivery at its destination within the time specified: Provided, however, that if said delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, upon establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved and discharged from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions brought under this section the burden of proof shall be upon the transportation company to show where the delay, if any, occurred.

1903, c. 590, s. 3; 1905, c. 545; 1907, cc. 217, 460.

148-323
149-390

For history of statutes prescribing penalties for delay in transporting freight, see Grocery Co. v. R. R., 136-398. **As to object of penalty statutes,** see Ibid. **Statute constitutional and valid:** Rollins v. R. R., 146-153; Cardwell v. R. R., 146-218; Grocery Co. v. R. R., 136-396; Walker v. R. R., 137-163; Katzenstein v. R. R., 84-688; Branch v. R. R., 77-347.

Penalty imposed is solely to enforce a common law and admitted duty, and is within legislative authority: Stone v. R. R., 144-220.

Penalty statutes must be strictly construed: Alexander v. R. R., 144-93.

Rule of law that common carriers are bound as insurers does not extend to time of delivery: Boner v. Steamboat Co., 46-211.

Rigid rule of common law relative to liability of common carriers should not be applied to a case involving violation of a penal statute: Whitehead v. R. R., 87-256.

This section is declaratory of the common law, and does not exclude any defense as to delay in transportation that could properly be made thereunder: Stone v. R. R., 144-220.

Defendant is estopped to claim that mismarking of three of packages was a sufficient excuse for failing to ship the fourth: Grocery Co. v. R. R., 136-396.

Clause in a bill of lading that goods will be shipped "at convenience of company" will not protect it from liability for an unreasonable delay: Branch v. R. R., 88-573.

Act providing penalty for delay of four days in transportation of goods refers to delay in starting goods from station of their receipt, and does not require delivery at their destination within time specified: Walker v. R. R., 137-163 (see amendments to statute since decision).

Penalty against railroad company for failure to forward freight under chapter 240, sec. 2, Laws of '74-'75, is not given by article 9, section 5 of constitution to county school fund: Katzenstein v. R. R., 84-688.

Clause in the charter of a railroad corporation, which confers upon its officers power to fix its charges for transportation of freight, is not infringed by statute which imposes penalty for failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate amount to be charged for such transportation: McGowan v. R. R., 95-417—(both statutes as to officers fixing charges and as to penalty for delay have been since amended).

Supreme court will take judicial notice of fact that railroad system does not pass through certain county: McCullen v. R. R., 146-568.

DUTY OF CARRIER AS TO SHIPMENT OF FREIGHT. It is duty of common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of obligation, if, by use of reasonable foresight, it could have been provided for: Purcell v. R. R., 108-414; Branch v. R. R., 77-347.

The only duty assumed by a carrier of freight under a bill of lading is to transport articles to destination within a reasonable time if on its own line, and, if not, to transport and deliver to next connecting carrier on Watson v. R. R., 145-236.

There is an implied agreement to forward freight in a reasonable time route to final destination, in absence of evidence of a joint obligation: and Code section 1907 fixes five days (now changed) as such reasonable time: McGowan v. R. R., 95-417.

Railroad company is not relieved of liability to penalty for delay of shipment of goods beyond five days (now changed) after receipt of same, by reason of its alleged inability to procure necessary transportation on account of large accumulation of freight. It is duty of company to provide sufficient cars: Keeter v. R. R., 86-346.

PLEADING AND PRACTICE HEREUNDER. In warrant to recover penalty under statute, an averment alone that amount claimed is "due by penalty," without stating facts or pointing out particular statute under which penalty is claimed, is insufficient: Stone v. R. R., 144-220.

Suit for penalty against foreign corporation brought in magistrate's court, practice discussed in Allen-Fleming Co. v. R. R., 145-37.

Judge must instruct jury as to what is "ordinary time required," and it is with jury to say whether tranportation made within such time: Jenkins v. R. R., 146-178; Alexander v. R. R., 144-93; Wall v. R. R., 147-407.

The delay and amount of recovery are question for jury and it is error to tell jury if they believe the evidence to answer issue "yes:" Ice Co. v. R. R., 147-61, 66. Proper issues for jury: Hamrick Bros. & Co. v. R. R., 146-185.

As to evidence of "ordinary" and "reasonable time" see paragraph below.

As to burden of proof, see below.

ACTION ON CONTRACT; DELAY OF EACH ARTICLE A SEPARATE BREACH, WHEN. Action for a penalty, given by statute to any person injured, is an action on contract: Doughty v. R. R., 78-22.

Action to recover penalty under statute is an action ex contractu and when sum demanded does not exceed two hundred dollars a justice of peace has jurisdiction: Katzenstein v. R. R., 84-688.

Railroad company refusing to transport cattle is liable to a separate penalty for each animal: Carter v. R. R., 129-213. As to "articles received for shipment," see Ibid.

AS TO WHO IS "PARTY AGGRIEVED." Section which provided that party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods, is constitutional as valid exercise of the police power: Rollins v. R. R., 146-153; Cardwell v. R. R., 146-218.

When bill of lading issued, title, in absence of any direction or agreement to contrary, vests in consignee, who is alone entitled to sue as "party aggrieved:" Stone v. R. R., 144-220.

Delivery of goods by vendor to a common carrier is a delivery to vendee, and this rule is not affected by failure of vendor to furnish vendee a bill of lading: Hunter v. Randolph, 128-91.

For delay to transport freight penalty is enforceable, independent of pecuniary injury, by the one whose legal right is denied: Summers v. R. R., 138-295.

Plaintiff loaded and received a bill of lading for a car load of wood, shipped to the consignee to be sold by him for plaintiff's benefit: Held, that plaintiff, and not consignee, was party aggrieved by delay: Rollins v. R. R., 146-153.

Where delivery at the buyer's home was a part of the contract of sale: Held, that plaintiff, and not the consignee, was party aggrieved" by unreasonable delay, since plaintiff is the one whose legal right is denied: Cardwell v. R. R., 146-218.

It is not relevant to the inquiry whether or not defendant knew the facts which gave plaintiff the right to sue: Ibid.

Evidence that plaintiff told defendant's agent that plaintiff was shipping goods to be sold on account, and that he could get no money until the goods were sold, is not relevant to the inquiry, since, when plaintiff establishes that he is party aggrieved it bears in no way upon his demand or defendant's obligation, whether defendant knew who was party aggrieved, either at inception of matter or at any other time: Rollins v. R. R., 146-153.

Shipper of goods to be sold by consignee for his benefit may recover value where they were not delivered and may join in same action claim for penalty for delay: Robertson v. R. R., 147 or 148th Report; 62 S. E., 413.

"Party aggrieved" must bring suit and the statute does not require or even permit the action to be brought on relation of the state: Robertson v. R. R., 147 or 148th Report; 62 S. E., 413.

Where there is an agreement that consignee is to pay for shipment on delivery, shipper is proper party to sue: Davis v. R. R., 147-68.

BURDEN OF PROOF. One suing a carrier for the penalty imposed has the burden of proving the issue of failure to transport within the ordinary time required: Jenkins v. R. R., 146-178; Hamrick v. R. R., 146-185; Watson v. R. R., 145-236; Alexander v. R. R., 144-93.

Burden of proof is upon defendant to show reasonableness in delays beyond ordinary or reasonable time prescribed: Stone v. R. R., 144-220.

To relieve from penalty, burden is upon defendant to show that shipment was "otherwise agreed upon" between parties: Whitehead v. R. R., 87-256.

Carrier, though accepting a shipment under a contract, "subject to delay," has the burden of showing exercise of due diligence to avoid delay in carrying and delivering goods: Parker v. R. R., 133-335.

Where there arises a presumption of actionable negligence against one of several connecting lines by reason of a wrongful delay of goods, such presumption is against any one of them in whose custody goods are shown to have been after delay occurred, and burden of proof is upon it to rebut presumption: Furn. Co. v. Express Co., 144-639 (see amendment as to burden of proof).

Where delay in transportation of freight was due to negligence of connecting carrier, burden was on initial carrier, in a suit against it for statutory penalty for such delay, to prove such fact: Watson v. R. R., 145-236.

Burden is on defendant to show that goods were burned, destroyed, or stolen without its default: Robertson v. R. R., 147 or 148th Report; 62 S. E., 413.

AS TO "ORDINARY" AND "REASONABLE" TIME. This section simply changes the rule of evidence as to proof of "reasonable time:" Stone v. R. R., 144-220.

The words "ordinary time" mean the regular customary time within which, by the facilities in general use for the performance of the duty of carrying goods, the carriage should be completed: Jenkins v. R. R., 146-178.

In an action against a carrier for such penalty, the court must define the term "ordinary time required," and the question whether the transportation was made within such time is for jury: Ibid.

Carrier may show that extraordinary unforeseen conditions prevented discharge of duty within ordinary time, and where such conditions are shown, question of reasonable time must then be measured by unusual conditions: Ibid.

When evidence discloses that time taken by railroad company for transporting goods, etc., was prima facie reasonable, as fixed by statute, question of reasonable time is one for jury to measure by statutory standard, burden of proof being upon plaintiff: Alexander v. R. R., 144-93.

Where it is shown that point of shipment is a regular station on company's main line, leading directly to point of destination, twenty-five miles away, though there is no testimony regarding ordinary time required for a freight train between the two points, jury may be permitted from their common observation and experience to consider and determine question of ordinary

time between points, and in absence of explanation fix amount of wrongful delay: Rollins v. R. R., 146-153.

Fourteen days consumed in carrying household goods from one point to another in the state, a distance of 277 miles, with only one terminal point requiring change, is unreasonable: Meredith v. R. R., 137-478.

Where delay arose and existed all at point of shipment, objection that there is no testimony as to the ordinary time required for a train between that point and the point of destination is not open to defendant: Rollins v. R. R., 146-153.

In action against railroad company for penalty for delay in shipment of local freight, it was held error to admit declarations of station agent to effect that company, during certain season, used most of its cars transporting through freight, his agency being unconnected with through freight business: Branch v. R. R., 88-573.

Where initial carrier delivers freight to connecting carrier within reasonable time, such initial carrier is not liable for delay subsequently occurring: Watson v. R. R., 145-236.

Where an initial carrier, in an action for penalty for delay, did not prove that the delay or a portion thereof occurred on the line of a connecting carrier, it would be presumed that entire delay occurred on initial carrier's line: Ibid.

Under section imposing a penalty on a railroad failing to transport freight within ordinary time, one suing for a penalty makes a prima facie case by showing that carrier neglected to transport freight within ordinary time required: Jenkins v. R. R., 146-178.

This section makes failure to transport within ordinary time prima facie unreasonable, and, where transportation is not within ordinary time, carrier is liable for the penalty imposed less two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles, but the two days at the initial point and forty-eight hours at each intermediate point are not the standards by which reasonable time is measured: Ibid.

Twenty-one days to carry shipment fifty-eight miles is unreasonable: Watson v. R. R., 145-236.

Where shipment could not be delivered before Sunday, delivery on next day was sufficient: Collection Agency v. R. R., 147-593.

Where twelve days consumed in transporting shipment twenty-five miles, jury may, from common observation and experience, consider and determine the question of ordinary time: Rollins v. R. R., 146-153.

Ordinary time is a question for the jury and it is error for the court not to leave it to them: Wall v. R. R., 147-407.

"Five days" means five full running days exclusive of the day of delivery and the day of shipment: Branch v. R. R., 88-571 (number of days changed by amendment).

Judicial notice in actions for penalty and for damages discussed in Furn. Co. v. Express Co., 144-639.

Where goods were on the road between Erie, Pa., to town of Lenoir for fourteen days, court will take judicial notice of time required for ship-

ment between the two points so far as to hold that there has been prima facie a breach of contract: Ibid.

Where delay entirely at initial point, that is sufficient evidence upon which jury can find delay unreasonable: Rollins v. R. R., 146-153.

"INTERMEDIATE POINTS." This section does not authorize carrier to hold freight at each intermediate point the extreme limit, without any necessity for detaining it at all: Meredith v. R. R., 137-478.

The 48 hours' allowance to a carrier for delay at intermediate points by section 2632 of this Revisal, is for change of cars if necessary, and for unloading and reloading: Watson v. R. R., 145-236.

A station of defendant's railroad which was terminus of two other railroads was not an intermediate point with reference to freight not transferred to the other lines, but shipped through on defendant's line to points beyond: Davis & Hooks v. R. R., 145-207.

Right of railroad to time allowed when not taken for purposes specified, discussed by Clark, C. J., in Davis v. R. R., 145-207; Watson v. R. R., 145-236. In less than carload shipments, point of transfer from one car to another is an "intermediate point:" Collection Agency v. R. R., 147-593.

A point at which a car is transferred from main line of defendant's system to a branch line is an "intermediate point:" Wall v. R. R., 147-407.

SUNDAY NOT EXCLUDED. What constitutes a reasonable time for the transportation of freight, must be determined by including the last day, unless it is Sunday: Davis & Hooks v. R. R., 145-207.

Where one of the two days next after the delivery of freight to a carrier for transportation was Sunday, such day was properly deducted in ascertaining whether the freight was transported within a reasonable time, not as Sunday, but as one of the two initial days of nonaction which carrier was entitled to before it was required to begin transportation: Davis & Hooks v. R. R., 145-207; Watson v. R. R., 145-236; Keeter v. R. R., 86-346.

Defense that last day being Sunday should not be counted is unavailable when it appears that the delay began to run on the Saturday preceding; the charge for delay only having begun to run, continues without regard to Sundays or holidays: Wall v. R. R., 147-407.

AS TO INTERSTATE SHIPMENTS. Language of this section applies only to interstate shipments, and the question of its interference with interstate commerce does not arise: Marble Co. v. R. R., 147-53.

In case of shipment from Georgia to North Carolina, where it does not appear in what state delay occurred, plaintiff can not recover: Ibid.

Shipment between two points in this state via point in South Carolina is interstate shipment, and penalty can not be recovered for delay: Ice Co. v. R. R., 147-61, 66.

Section is operative upon freights to be shipped to points outside state as well as those to be delivered within its territory, and was not in conflict with federal constitution: Bagg v. R. R., 109-279.

CORPORATION COMMISSION'S POWER HEREUNDER. Clause making it unlawful for any railroad to allow any goods to remain at any intermediate point for a longer period than 48 hours, unless otherwise provided by corporation commission, gives to commission right to fix time

allowed as free time for intermediate points and to make reasonable regulations as to time of transit: Summers v. R. R., 138-295.

Corporation commission has no power to change time allowed as free time at point of shipment, nor to alter the penalties fixed by this section: Ibid.

2633. Paid at classified rates; penalty for failure to deliver. All common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the interstate commerce commission in case of shipments from without the state and with those of the corporation commission of this state in case of shipments wholly within this state by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee or consignees of the correct amount due for freight according to such classification and rates, and upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates such common carrier shall deliver the freight in question to consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by any suit in any court of competent jurisdiction.

1905, c. 330. Common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others: Randall v. R. R., 108-612; Allen v. R. R., 100-397.

150-419

Where railroad corporation, chartered by another state, leases railroad chartered by this state, it is bound to observe and obey all laws of this state regulating business of transportation: Freight Discrimination Cases, 95-434.

Section 2633 imposes only one penalty for refusal of railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for same offense: Harrill v. Rwy. Co., 144-532.

A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by consignee and, in absence of conflicting regulation by congress, section 2633, imposing a penalty for default of railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce: Harrill v. Rwy. Co., 144-532.

It is no defense hereunder for defendant company to show its agent did not know correct amount of the charges because of defendant's failure to file its schedule of rates, under requirement of interstate commerce act, or that bill of lading showing such charges had not been re-

ceived with goods at their destination, in usual course of its business: Harrill v. Rwy. Co., 144-532.

BILLS OF LADING. Bill of lading issued by a common carrier only determines conditions upon which freight is to be transported after it passes under its control, and it does not abrogate or annul any contract made by common carrier before it was issued in regard to receiving and forwarding freight: Hamilton v. R. R., 96-398.

Bill of lading is both a contract and receipt; as a contract to carry and deliver goods upon terms and conditions specified in instrument, it can not be explained by parol testimony so as to alter its legal effect, in absence of fraud or mistake, but as a receipt or acknowledgment of quantity, character or condition of articles, it may be explained, varied or contradicted like any other receipt: Mfg. Co. v. R. R., 121-514.

Common carrier can make a valid agreement, fixing value of shipments, in case of loss by its negligence, if such agreements be reasonable, or based on valuable consideration, and it must clearly appear that such was the intention of parties and burden to prove it is on the carrier: Gardner v. R. R., 127-293.

Bill of lading is prima facie evidence of actual value of property therein named: Gardner v. R. R., 127-293.

Stipulation to ship "at company's convenience" is too indefinite, and therefore unreasonable: Whitehead v. R. R., 87-255.

Delivery of bill of lading is not necessary to make carrier liable as such for goods sent to it for shipment: Berry v. R. R., 122-1002.

Stipulation by an express company contained in its bill of lading that it shall not be liable for loss or damage, unless demand of payment therefor is made within thirty days from date of bill of lading, is an unreasonable restriction of its liability: Watch Case Co. v. Express Co., 102-351; Cigar Co. v. Express Co., 120-348.

Stipulations restricting common law liability of common carrier are invalid unless reasonable, because parties are not dealing on an equal footing: Cigar Co. v. Express Co., 120-348; Mitchell v. R. R., 124-236; Hinkle v. R. R., 126-932; Parker v. R. R., 133-335; Everett v. R. R., 138-68.

A clause in a bill of lading that notice of loss or damage to goods must be given in writing to carrier within 30 days after delivery thereof, or after due time for such delivery, is unreasonable and void: Mfg. Co. v. R. R., 128-280.

Stipulation that in case any claim for damage should arise for loss of articles mentioned in receipt, while in transit or before delivery, extent of such damage or loss shall be adjusted before removal from station, and claim therefor made in thirty days to "trace agent" of the carrier, is an unreasonable provision which courts will not uphold: Capehart v. R. R., 81-438.

Where bill of lading provided that corporation should not be held liable for wrong carriage or wrong delivery of goods that were marked with initials, numbered, or imperfectly marked: Held, not to cover failure to duly forward goods only marked with an initial: McGowan v. R. R., 95-417.

2634. Time within which loss or damage must be paid; penalty; amount of recovery; actions united; remedy cumulative. Every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid within sixty days in case of shipments wholly within this state, and within ninety days in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment or point of delivery to another common carrier: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved in any court of competent jurisdiction: Provided, that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property hipped, for loss or damage thereto and for the penalties herein provided for may be united in the same complaint. This section shall apply to every express company, firm or corporation doing express business in the state.

1905, c. 330, ss. 2, 4, 5; 1907, c. 983. **For reason of the requirement to give notice of loss to railroad,** see Hinkle v. Rwy. Co., 126-932.

147-343
148-485
148-469
148-323
149-89
152-342
152-269

Where cattle are received by common carrier for transportation and are not seasonably and safely delivered, that is, not delivered at all, or delivered in a damaged condition, and after unreasonable delay, plaintiff's case is made out: Hinkle v. Rwy. Co., 126-932—**and burden is then upon defendant, and if it wishes to escape any part of its common-law liability by showing a special contract, it must affirmatively prove such contract, and bring injury clearly within terms of its exemption,** Ibid.

If condition of contents of box is known to railroad which receives it for transportation over its line, failure to guard against liability for condition of such goods by examination or stipulation is negligence: Mfg. Co. v. R. R., 121-514.

It is a principle of law, when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof: Mitchell v. R. R., 124-236.

In case of limited liability, proof of shipment and loss or injury makes a prima facie case for shipper, and then burden is upon carrier to show that circumstances of loss bring it within excepted causes, and when this is shown, burden still rests upon carrier of showing that loss or injury was not due to its own negligence: Ibid.

Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage and burden is upon it to rebut presumption: Gwyn-Harper Mfg. Co. v. R. R., 128-280; Morganton Mnfg. Co. v. R. R., 121-514; Meredith v. R. R., 137-478; Everett v. R. R., 138-68; Mitchell v. R. R., 124-236

Where carrier accepts goods for transportation, in absence of a special contract, it assumes duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to connecting carrier: Meredith v. R. R., 137-478.

Section 2644, which provides a penalty for a carrier's failure to adjust a loss in a shipment of goods from without the state within 90 days after a claim for such loss is filed with it, is not in violation of constitution of the United States, Art. 1, section 8: Morris v. Express Co., 146-167.

Where a common carrier receives freight and fails to deliver on demand and admits loss and responsibility, law will presume such loss attributable to its negligence: Everett v. R. R., 138-68.

Issue submitted in this case under the evidence was proper in an action against a carrier for the loss of goods: Mfg. Co. v. R. R., 128-280.

AS TO CONNECTING CARRIERS. Duty of safe carriage attaches as the goods pass into custody of each connecting line and ceases only when they are safely delivered to its successor: Lindley v. R. R., 88-547.

Railroad company, whose line is one of several connecting roads between places from and to which freight is shipped, in absence of special contract, or of an allegation in pleadings and proof of an association or co-partnership by which each connecting line will become liable for contracts of others, is not responsible for damages for negligence occurring beyond its terminus. In such cases its liability is confined to that of forwarding agent: Knott v. R. R., 98-73.

Where box of goods is shipped over connecting lines and terminal line receives box in apparently good condition and marks bill of lading "O. K." and goods are found to be damaged at end of line, a rebuttal presumption is raised that damages occurred on that line: Mfg. Co. v. R. R., 121-514.

Where action is brought against connecting carrier for loss of goods, official reports of officers of other connecting carriers are admissible on behalf of plaintiff: Mfg. Co. v. R. R., 128-280.

To show that freight was in good condition when it was delivered by defendant to connecting line, evidence that it is custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, is admissible: Knott v. R. R., 98-73.

Where bill of lading requires that notice of loss shall be given at point of delivery, an intermediate carrier can not object that it was not notified: Mfg. Co. v. R. R., 128-280.

Evidence that goods were delivered to carrier is admissible in an action against a connecting carrier for loss of goods: Mfg. Co. v. R. R., 128-280.

Upon proof that goods were accepted for transportation in good condition by defendant and delivered by connecting carrier to plaintiff at destination, after unreasonable delay, in a damaged condition, court

should have submitted case to jury, and in absence of any evidence by defendant rebutting prima facie case, should have instructed jury that they would be justified in finding that delay and injury occurred while goods were in defendant's possession: Meredith v. R. R., 137-478.

On proof that carrier received goods in good condition, burden of proof rests upon such carrier to show delivery in the same condition to next carrier or to consignee, such proof being peculiarly within its power: Ibid.

Where two or more common carriers unite in forming an association creating a through line for transportation of freight, payment of tariff charges to be made at the beginning or end of transportation, with through bills of lading giving the names of the traffic agents of the different lines, freight charges to be divided according to the respective mileage of the companies, they become co-partnership and each line is liable for any damage resulting from delay or otherwise on any part of through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line: Rocky Mount Mills v. R. R., 119-693.

2634a. Placing of cars for loading; requisites of application; penalty for not placing in time. Whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in car-load lots with any kind of freight embraced in the tariffs of said company, stating in said application the character of the freight, the number of cars wanted, the station, depot, siding, wharf or boat-landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish such car or cars within four days from seven o'clock, A. M., the day following such application, which application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the car or cars named in the written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making the application: Provided, that the railroad company, before furnishing the car or cars upon such application of the shipper may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which deposit of five dollars for each car may be retained by the railroad company as a forfeit for trackage, in case the car or cars are not loaded within forty-eight hours after notice of the placing of the car or cars in accordance with the demand: Provided, that the corporation commission may excuse from the penalties imposed by this section independent lines not owned, operated or controlled by any other line or system when trackage is less than one hundred miles.

1907, c. 217, s. 3. A written application by a shipper to a carrier for a freight car to be furnished within two days is not a compliance with rule 9 of the corporation commission: McDuffie v. R. R., 145-397.

A railroad company must furnish suitable cars for perishable goods accepted for shipment: McConnell v. R. R., 144-87.

2635. Existing remedies continue. The preceding section shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon said common carrier.

1905, c. 330, s. 5. This section allowing a carrier five days (now changed) within which to ship goods, does not relieve it from its common law liability for loss caused by unreasonable delay in shipment thereof: Parker v. R. R., 133-335.

Person who has sustained injuries by reason of failure of railroad company to provide proper means of transportation or operate its trains as required by statute may bring an action on contract, or in tort, independent of statute: Purcell v. R. R., 108-414.

Railroad company is liable in damages sustained by reason of delay in shipment of freight: Branch v. R. R., 88-570.

Where machinery was consigned to agent of a railroad, to be forwarded to plaintiff over such road, and it was negligently detained for a time, held that defendants were not liable as common carriers for this neglect but only as bailees: Foard v. R. R., 53-235.

Section 2632 does not supersede or alter duty of carrier at common law, but merely enforces admitted duty and superadds penalty: Meredith v. R. R., 137-478.

2636. Carrier's right against other carrier. Any common carrier, upon complying with the provisions of the two preceding sections, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question.

1905, c. 330, s. 3.

2637. Unclaimed freight sold. Every railroad, steamboat, express or transportation company which shall have had unclaimed freight, not perishable, in its possession for a period of six months, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to

take place. The expenses incurred for advertising shall be a lien upon such freight in a ratable proportion according to the value of each article, package or parcel, if more than one.

Code, s. 1985; 1871-2, c. 138, s. 48.

2638. Unclaimed perishable freight. In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be, on giving the notice required in the preceding section, after its receipt at the place where it was directed to be left.

Code, s. 1986; 1871-2, c. 138, s. 49.

2639. Funds from unclaimed freight go to University. Such railroad, steamboat, express or transportation company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim such surplus within five years, said surplus shall be paid to the university.

Code, s. 1987; 1871-2, c. 138, s. 50.

2640. Through freight and travel. The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads of said corporations or companies, and rolling stock thereof, on such terms as may be agreed upon by the directors of said corporations or companies.

Code, s. 1995; 1866-7, c. 105.

2641. Charges on partial freight deliveries. Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu.

1903, s. 495.

XI. Overcharges.

2642. Not to receive more than tariff rate. No railroad, steamboat, express or other transportation company engaged in the carriage of freight, and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages, more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law.

1903, c. 590. Competent for courts, certainly in absence of legislative regulations, to protect public against exaction of oppressive and unreasonable charges by a corporation enjoying municipal franchise: Griffin v. Water Co., 122-206. 146-12

Where 96 cents was paid as freight on a part of shipment which was "short" and not delivered, this was an overcharge: Cottrell v. R. R., 141-383.

Presumption is that common carriers obey the law, and make and observe the lists of charges thus required to be made, while they continue current and unchanged: Freight Discrimination Cases, 95-434.

2643. Overcharge on tariff rates refunded. In case of any overcharge, contrary to the preceding section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed in the preceding section a written demand, supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section.

1903, c. 590, s. 2. Claims accompanied in each case with the freight bill and bill of lading, amount to a separate written demand for each overcharge within the statute, even though two overcharges were set out in one instrument, and demand was made for total sum: Efland v. R. R., 146-129. 146-12 146-13

2644. Penalty for failure to refund overcharge. Any company failing to refund such overcharge, within the time allowed, shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars.

1903, c. 590, s. 2. Section 2644, which provides a penalty for a carrier's failure to adjust a loss within a certain time after a claim therefor is field, does not deny the carrier the equal protection of the law: Morris v. Express Co., 146-167. 146-129 146-135 148-469

When freight is shipped over connecting lines, no action lies against last carrier to recover back a charge in excess of rate agreed upon by first carrier in absence of proof that first carrier, who gave bill of lading, had authority to bind connecting lines by its contract rate of shipment, or that last carrier agreed to refund sum paid in excess of amount agreed by first shipper to be charged: Mfg. Co. v. R. R., 106-207.

It is error for judge below in effect to charge jury that such tariff rate published between two points for freight moving an opposite direction to that of shipment in question was conclusive, and that they should be governed in their verdict as to overcharge accordingly: Scull v. R. R., 144-180.

Court erred in admitting the unsworn declarations of an agent that there was an overcharge: Pump Co. v. R. R., 138-300.

Jury having found that shipment of goods was made upon a connecting line on a bill of lading which accompanied goods, and that defendant line collected only rate specified in bill of lading, the plaintiff can not recover: Ibid.

The penalty not exceeding $100 prescribed for a railroad's failure to refund on proper demand an overcharge in freight, is not objectionable as disproportionate to a claim of $1.39, since it is not imposed to facilitate the collection of claims, but to enforce the performance of a carrier's duties: Efland v. R. R., 146-129, 135.

An action lies after payment to recover back an overcharge by common carrier: Mfg. Co. v. R. R., 106-207.

2645. Live stock killed, negligence presumed. When any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the company in any action for damages against such company: Provided, no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued.

Code, s. 2326; 1856-7. c. 7. [Space will not permit the subject of negligence to be elaborately annotated, hence only cases within scope of section appear here.]

For definitions of negligence, see under section 59.

Live stock are not expected to show same judgment on approach of train as human beings: Carlton v. R. R., 104-365.

This section applies to a town as well as in the country and to stock law and non-stock law territory: Shepard v. R. R., 140-391.

Language of statute is broad enough to include such case as well as when live stock were running at large: Randall v. R. R., 104-410.

Measure of damages in such case is difference in value of cow and that of beef: Roberts v. R. R., 88-560; Boing v. R. R., 91-199.

Where plaintiff showed killing of stock and that the action was commenced within six months thereafter and defendant introduced evidence tending to show that it was not negligent, it was error to direct verdict for defendant: Hardison v. R. R., 120-492.

Where plaintiff makes a prima facie case by suing for killing of a cow within six months, defendant is not entitled to nonsuit plaintiff on ground that such prima facie case is rebutted by evidence of defendant: Davis v. R. R., 134-300.

Whether the title to the cow that was killed was in the wife of plaintiff, under a gift from plaintiff to her, is a question for jury: Ibid.

WHEN THERE IS NEGLIGENCE. Where, in such case, court below told jury that if train, running faster than schedule time, could not be stopped within distance the object was discovered, it was negligence: Held to be error: Seawell v. R. R., 106-272.

Where engineer was behind time and running, in night time, faster than schedule time, but within limit allowed, killed plaintiff's live stock, and his engine being provided with all usual modern appliances, he could not have stopped it in time to prevent killing: Held not to be negligence: Seawell v. R. R., 106-272.

Judge charged company that the company should provide such appliances as would enable engineer to stop freight train within seventy-five yards; and if not furnished, then it was defendant's duty to so slacken speed that train could be stopped within that distance: Held, error: Winston v. R. R., 90-66; Doggett v. R. R., 81-459; Proctor v. R. R., 72-579.

Test of negligence in this case is not whether proper effort was used after animal was discovered upon track, but whether, by exercise of proper lookout, it could have been discovered in time to have prevented killing: Carlton v. R. R., 104-365.

Where plaintiff's horse was in his pasture, through which defendant's road ran, and was run over in day time by one of engines of defendant, it appearing on trial that horse, before being struck, ran some 200 yards on track, and that there was nothing to prevent engineer from seeing him, and that no alarm was given by engineer until about time horse was run over: Held, that there was such negligence as would make defendant liable: Jones v. R. R., 70-626.

Independent of legal presumption, where railroad cars were left on an inclined plane where they could be easily set in motion, and were very insecurely fastened; and one of animals, for killing of which this suit was brought, was killed a month previous to the other by a car which had escaped and run down same grade, and agents of defendant being thus apprised of danger of such action, did not use proper precautions to prevent future injury: Held, to be gross negligence for which company was responsible: Battle v. R. R., 66-343.

Where beast on a railroad would not be driven off from track by person trying to do so, and could not be scared off by steam whistle, engineer striving with all his might to arrest progress of train before it reached it, but it was run over and killed: Held, not to be negligence: Montgomery v. R. R., 51-464.

Proof that plaintiff's cow was seen near defendant company's railway track, with one of its legs broken, about time that two trains had passed over road, is some evidence in support of plaintiff's claim for damages: Boing v. R. R., 87-360.

Where horse was feeding within three feet of railroad track, in plain

view of engineer, who did not slacken speed of train, or take other precautions, until train was within close proximity to horse, and he had gotten upon track it was negligence: Snowden v. R. R., 95-93.

PRESUMPTION OF NEGLIGENCE, WHEN; REBUTTABLE. Law presumes negligence when action is brought within six months of killing: Bethea v. R. R., 106-279; Carlton v. R. R., 104-365; Randall v. R. R., 104-410, 107-748; Mesic v. R. R., 120-489; Wilson v. R. R., 90-69; Pippen v. R. R., 75-54—and burden of proving it is not upon plaintiff: Carlton v. R. R., 104-365.

In action against railroad company for killing or injuring live stock, force of presumption of negligence only applies when facts are not known, or when from testimony they are uncertain. When facts are fully disclosed and there is no controversy as to them, court must decide whether they make out case of negligence; and when they fail to do so, defendant can not be held liable: Doggett v. R. R., 81-459; Durham v. R. R., 82-352; Mesic v. R. R., 120-489; Randall v. R. R., 104-410.

This section applies to all cases of killing stock by railroad and while presumption of negligence arising from killing may be rebutted, it is only where undisputed facts show there was no negligence that trial judge should direct verdict for defendant: Hardison v. R. R., 120-492.

This presumption arises from fact of killing where animal is hitched to a wagon or cart, as well as where it is straying at large when killed: Randall v. R. R., 107-748.

Law presumes negligence when action is brought within six months of killing, but this presumption may be rebutted by showing there was none in fact: Bethea v. R. R., 106-279.

In action against railroad company for killing certain mules of plaintiff, where negligence is established by force of the statute, it can only be rebutted by showing that by exercise of due diligence stock could not have been seen in time to save them: Pippen v. R. R., 75-54.

Presumption of negligence thereunder can only be rebutted by showing that agents of railroad used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence: Battle v. R. R., 66-343.

Statutory presumption of negligence for killing live stock, when action is brought within six months, is not rebutted by showing that live stock were under control of a person at time: Randall v. R. R., 104-410.

Where killing of stock by railroad is admitted or proven, trial judge may instruct jury that a certain state of facts, if believed by them, would rebut presumption of negligence, but not that certain evidence, though uncontradicted, would do so: Baker v. R. R., 133-31.

AS TO OWNER'S CONTRIBUTORY NEGLIGENCE. If owner of cattle permit them to stray off and get upon track of railroad and they are killed or hurt, railroad company is not liable unless train was being carelessly run, or by exercise of proper care after animals were discovered injury could have been avoided or prevented: Doggett v. R. R., 81-459.

Where plaintiff permitted his steer to wander upon defendant's track, he is not guilty of contributory negligence: Bethea v. R. R., 106-279.

Prima facie evidence of negligence hereunder is not impaired by a local act requiring stock to be fenced in, but defendant must repel presumption by satisfactory proof to jury: Roberts v. R. R., 88-560.

Fact that "stock law" makes it unlawful for plaintiff to permit his cow to run at large affords no excuse for an injury to her resulting from defendant's negligence: Roberts v. R. R., 88-560.

Plaintiff's mule was killed by defendant's train: Held, that even if plaintiff was guilty of contributory negligence in turning mule out of enclosure, he is entitled to recover damages if defendant could have prevented accident. But plaintiff had the right to turn out mule and the act can in no sense be considered as contributory negligence: Farmer v. R. R., 88-564.

The law in reference to "common of pasture" touched upon and discussed by Ashe, J., in Farmer v. R. R., 88-564.

2646. Injuries by negligence of fellow-servants; defective machinery. Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void.

1897 (Pr.), c. 56. For history of the law of fellow servant, see Coley v. R. R., 129-407. This section is constitutional as far as it applies to fellow servants: Nicholson v. R. R., 138-517; Coley v. R. R., 128-534, 129-407; Kinney v. R. R., 122-961; Wright v. R. R., 123-280; Hancock v. R. R., 124-222—and we see no reason why the remainder of the act is not equally constitutional, as it is necessary to give any practical value to this act itself, Coley v. R. R., 129-409. 152-1

This section is applicable to employee of "any railroad operating in this state" and is not limited to injuries received in this state: Williams v. R. R., 128-286.

This section has the effect of making all co-employees of railroad companies agents and vice-principals of the company so far as fixing the company with responsibility for their negligence is concerned: Fitzgerlad v. R. R., 141-534.

Court will take notice of this section without being pleaded: Hancock v. Rwy., 124-222.

Lumber roads and street railways are "railroads" within the meaning of this section: Hemphill v. Lumber Co., 141-487.

It will not be presumed that doctrine of non-liability for acts of fellow servants obtains in another state: Williams v. R. R., 128-286.

Fellow servant law applies to all railroad employees, whether injured while running trains or rendering any other service: Sigman v. R. R., 135-181.

Fellow servant act applies to corporations chiefly engaged in manufacturing, which, in connection with and in aid of its primary purpose, owns and operates railroad having its own engines, cars, crews, etc.: Bird v. Leather Co., 143-283.

Under Fellow Servant Act, which operates on all employees of railroad companies, whether in superior, equal or subordinate positions, if plaintiff, a hostler of defendant, was injured as proximate cause of negligence of his helpers in shoveling coal from a car into a tender, defendant is responsible: Fitzgerald v. R. R., 141-530.

By contract of service made in North Carolina, the provisions of the Fellow Servant Act must be read into the contract, and there being no evidence that service was to be performed altogether in another state, it would seem that relative rights and liabilities of parties are fixed by terms of contract: Miller v. R. R., 141-49.

The contention that Fellow Servant Act applies to defendant in this case can not be determined where its answer denied that it owned or operated the logging railroad and no appropriate issues were submitted: Tanner v. Lumber Co., 140-475.

This section applies to an injury suffered by any employee in any department of work of a railroad which is being operated, but does not apply to an employee engaged in building a trestle for extension of railroad, at a point some miles from track on which trains are being operated: Nicholson v. R. R., 138-516.

In an action against a railroad company for wrongfully causing death of engineer, question whether it and another road were partners in operating part of road on which deceased was killed was properly submitted to jury: Harrill v. R. R., 135-601.

This section has no application to injuries sustained by servant of an independent contractor of a railroad company by reason of negligence of a fellow servant: Avery v. R. R., 137-130.

Person employed by railroad company to load express hauled by company is not a fellow servant of an employee of express company: Hopper v. Express Co., 133-375.

DEFECTIVE APPLIANCES, ETC. Failure to furnish employee with modern appliances is culpable, continuing negligence on the part of employer, which cuts off defence of contributory negligence and negligence of a fellow servant, such failure being the causa causans: Troxler v. Rwy., 124-189.

Under act depriving railroad companies of defense of assumption of risk, a railroad company can not plead such defense to an action by an employee for injuries from a defective sand-dryer: Walker v. R. R., 135-738.

A cross-piece used to keep steady lumber loaded on flat car is not such an appliance as the automatic coupler, or iron handhold, or many other parts of the equipment of the car, coming clearly within the language of the statute: Wallace v. R. R., 141-657.

When under instructions from his superior officer plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently cause an injury to himself in such manner as it was his duty in replairing to

prevent, he can not recover, and section 2646 has no application: Mathis v. R. R., 144-162.

In an action against the defendant railroad, if the jury should find that plaintiff, while in performance of his duty, was injured, if injury to employee was the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to defendant, by reason of this section: Biles v. R. R., 139-528.

AS TO "ASSUMPTION OF RISK" AND "CONTRIBUTORY NEGLIGENCE." Doctrine of assumption of risk has been eliminated by the fellow servant act: Biles v. R. R., 143-78; Thomas v. R. R., 129-392; Cogdell v. R. R., 129-398; Coley v. R. R., 128-534.

Where, in trial of an action for damages for injuries to plaintiff, an engineer, resulting from alleged negligence of defendant company, jury found that plaintiff did not contribute to his own hurt, it was immaterial under act abolishing doctrine of "fellow servant," which servant of defendant was guilty of negligence: Kinney v. R. R., 122-961.

The jury, under the charge, having found the issue of negligence gainst defendant, under the principle established in the Greenlee and Troxler cases, both defenses of assumption of risk, which ordinarily includes the negligence of a fellow employee, and that of contributory negligence, are closed to defendant, unless, perhaps, the negligent conduct of injured employee should amount to reckleness: Hairston v. Lumber Co., 143-512.

Error to submit issue as to assumption of risk, where cause of action is for injury to railroad employee: Mott v. R. R., 131-234; Cogdell v. R. R., 129-398.

2646a. Record made of purchases of railroad brasses. Every person, firm or corporation buying railroad brasses, or any composition metal specially used in the operation of trains, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the name of the person from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal. The said register shall be at all times open to the inspection of the public.

1907, c. 464.

2647. How action brought for penalties. All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state.

Code, s. 1976; 1885, c. 221.

2648. Officials to account to successors. The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company.

Code, s. 2001; 1870-1, c. 72, ss. 1, 3. **For other statutes affecting railroads, see Corporation Commission.**

CHAPTER 62.

REGISTER OF DEEDS.

I. Office of.

2649. Seal of office. The office of register of deeds for every county in the state shall have and use an official seal, which seal shall be provided by the county commissioners of the several counties, and shall be of the same size and design as the seals now used by the clerk of the superior court, with the words "Office of Register of Deeds," the name of the county and the letters "North Carolina" surrounding the figures.

1893, c. 119, s. 1.

2650. Election for. In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, * * * a register of deeds.

Const., Art. VII, s. 1. **The office of register of deeds is constitutional, but the duties are statutory, and the legislature may, within reasonable limits, change the duties and diminish the emoluments of the office, if the public welfare requires it:** Fortune v. Comrs., 140-322.

2651. Vacancy filled by commissioners. When a vacancy occurs from any cause in the office of register of deeds, the board of county commissioners shall fill such vacancy by the appointment of a successor for the unexpired term, who shall qualify and give bond as required by law.

Code, s. 3649; 1868, c. 35, s. 4. **See also section 1321.**

2652. Oath of office. The register of deeds shall take the oath of office on the first Monday of December next after his election before the board of county commissioners.

Code, s. 3647; 1868, c. 35, s. 2; 1876-7, c. 276, s. 5. **For form of oath, see section 2360.**

2653. Where kept. The register shall keep his office at the courthouse unless the board of county commissioners shall deem it impracticable.

Code, s. 3650; 1868, c. 35, s. 5.

2654. When open. The board of county commissioners may fix by order, to be entered on their records, what days of each week, and at what hours of each day, the register of deeds shall attend

at his office in person or by deputy, and he shall give his attendance accordingly.

Code, s. 3651; 1868, c. 35, s. 6. **While it is the duty of the register of deeds to permit all persons to inspect the records committed to his custody, he will not be required, without the payment of his proper fees, to allow anyone to make copies or abstracts therefrom;** Newton v. Fisher, 98-20.

II. Duties of.

2655. Call on clerk for instruments. The register of deeds shall at least once a week apply to the clerk of the superior court of his county for all instruments of writing admitted to probate, and then remaining in the office of such clerk for registration, and also for all fees for registration due thereon; which fees the clerk of the superior court shall receive for the register.

Code, s. 3652; 1868, c. 35, s. 7.

2656. Proceed against clerk for failure to deliver papers. In case the clerk fails to deliver such instruments of writing, and pay over such fees as are prescribed in the preceding section, on application of the register, the clerk shall forfeit and pay to the register one hundred dollars for every such failure; for which sum judgment may be entered at any time by the judge of the superior court, on motion in behalf of the register, on a notice of ten days thereof to the clerk.

Code, s. 3653; 1868, c. 35, s. 8.

2657. Certify and register copies. When a deed, mortgage or other conveyance conveying real estate situate in two or more counties is presented for registration duly probated and a copy thereof is presented with the same, the register shall compare the copy with the original, and if it be a true copy thereof he shall certify the same, and thereupon the register shall endorse the original deed or conveyance as duly registered in his county, designating the book in which the same is registered and deliver the original deed to the party entitled thereto and register the same from the certified copy thereof to be retained by him for that purpose.

1899, c. 302.

2658. To register instruments within what time. The register of deeds shall register all instruments in writing delivered to him for registration within twenty days after such delivery, except mortgages and deeds in trust, or other instruments made to secure the payment of money, which he shall register forthwith after delivery to him. He shall indorse on each deed in trust and mortgage the

day on which it is presented to him for registration, and such indorsement shall be entered on his books and form a part of the registration, and he shall register such deeds in trust and mortgages in the order of time in which they are presented to him.

Code, s. 3654; R. C., c. 37, s. 23; 1868, c. 35, s. 9. As to registration of deeds, contracts to convey, and leases of land, see sections 979, 980—of mortgages and deeds of trust, see section 982—of conditional sales of personal property, see section 983—of conditional sales of railroad property, see section 984—of marriage settlements and other marriage contracts, see section 985—of deeds of gift, see section 986—of powers of attorney, see section 987—of certified copies of any deed or writing which is required or allowed to be registered, see section 988. For registration of deeds as notice to the world, see annotations under section 980.

The reason for the enactment of this section was the insufficiency of the old law: Moore v. Ragland, 74-348.

A deed may be registered at any time after probate and order made for registration: Sellers v. Sellers, 98-13—there being no limitation as to time: Hallyburton v. Slagle, 130-484.

Registration hereunder does not mean a partial or imperfect registration; it means a registration complete and perfect, so that it may serve all the purposes of the law in protecting the rights of parties directly interested and give notice truly to the public: Kivett v. Young, 106-570.

Register need not mark deed filed for registration until his fees are paid: Cunninggim v. Peterson, 109-33—and where he holds instrument until such fees are paid and on the day they are paid marks it filed as of the day it was first handed to him, it only operates as notice from the day the fees were paid and the endorsement actually made, Ibid.

Endorsement made on deeds by the register when they are presented to him for registration, is not essential to registration; and, when made, is not conclusive evidence but only prima facie evidence of the facts therein recited: Cunninggim v. Peterson, 109-33.

A register of deeds has the power and it is his duty to correct any error he may have made in the registration of a deed, either by inserting any omitted matter or by a reregistration of the entire instrument: Sellers v. Sellers, 98-13.

Certificates of registration made by registers of deeds are prima facie evidence of the facts therein recited: Sellers v. Sellers, 98-13.

Registration of a deed in trust is deemed complete from the time when register commences it: Metts v. Bright, 20-311.

Where register received a deed of trust and, without noting the time of filing thereon, forthwith began registering same, and two hours afterward an execution was levied upon the property conveyed: Held, that the time of filing could be proved by parol and it had priority over the levy: Metts v. Bright, 20-311.

Where deed was delivered to register at 10 o'clock a. m., Dec. 20, 1866, and was actually registered Jan. 28, 1867, and the summons for the garnishee was left at his residence at 8 o'clock a. m., Dec. 20, 1866, but not

actually received by him until the evening of that day: Held, that the lien under the deed had priority: Parker v. Scott, 64-118.

The filing of a deed for registration has the effect of registration, Smith v. Lumber Co., 144-47; Davis v. Whitaker, 114-280; Glanton v. Jacobs, 117-428, and cases cited on page 429.

ERRORS IN REGISTRATION HELD NOT TO INVALIDATE. Case in which the names of the parties to the instrument were wrongly recorded in premises and in description of property, but registration otherwise regular, and was held good: Royster v. Lane, 118-156.

A registry of a mortgage is not void because of the clerical mistake made by the register in transcribing, which does not affect the sense and the provision as to amount secured, description of property, etc., or obscure the meaning of the instrument: Royster v. Lane, 118-156.

Where, in the registration, no signatures to the instrument were copied by the register, but names of the parties appeared in the body of the instrument and in the acknowledgment, as copied, registration is valid: Smith v. Lumber Co., 144-47.

Where register failed to copy the seal attached to the signature to the instrument it does not invalidate the registry, if the fact that a seal was affixed appears in the body thereof: Broadwell v. Morgan, 142-475; Heath v. Cotton Mills, 115-202.

2659. Bond liable for failure to register. In case of his failure to register any deed or other instrument within the time and in the manner required by the preceding section, the register shall be liable, in an action on his official bond, to the party injured by such delay.

Code, s. 3660; 1868, c. 35, s. 10. For bond and liabilities thereon, see section 301. The registration of a deed is presumed to be correct: Cochran v. Improvement Co., 127-386. Liability for wrongly recording amount in a mortgage: Kivett v. Young, 106-567.

Under section 415 an action for a penalty against a register of deeds and the surety on his official bond abates by the death of the officer: Wallace v. McPherson, 139-297.

2660. To file papers alphabetically. The register shall keep in files alphabetically labeled all original instruments delivered to him for registration, and on application for such originals by any person entitled to their custody, he shall deliver the same.

Code, s. 3661; 1868, c. 35, s. 11.

2661. Transcribe and index books on order. The board of county commissioners, when they deem it necessary, may direct the register of deeds to transcribe and index such of the books in the register's office as from decay or other cause may require to be transcribed and indexed. They may allow him such compensation at the expense of the county for this work as they think just. The

books when so transcribed and approved by the board shall be public records as the original books, and copies therefrom may be certified accordingly.

Code, s. 3662; 1868, c. 35, s. 12.

2662. Number of survey in grants registered. The register of deeds in each county in this state, when grants have been registered without the number of the tract or survey, shall place in the registration of the grants the number of the tract or survey, when the same shall be furnished him by the grantee or other person; and in registering any grant he shall register the number of the tract or survey.

1889, c. 522, s. 2. **For requirement to register surveys, see section 1772 et seq.**

2663. Certificate of survey to be registered. It shall be the duty of the register of deeds in each county, when any grant is presented for registration with a certificate of survey attached, to register such certificate of survey, together with all endorsements thereon, together with said grant, and a record of any certificate of survey so made shall be read in evidence in any action or proceeding: Provided, the failure to register such certificate of survey shall not invalidate the registration of the grant.

1905, c. 243.

2664. Keep general index. The board of county commissioners, at the expense of the county, shall cause to be made and consolidated into one book, a general index of all the deeds and other documents in the register's office, and the register shall afterwards keep up such index without any additional compensation.

Code, s. 3663; 1868, c. 35, s. 13.

2665. Index instruments. The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and reference shall be made, opposite each name, to the page, title or number of the book in which is registered any instrument.

Code, s. 3664; 1899, c. 501; 1876-7, c. 93, s. 1. **Failure to index a misdemeanor, see section 3600.**

Surveys to be indexed, see section 1722.

Liability for failing to properly index recorded mortgage: Daniel v. Grizzard, 117-105.

The failure of the register of deeds to index a deed which has actually been registered can not impair its efficacy: Davis v. Whitaker, 114-279.

2666. Clerk to board of commissioners. The register of deeds is ex-officio clerk of the board of county commissioners, and as such shall perform the duties imposed by law or by order of the said board.

Code, s. 3656; 1868, c. 35, s. 15; Const., Art. VII, s. 2. **For duty in regard to official reports, see section 919. For general duty as clerk of board, see sections 1324-1326.**

2667. Serve certain notices by mail. The register of deeds shall serve by mail all notices issued by the board of county commissioners to justices of the peace, road overseers and school committeemen, in lieu of the service by the sheriff, and shall receive as his compensation his actual expenses for mailing, and nothing more.

Code, s. 3657; 1879, c. 328, ss. 1, 3.

2668. Make out tax lists. The register shall make out the tax lists as directed by law, under the supervision of the board of county commissioners.

Code, s. 3658; 1868, c. 35, s. 16.

2669. Omitted duties, how performed. Whenever, upon the termination for any cause of the term of office of the register of deeds, it appears that he has failed to perform any of the duties of his office, the board of commissioners shall cause the same to be performed by another person or the successor of any such defaulting register. Such person or successor shall receive for his compensation the fees allowed for such services, and if any portion of the compensation has been paid to such defaulting register, the same may be recovered by the board of county commissioners, by suit on his official bond, for the benefit of the county or person injured thereby.

Code, s. 3655; 1868, c. 35, s. 14.

NOTE. Failure to perform duty a misdemeanor, see sections 3592-3599.

Failure to keep index, misdemeanor, see section 3600.

Entry-taker ex officio, see section 1701.

County ranger ex officio, see Strays.

For duties in regard to marriage license, see sections 2090, 2091, 2092.

For duty in regard to mortgage given by clerk of superior court in lieu of bond, see section 268.

Constables' bonds registered by, see section 302.
Coroner's bonds registered by, see section 300.
For duties in regard to elections, see Elections.
For duty to record appointments of deputy clerks, see section 899.
For registration of report establishing dividing fences, see section 1668.
For registration of timber trademarks, see section 3024.
For duty as to official reports, see section 919.

CHAPTER 63.

RELIGIOUS AND BENEVOLENT SOCIETIES.

2670. Religious body may appoint trustees. The conference, synod, convention or other ecclesiastical body, representing any church or religious denomination within the state, as also the religious societies and congregations within the state, may from time to time and at any time, appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation, who and their successors shall have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation.

Code, s. 3667; R. C., c. 97, s. 3; 1796, c. 457, s. 1; 1844, c. 47; 1848, c. 76.

The provisions of this chapter apply only to church property and not to property held in trust for a "Baptist church and for the education of the youths of colored race:" Thornton v. Harris, 140-498—does not apply to educational institutions, only to religious societies, Allen v. Baskerville, 123-126.

There is no provision in our laws for donations to be employed in any general system of diffusing knowledge of Christianity throughout the earth: Bridges v. Pleasants, 39-26.

For actions by trustees, see section 2671. For removal of trustees, see section 2671. For construction of trusts, see section 2672.

2671. Religious body may remove trustees. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise; and the said trustees and their successors may sue and be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matter relating thereto. And they shall be accountable to the said churches, denominations, societies and congre-

gations for the use and management of said property, and shall surrender it to any person authorized to demand it.

Code, s. 3668; R. C., c. 97, s. 4; 1796, c. 457, ss. 2, 3; 1844, c. 47. **The trustees of a church represent a quasi-corporation and are accountable to congregation for use and management of church property:** Lord v. Hardie, 82-241.

A congregation taking possession of church can not contest validity of mortgage given by trustees for purchase money on ground that it was ultra vires: Rountree v. Blount, 129-25.

Pastor of church recovered judgment against trustees of said church for salary, and execution was levied upon communion service: Held, it was not liable to seizure and sale under execution: Lord v. Hardie, 82-241.

Building committee of church not liable individually for injury to one engaged in building it: Wilson v. Clark, 110-364.

Trustees are liable for goods ordered by one of their number and used by them in building church even though order was not authorized: Tull v. Trustees, 75-424.

REMOVAL OF TRUSTEES. Under this section a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created: Nash v. Sutton, 117-231.

An individual member of a religious society may maintain an action for removal of faithless trustees who have deprived society of property held by them in trust: Ibid.

In action for removal of trustees judgment may be so framed as to appoint plaintiff trustee instead of trustees so removed and to direct conveyance of legal title of property to him to be held in trust for use and benefit of society and to convey it as such society may direct: Ibid.

A duly appointed trustee of a religious society may maintain an action for removal of faithless or incompetent trustees, and compel them to convey property held by them to purposes to which it was designed: Ibid.

A trustee of religious society instituted a special proceeding, in which he demanded judgment that certain other trustees should be removed, and that a lost deed should be set up and a trust therein declared; demurrer for misjoinder of causes of action was sustained: Ibid.

ACTIONS BY TRUSTEES OR BY MEMBERS. Where testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require executor to performance of provision to build such fence: Cabe v. Banhook, 127-424.

Title is vested in trustees individually and they may recover at law, though in writ and declaration they style themselves "trustees:" Walker v. Fawcett, 29-44.

It is only when suit is brought by persons who claim as "successors" that question arises whether original bargainees were duly chosen trustees of a religious congregation, and whether persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to former, and thereby vest in them title to property, which is necessary to support an action: Ibid.

Where conveyance is made to A. B. and C. for a certain tract of land, as trustees for the Methodist Episcopal Church, a suit of trespass quare clausum fregit may be brought by A. B. and C. against wrongdoers, though they may not have been appointed trustees according to law: Ibid.

In absence of trustees and a governing body authorized to appoint, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow-members, to maintain such action as may be necessary to protect their common interest: Nash v. Sutton, 109-550.

Trustees of a religious society can not recover in action for alleged nuisance near premises used as place of worship and residence of pastor for any physical suffering by pastor or members of congregation: Taylor v. R. R., 145-400.

CONTESTS BETWEEN RIVAL BOARDS AND CONGREGATIONS. That plaintiffs, as officers and members of "Second Baptist Church of Raleigh," met for worship and transaction of business in another and different house from church edifice of that association makes no difference in determining who are the Second Baptist Church, and whether or not plaintiffs have dissolved their connection with association, when it is not required by its laws to meet in any particular house or place, except that members thereof shall reside, and meetings thereof shall be held, in the city of Raleigh: Perry v. Tupper, 74-722.

In a contest between two committees, each claiming to be the rightful board of trustees, to hold same title in trust for same beneficial owner, title does not come in controversy: Thornton v. Harris, 140-498.

What amounts to voluntary withdrawal of members from religious association is question of law: Perry v. Tupper, 74-722.

Contests between churches of somewhat similar names over question of ownership of devise: Tilley v. Ellis, 119-233; Simmons v. Allison, 118-763.

Devise to a diocese, which was divided, is also divided: Diocese v. Diocese, 102-442.

2672. Title to lands to vest in trustees, or in religious societies. All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the state for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation, for which said glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which the said churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of the said churches, denominations, societies and con-

gregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in the said churches, denominations, societies and congregations, respectively, according to such intent.

Code, s. 3665; R. C., c. 97, s. 1; 1776, c. 107; 1796, c. 457, s. 4. By act of 1796, religious societies or their trustees have not a general capacity of aquisition; they can only take for the use of the society: Trustees v. Dickenson, 12-189.

Where a testator bequeathed property in trust for support of minister of Associate Seceding Party, "who shall preach at the Seceding Congregation Meeting-House, called Gilead," and a majority of that congregation, being of a different denomination, refused to permit a minister of Associate Seceding Party to officiate in their church, it was held that a trust resulted, although Associate Seceding Party offered to build another church near one mentioned by testator: McAuley v. Wilson, 16-276.

Recital in a deed conveying land to vestry and wardens of church, that it was made "for purpose of aiding in establishment of Home for Indigent Widows or Orphans, or in promotion of any other charitable or religious objects to which property may be appropriated" by grantee, creates no trust and grantee can convey perfect title: St. James v. Bagley, 138-384.

A grantor can impose conditions and can make title conveyed dependent upon performance; but if he does not make any condition, but simply expresses motive which induces him to execute deed, legal effect of granting words can not be controlled by language indicating grantor's motive: Ibid.

A provision in a will that church is to be built from certain funds will not fail because there is not sufficient amount to build church as large as directed: Paine v. Forney, 128-237.

A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing courts to interfere and control their management and disposition of property, unless this is clear intent of grantor expressed in language which should be construed as imperative: Hayes v. Franklin, 141-599.

A bequest for religious charity must, in this state, be to some definite purpose, and to some body or association or persons having a legal existence and with capacity to take; or at least, must be to some such body on which the legislature shall, within a reasonable time, confer a capacity to take: Bridges v. Pleasants, 39-26.

When it is doubtful whether language in a grant operates as declaration of trust, court will examine entire deed, relation of parties, etc., to enable it to gather intention of grantor: St. James v. Bagley, 138-384.

In order to create a trust, it must appear that the words were intended to be imperative; and when the property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence: Ibid.

The doctrine of execution cy pres does not prevail in this state: McAuley v. Wilson, 16-276; Holland v. Peck, 37-255; Bridges v. Pleasants, 39-26; White v. University, 39-19.

Cases of interest hereunder in which devises, bequests and other conveyances for religious, charitable, or educational purposes are construed, or where doctrines as to such trust estates generally treated: In re Murray's Will, 141-589; Hayes v. Franklin, 141-599; Witherington v. Herring, 140-495; Thornton v. Harris, 140-498; Allen v. Baskerville, 123-126: Keith v. Scales, 124-497; St. James v. Bagley, 138-384; Freeman v. Freeman, 141-97; Bond v. Mfg. Co., 140-381; Paine v. Forney, 128-237; Baptist University v. Borden, 132-476; Brewer v. University, 110-26; United Brethren v. Comrs., 115-489; Tilley v. Ellis, 119-233; Simmons v. Allison, 118-763; Diocese v. Diocese, 102-442; Holland v. Peck, 37-255; University v. Gatling, 81-508; McKethan v. Ray, 71-166; Miller v. Atkinson, 63-537; Taylor v. Bible Society, 42-201; Bridges v. Pleasants, 39-26; Hester v. Hester, 37-330; Stanley v. McGowen, 37-9; Wardens of the Poor v. Gerard, 37-210; White v. University, 39-19; McAuley v. Wilson, 16-276; Trustees v. Dickenson, 12-189.

2673. How religious body to convey land. The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregaton, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made shall be effective to pass said land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property.

1885, c. 384; 1889, c. 484. **Where land was conveyed to officers and members of church for purpose of keeping and maintaining a church for worship, and all privileges and appurtenances thereto belonging, court will not restrain officers of church from leasing small portion of lot for term of years for erecting a store, the rent payable to said officers, on ground that officers are committing a breach of trust and acting contrary to terms of deed:** Hayes v. Franklin, 141-599.

Other cases of interest: St. James v. Bagley, 138-384; Nash v. Sutton, 109-550.

2674. Church on vacant land vests title. All houses and edifices erected for public religious worship on vacant lands, or on lands of the state not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established.

Code, s. 3666; R. C., c. 97, s. 2; 1778, c. 132, s. 6.

2674a. Benevolent orders may appoint trustees, who may hold and transfer property. Lodges of masons, odd fellows and knights of pythias, camps of the woodmen of the world, councils of the junior order of united american mechanics, order of the elks, and

any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies in such manner as such body or society may deem proper, which trustees, and their successors, shall have power to receive, purchase, take and hold property, real and personal, in trust for such benevolent society or body; and such trustees shall have the power when instructed so to do by resolution adopted by the said societies, or body, of which they are trustees, to sell and convey in fee-simple any real or personal property owned by said body or society; and such conveyances so made, or hereafter to be made, by said trustees shall be effective to pass said land or property in fee-simple to the purchaser.

1907, c. 22.

CHAPTER 64.

RESTORATION TO CITIZENSHIP.

2675. Petition for. Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship.

Code, ss. 2938, 2940; R. C., c. 58, ss. 1, 3; 1840, c. 36, s. 4. **The disqualification for citizenship is not part of the judgment of the court, but a mere consequence thereof:** State v. Jones, 82-685.

2676. When and where petition for, filed. At any time after the expiration of four years from the date of conviction, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found.

Code, ss. 2940, 2941; 1897, c. 110; R. C., c. 58, ss. 3, 4; 1840, c. 36, s. 3.

2677. Notice given. Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard.

Code s. 2938; R. C., c. 58, s. 1; 1840, c. 36.

2678. Hearing and evidence. The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition, or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this state for three years next preceding the filing of the petition.

Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; R. C., c. 58, ss. 1, 2; 1840, c. 36.

2679. Decree. At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto.

Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.

2680. Pardon, or suspension of judgment; procedure after. Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor, or the court suspended judgment on payment of the costs and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement there-

of be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon has been granted by the governor and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction.

1899, cc. 44, 249; 1905, c. 547.

See cases prior to this enactment: State v. Houston, 103-383; State v. Pearson, 97-434.

CHAPTER 65.

ROADS, BRIDGES, FERRIES.

I. Described.

2681. What constitutes; board of supervisors. All roads and ferries that have been laid out or appointed by virtue of any act of assembly, or any order of court, are hereby declared to be public roads and ferries; and the justices of the peace in each township shall have the supervision and control of the public roads in their respective townships. They shall, with respect to this work, constitute and be styled the board of supervisors of public roads of such township, and under that name, for the purposes aforesaid, they are hereby incorporated the board of supervisors of public roads, and the board of county commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and settle ferries, to order the laying out of public roads where necessary, to appoint where bridges shall be made, to discontinue such roads and ferries as shall be found useless, and to alter roads so as to make them more useful.

Code, s. 2014; 1887, c. 73; 1889, c. 543; 1893, c. 141; R. C., c. 101, s. 1; 1784, c. 227, s. 1; 1868, c. 20, ss. 11, 16, 17, 18; 1868-9, c. 185, s. 14; 1879, c. 82, s. 1. **For annotations as to establishing public roads, see under section 2683.**

LEGISLATIVE CONTROL OVER ROADS, BRIDGES, ETC. Article 8, section 2 of the constitution, giving to commissioners a general supervision and control over roads, bridges, ferries, etc., does not deprive legislature of power over these subjects: Barrington v. Ferry Co., 69-165—and does not deprive it of the power to authorize establishment of public

ferry at certain point for term of 30 years and to make it unlawful for any person to establish any other ferry within 1½ miles of said ferry: In re Spease Ferry, 138-219.

It is for legislature to prescribe by what method roads shall be worked and kept in repair, whether by labor, by taxation of property, or by funds raised from license taxes, or by a mixture of two or more of these methods, and this may vary in different counties and localities: State v. Holloman, 139-642.

The question, what is a public use, is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for appropriation of property, but it will not be conclusive: Cozard v. Hardwood Co., 139-283.

Legislature can provide special road law and method of working public roads for a county, or several counties, or a township or other locality, and make the adoption of such systems depend upon acceptance or rejection thereof by people or landholders, or by official board of such county, township or locality: State v. Holloman, 139-642.

Legislature has complete power to regulate highways in state and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and preservation of roads, and this power may be conferred upon local governing agencies and its being put into effect can be made dependent upon action of board of supervisors: State v. Holloman, 139-642.

AS TO WHAT IS A PUBLIC HIGHWAY. A public highway is one established by public authority, and kept in order by the public under the direction of law; or else it is one used generally by the public for twenty years, and over which public authorities have exerted control, and for the reparation of which they are responsible: State v. Purifoy, 86-682; State v. McDaniel, 53-284; Boyden v. Achenbach, 79-539; Kennedy v. Williams, 87-6; State v. Johnson, 61-140.

A public road is one that is dedicated to the public and worked by an overseer appointed according to law: Collins v. Patterson, 119-602—but a neighborhood road not dedicated to public, but used by public under permission or license of owner of land, is not a public road within meaning of this section: Ibid; but compare Tise v. Whitaker-Harvey Co., 146-374.

The fact that proper authorities have been empowered to sell portion of public square, the power not having been exercised, does not destroy its character of a public highway: State v. Eastman, 109-785.

An overseer is not essential to the existence of a highway. A public square, in a city or town, within which is situated the courthouse, is a public highway: State v. Eastman, 109-785.

There may be a public road de facto, and the only person who can question right to such road is owner of land, but owner can only be bound by proceeding against him according to law of land, or by user of twenty years, from which such proceedings will ordinarily be presumed: State v. Marble, 26-318.

Right to a public way arises at once upon a dedication by owner and acceptance by public, or persons in a position to act for them: Tise v. Whitaker-Harvey Co., 146-374.

WHAT AMOUNTS TO DEDICATION OF PUBLIC HIGHWAY OR OF HIGHWAY BY PRESCRIPTION. Dedication of a public way may be in express terms, or implied from owner's conduct, and, while intent to dedicate is usually required, conduct of owner may, under certain conditions work a dedication on his part, even in the absence of an intent to dedicate: Tise v. Whitaker-Harvey Co., 146-374.

Where road has been used by public, as public highway, for twenty years, and there is no evidence how this user commenced, a presumption of law arises that this road has been laid off and established, as a public road, by due course of law; but a possession or user by public for a less time will not raise this presumption: State v. Marble, 26-318; Woolard v. McCullough, 23-432; State v. Hunter, 27-369.

Right to a public way can not be acquired by adverse user alone in less than 20 years: Tise v. Whitaker-Harvey Co., 146-347.

In an action to enjoin obstruction of an alleged public way, whether a certain writing shows that no dedication was understood or intended by the parties, held for the jury: Ibid.

Where individual appropriates land for public highway, much less time than twenty years will suffice to make it a public road; for it is more the intention of owner, than the length of time of user, which must determine fact of dedication: State v. Marble, 26-318.

FERRIES; ESTABLISHMENT; EXCLUSIVE PRIVILEGES. The power to establish ferries is one of the attributes of sovereignty which is to be exercised by legislature itself, or by any agent whom that body may authorize to act for it: In re Spease Ferry, 138-219.

The essential element of a ferry franchise is exclusive right to transport persons, with horses and vehicles and such personal goods as accompany them, from one shore to other: Broadnax v. Baker, 94-675.

The essential idea in a ferry is the crossing of a stream or other body of water from shore to shore: Ibid.

Franchise of keeping a public ferry is so incident to riparian ownership that it can be granted to none but those who own the land at one of the termini, unless such proprietors refuse to exercise it, when it may be granted to another, upon his making compensation to owner, and this is so even when termini are public roads: Broadnax v. Baker, 94-675; Pipkin v. Wynns, 13-402.

Legislature has power to grant franchise of ferry to any one, and to authorize condemnation of land of riparian owner as a landing place: Barrington v. Ferry Co., 69-165.

An order of the commissioners to lay out a ferry amounts to the establishment thereof: Robinson v. Lamb, 129-16.

Art. 7, section 2, of the constitution giving supervision and control of roads, bridges, etc., to county commissioners does not deprive general assembly of power to authorize establishment of public ferry at certain point for term of 30 years and providing that it shall be unlawful for any person to establish any other ferry within 1½ miles of said ferry: In re Spease Ferry, 138-219—and it must be construed as a restriction

upon the general powers of the commissioners "to appoint and settle ferries," In re Spease Ferry, 138-219.

While county commissioners control public bridges and ferries, it is by virtue of their duties, imposed by law, in regard to public roads: Greenleaf v. Comrs., 123-30.

An order of the county court granting to one tenant in common exclusive right of keeping a ferry and receiving tolls, without default in the others, and without notice to them, is void: Pipkin v. Wynns, 13-402.

The discretionary power of the county commissioners to establish ferries and public roads is subject to review by superior court on appeal: Robinson v. Lamb, 126-498.

An order of the commissioners establishing a ferry gives a vested right and is not vacated by an appeal to the superior court: Robinson v. Lamb, 129-16.

Where a river lies wholly within a county, commissioners of an adjoining county have no jurisdiction to establish ferry across such river: Robinson v. Lamb, 131-229.

General assembly granting to a company privilege of establishing ferry within two miles of another which has been used for over forty years did not divest any vested right belonging to owner of such old ferry: Barrington v. Neuse River Ferry Co., 69-165.

Public bridges and ferries are incidental to public roads and are not to be established or assumed, or maintained, as county charges, unless as parts thereof, in actual existence or in contemplation: Greenleaf v. Comrs., 123-30.

Public ferry is protected by statute from all interference with proper enjoyment and use of franchise by erection of another ferry: Broadnax v. Baker, 94-675.

Where plaintiff granted a ferry franchise from two points, opposite each other, on a large stream, it was held that he could not enjoin and recover damages from a party who used stream as a highway in conveying freight from points up the river, although one of these points was within statutory distance of five miles: Broadnax v. Baker, 94-675.

Every subtraction from the profits of a ferry, by conveying its customers over the stream, with or without charge, is an injury for which an action will lie: Broadnax v. Baker, 94-675—and in such case it is the diminution in number of customers who would use ferry, and consequent reduction of tolls, which is measure of damages recoverable, Ibid.

The distance of five miles prescribed in reference to ferries is five miles in a direct straight line from ferry first established: Toll-Bridge Co. v. Flowers, 110-381.

Where statute prohibits establishment of ferry within certain limits, it does not affect license for ferry already granted: Robinson v. Lamb, 129-16.

Public ferries are not monopolies, but franchises granted in consideration of public services. They may be exclusive, but are simply licenses revocable at will: In re Spease Ferry, 138-219.

No one, in absence of special authority from legislature or board of county commissioners, has the right to erect and maintain a bridge or

ferry within such a distance of a duly authorized toll bridge as will divert from latter custom which, in ordinary course of travel, would pass over it, whether that distance be greater or less than five miles: Toll-Bridge Co. v. Flowers, 110-381. For discontinuance of ferries, see under section 2684.

2682. Width. All roads, except such as are causewayed or through cuts, shall be not less than eighteen feet wide, clear of trees, logs and other obstructions to the passage of ordinary vehicles, and there shall be ten feet in width in the centre of the roadway clear of stumps and runners. Where, by the overseers, it may be deemed expedient to make or repair causeways on the same, they shall be at least fourteen feet wide; and earth, necessary to raise or cover them, shall be taken from either hand, so as to form a drain on each side of the causeway; and they shall make, of the same width, necessary bridges through swamps and over small streams of water. Provided, this section shall not apply to the roads in those counties where there is by law a classification of the widths of the roads.

Code, s. 2025; R. C., c. 101, s. 14; 1784, c. 227, s. 2; 1880, c. 30, s. 6.

II. Established.

2683. By whom; jurors; appeal. The board of supervisors shall have the right to lay out and discontinue cartways, and the board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads: Provided, that in laying out and establishing roads and cartways, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required: Provided further, that either party may appeal from the decision of the board of supervisors to the board of commissioners of the county.

Code, s. 2023; 1879, c. 82, s. 9. As to laying out and discontinuing cartways, see sections 2686, 2694.

A county court can not dedicate or appoint a public road in any other manner than as authorized by law: State v. Marble, 26-318. County court has full power to order laying out of public roads; but none to lay them out: Welch v. Piercy, 29-365. Court has the power to decide whether public convenience requires laying out of road and to order a jury for purpose of laying it out: Ibid.

The main question to be determined as to propriety of laying out public road is, whether it is necessary for public good and convenience: King v. Blackwell, 96-322.

Order of county commissioners laying out road is competent evidence to show establishment of such road and such judgment can not be collaterally attacked: State v. Yoder, 132-1111.

The mere address of a petition is not of its essence: therefore, a petition for laying off a public road presented to county commissioners, and

definitely describing terminal points of road prayed for, is sufficient in form and substance to support action of board establishing road, although such petition is addressed to "Board of Supervisors of Public Roads:" State v. Smith, 100-550.

Where road is opened by order of county court, according to law in every respect, except that no damages were assessed by jury to owners of land, none but those owners can impeach order for that cause: Woolard v. McCullough, 23-432.

Where charter has been granted for turnpike road and road opened, county court has no right to convert it into public road, unless charter has been duly surrendered, or, from a nonuser for twenty years a dedication to public may be presumed: State v. Johnson, 33-647—and even in such case road can only be made public road in manner prescribed; the mere appointment of an overseer will not be sufficient for that purpose: Ibid.

When a road has been laid off by order of county court upon report of a jury, confirmed by court, and an appeal is taken to superior court, it is too late to take exceptions to jury. Objection should have been made in court below, upon return of jury, by a motion to quash proceedings of jury: Piercy v. Morris, 24-168.

Mere appointment of overseer and assignment of hands to a supposed road are not per se a judicial determination that a public road be laid out where none before existed: Baker v. Wilson, 25-168.

County commissioners are vested by statute with power to lay out or discontinue public roads, and from their action an appeal lies to superior courts in term, where issues of fact are to be tried by jury, and from that court an appeal lies to supreme court, as in other cases: King v. Blackwell, 96-322; Blair v. Coakley, 136-405; Lambe v. Love, 109-305; McDowell v. Insane Asylum, 101-656; see section 2690.

Order in which work upon public highways is to be performed is within sound discretion of commissioners and a finding by court that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of people of county, excludes any interference by the courts: Glenn v. Comrs., 139-413.

A board of county commissioners denied and dismissed a petition for public road, and at subsequent meeting dismissed a similar petition for same road without going into merits of cause, and then, at a later meeting, upon petition by and against the same party as the first, allowed public highway to be constructed: Held, former judgments and proceedings of commissioners were not res judicata so as to prevent establishment of such highway: Warlick v. Lowman, 111-532.

2684. Petition; notice given. The board of county commissioners shall not establish any ferry, or order the laying out of any public road, or discontinue or alter such road or ferry, unless upon petition in writing. And unless it appear to the board that every person, over whose lands the said road may pass, or whose ferry shall be within two miles of the place at which another ferry is prayed to be established, shall have had twenty days' notice of the inten-

tion to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof be posted during the same period at the court-house door; at which meeting the board shall hear the allegations set forth in the petition, and if sufficient reason be shown, the board shall appoint and settle or discontinue the said ferry, or order the laying out, or discontinue or alter the said road, as the case may be.

Code, s. 2038; R. C., c. 101, s. 2; 1813, c. 862, s. 1. **For annotations as to laying out public roads, see section 1683. For annotations as to establishment of public ferries see section 2681.**

The law does not intend that establishment of necessary road should be impeded for want of twenty days' notice, if, before an order is made for laying off road, ample notice is given to owner: Little v. May, 10-599.

DISCONTINUANCE OF ROADS AND FERRIES. County court has no authority to discontinue public road but upon petition of one or more persons, filed in court, and other necessary proceedings prescribed by law, and any order for discontinuing a public road, made otherwise, is void: State v. Shuford, 28-162.

Where proceedings to change a road show no road as having been prepared nor describe where altered road is to run, except that it is to be brought nearer a particular house and the prayer is only that an order may be ''made for turning the road,'' and then an entry appears that ''said report was confirmed, and duly entered of record,'' there is no sufficient judgment for establishing the road as altered: State v. Spainhour, 19-547.

In determining upon propriety of discontinuing public road, evidence as to original object in opening road is not pertinent to inquiry, as its utility is not dependent upon intentions of those at whose instance it was first laid out, but upon wants of community and its tendency to promote public interest: Ashcraft v. Lee, 81-135.

Evidence as to number of families to be benefited by continuing road is pertinent and important: Ashcraft v. Lee, 81-135.

Evidence that road hands in a certain township are in number insufficient to keep up all roads in that township has no tendency, unless connected with other facts, to show that any particular road should be discontinued: Ashcraft v. Lee, 81-135.

Merely referring to section: Russell v. Leatherwood, 114-683.

2685. How laid out. All public roads shall be laid out by a jury of three freeholders, who shall be summoned by the sheriff to meet at one of the termini of the proposed road, and, being duly sworn by the sheriff or other person authorized to administer oaths, shall lay out said road to the greatest advantage of the inhabitants, and with as little prejudice as may be to lands and enclosures; which laying out and such damage as private persons may sustain, shall be done and ascertained, by the same jury on oath; and all damages by them assessed shall be deemed a county charge. 152-663

Code, s. 2040; 1885, c. 65; R. C., c. 101, s. 4; 1872-3, c. 189, s. 3; 1879,

c. 82, s. 9. **Court has no power, except as to termini, to direct jury or anyone else how road shall run, that being exclusive province of jury, their verdict being, of course, subject to judgment of court, whether it shall be received or not:** Welch v. Piercy, 29-365.

Owner of property must seek compensation for land taken for a highway in manner pointed out by statute: Hitch v. Comrs., 132-573.

Under Acts 1899, chapter 581, providing for assessment of damages for taking land for road purposes, a petition to county commissioners is proper procedure, and not an action in superior court: Jones v. Comrs., 130-451.

If commissioners take land for a highway without authority of law they are liable therefor individually: Hitch v. Comrs., 132-573.

An appeal lies from action of board of county commissioners confirming report of a jury laying out road, notwithstanding there was no appeal from original order allowing road and appointing jury to locate it: Lambe v. Love, 109-305.

(1909 420)

2686. Cartways, tramways, established. If any person be settled upon or cultivating any land, or shall own any standing timber to which there is leading no public road, or which is not convenient to water, and it shall appear necessary, reasonable and just that such person should have a private way to a public road or watercourse or railroad over the lands of other persons, he may file his petition before the board of supervisors of the township praying for a cartway, tram or railway to be kept open across such other persons' lands, leading to some public road, ferry, bridge, public landing or watercourse or railroad; and upon his making it appear to the board that the adverse party has had ten days' notice of his intention, the board shall hear the allegations of the petitioner and the objections of the adverse party or parties, and if sufficient reason be shown, shall order the constable to summon a jury of five freeholders, to view the premises, and lay off a cartway, tram or railway, not less than fourteen feet wide, and assess the damages the owner of such land may sustain thereby; which, with the expense of making the way, shall be paid by the petitioner; and the cartways established under this section shall be kept open for the free passage of all persons on foot or horseback, and all carts and wagons: Provided, that if the notice aforesaid shall not have been given, the board shall cause such petition to be filed with their chairman until their next meeting, when they shall proceed to hear and determine the same, and the petitioner or the adverse party may appeal from the order of the supervisors to the board of commissioners of the county, and from the order of the board of commissioners to the superior court at term, when the issues of fact shall be tried by a jury, and from the judgment of the superior court to the supreme court, as in other cases of appeal.

Code, s. 2056; 1903, c. 102; 1887, c. 46; R. C., c. 101, s. 37; 1798, c. 508, s. 1; 1822, c. 1139, s. 1; 1879, c. 258. Form of the petition, and proper methods of procedure, under this section pointed out in Warlick v. Lowman, 103-122.

This section is in derogation of the rights of landowners, and must be strictly construed: Ibid.

As to cartways by prescription and dedication, see annotations headed "What amounts to dedication," etc., under section 2681.

A cartway is as distinct as possible; indeed, it is a way established by law for a person who has not the benefit of a public highway, and for that reason alone: State v. Purifoy, 86-682.

If plaintiff can have a practicable cartway on his own land it should not be constructed on land of another: Mayo v. Thigpen, 107-63.

To be entitled to cartway petitioner must show that it is a necessity; that his demand is reasonable and just: Warlick v. Lowman, 103-122; 104-403—or that he has no other means of egress and ingress, Burwell v. Sneed, 104-118; State v. Purify, 86-682—or that his lands are connected with public road but by an impassable tract, Mayo v. Thigpen, 107-63. "Sufficient reason" for its establishment under a private act, discussed in Cook v. Vickers, 144-312.

Petitioner not entitled to cartway simply because one would be more convenient to him: Burwell v. Sneed, 104-118; Warlick v. Lowman, 103-122; Lea v. Johnson, 31-15—or because it would give him a shorter and better outlet to public road, Warlick v. Lowman, 103-122.

When jury find cartway applied for is a necessity, because there is no other, then evidence of length and nature of route proposed, as compared with other, is competent to show that demand is reasonable and just: Warlick v. Lowman, 104-403; see Cook v. Vickers, 144-312.

Owner of a tract who does not reside on same, nor has cultivated, fenced, or in any wise improved any part of it, but has only used it as range for cattle, is not entitled to private way over adjoining land: Caroon v. Doxey, 48-23.

Courts have no authority to have lands of citizens taken for a cartway without consent of owner except in instance provided for by statute: Lea v. Johnson, 31-15.

Action of township supervisors in ordering establishment of cartway is such a final determination of matter as will support an appeal to board of commissioners, and hence through superior to supreme court, although order may not have been executed: Warlick v. Lowman, 101-548.

Upon trial of an issue whether proposed cartway was necessary and reasonable, opinions of witnesses are not competent, question not being one of science, peculiar skill or professional knowledge: Burwell v. Sneed, 104-118.

AMENDMENT UNCONSTITUTIONAL. Amendment made to law regarding cartways, etc., in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional, in that private property can only be taken for a public use:

Cozard v. Hardwood Co., 139-283; Leigh v. Garysburg Mfg. Co., 132-171—**but a way ex necessitate may be acquired,** Ibid.

2687. Church roads established. The board of supervisors in each township is authorized to order the laying out of any and all necessary roads to and from any church or other place of public worship in their said townships, to discontinue such roads when they may be found useless, and to alter the same so as to make them more useful, and the right of way herein provided for shall terminate whenever the church or place of worship shall cease to be used as such.

Code, s. 2062; 1872-3, c. 189, ss. 1, 5.

2688. Petition for church road; procedure. The said board of supervisors shall not order the laying out of any such road or discontinue or alter the same except upon petition, in writing, nor shall they hear any such petition, unless it may be made to appear that every person over whose lands the said road may pass shall have had ten days' notice of the intention to file such petition, by personal service of notice in writing, or if the owner be unknown or there be no owner, agent or attorney of such owner resident in this state, then by notice thereof posted up at the courthouse door of the county in which the township is situate and at two public places in the township for the space of ten days; and upon the hearing of the petition, if sufficient reason be shown, the said board of supervisors shall order the laying out, discontinue or alter the said road as the case may be, and from their determination any party dissatisfied may appeal as is provided in this chapter in the section directing the laying off of cartways.

Code, s. 2063; 1872-3, c. 189, s. 2.

2689. Manner of laying out. All roads provided for in the two preceding sections shall be laid out to the greatest advantage of the inhabitants and with as little prejudice as may be to lands and enclosures, within twenty days from the notification of their appointment by three disinterested freeholders, to be appointed by the said board of supervisors; and such damage as any individuals may sustain shall be ascertained by the said freeholders, and a report thereof with the proceedings had by them shall be made to the said board of supervisors; and all damages so assessed by the freeholders shall be paid by the petitioners, and until paid there shall be no confirmation of the report of the freeholders, and such laying out shall be of no effect.

Code, s. 2064; 1872-3, c. 189, s. 3.

2690. Appeal; bond; trial de novo. Any person may appeal to the superior court at term time from the determination of the board of county commissioners, and if any person shall appeal from the board on a petition, he shall give bond to the opposing party as provided in other cases of appeal, and the superior court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out, establish, alter or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the superior court in term time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said preceeding tried in the superior court in term time by jury, and from the judgment of the superior court either party may appeal to the supreme court as is provided by law for other appeals.

Code, s. 2039; R. C., c. 101, s. 3; 1813, c. 862, s. 1; 1879, c. 258. **Appeal lies from order laying out or discontinuing public roads:** King v. Blackwell, 96-322; McDowell v. Insane Asylum, 101-656—**from order altering public road,** Blair v. Coakley, 136-405—**from order establishing ferries,** Robinson v. Lamb, 126-498—**from confirmation of report of jury laying out a road, notwithstanding there was no appeal from original order,** Lambe v. Love, 109-305. **From verdict and judgment on issues of fact tried by jury on appeal to superior court from order establishing or discontinuing a public road, an appeal lies to supreme court:** King v. Blackwell, 96-322; Ashcraft v. Lee, 81-135. **Appeal must be taken to and docketed at the next term of superior court:** Blair v. Coakley, 136-405; Brown v. Plott, 129-272.

When a party appeals from decision of county court laying off a road over his lands, and superior court lays it off as appellant wishes, appellant shall not pay costs: Harris v. Coltraine, 10-312.

The discretionary power of commissioners to establish public roads is subject to review by superior court on appeal: Robinson v. Lamb, 126-498. **Superior court can only determine on the merits:** Piercy v. Morris, 24-168.

2691. Public ferry sites condemned. Wherever a public ferry has been or may hereafter be established, the board of county commissioners of the county in which any such ferry is or may be located shall have power to condemn land, not exceeding one acre for each public ferry, adjacent or convenient to said ferry, upon which to erect necessary buildings for the use and convenience of ferrymen and the traveling public, under the same rules and regulations as are provided by law for condemning land for public roads; and upon the payment, or offer of payment, to the owner of said lands, of the amount awarded to him therefor, title to the same shall vest in the county in which said land is situate. Nothing in this section shall be construed to deprive the owner of land so condemned of the right of appeal to the superior court.

1889, c. 447.

III. Changed or Discontinued.

2692. On petition. Whenever, upon petition of any person, a road shall be changed and, as a condition thereof, it shall be required by the board that he put the proposed road in good condition, he may, at any time thereafter, tender the same to the overseer, who shall receive it, if it be in such condition as is required for highways; and if not, he shall reject it; and in either case he shall report and certify the fact to said board where the same may be considered; and said board shall hear all persons interested in the matter of receiving or rejecting the road; and the decision of the board shall be conclusive as to the condition of the road; but the old road shall not be closed until it be discontinued by order of the board.

Code, s. 2041; R. C., c. 101, s. 5; 1784, c. 227, s. 13; 1813, c. 862, s. 1.

As to discontinuance of roads and ferries, see annotations under section 2684. As to discontinuance of cartways, etc., see section 2694.

An appeal from action of county commissioners in altering a public road should be taken to next term of superior court, though it was a criminal term: Blair v. Coakley, 136-405.

In a petition to turn or change a public road, it must be alleged that new road is necessary, or would be more useful to public, otherwise petition will be dismissed: Leath v. Summers, 25-108.

Public roads are laid out for public convenience, and therefore should not be altered but when interest of public requires it: Kenedy v. Erwin, 44-387.

2693. By land owner. In addition to the mode prescribed in the preceding section for turning roads, the following method may be observed by any one who desires to change a road from one part of his land to another part, namely: Such person shall lay out the same, and after putting it in such good condition as highways are directed to be, shall apply to a justice of the peace, who thereupon shall notify the overseer of the road, and summon two freeholders to meet on the premises at a given day; and the said freeholders, being duly sworn, shall, with the justice, view and examine carefully the road which is proposed in place of the other, and all matters and facts tending to show whether the change should be allowed. They shall report, in writing subscribed by them, the result of their consideration to the next meeting of the board of supervisors, which may confirm or reject their report: Provided, that such justice and freeholders shall be disinterested in the land, and not of kin or affinity to the applicant.

Code, s. 2042; R. C., c. 101, s. 6; 1834, c. 22.

2694. Cartways, tramways, railways; gates. Cartways, tramways or railways laid off according to the provisions of this chapter,

may be changed or discontinued upon application by any person concerned, under the same rules of proceeding as they may be first laid off, and upon such terms as to the board of supervisors shall seem equitable and just. Cartways, tramways or railways for the removal of timber, shall continue for a period not longer than five years, and in entering cultivated land, shall protect the same by sufficient stock-guards. And any person through whose land a cartway may pass may erect gates across the same, which shall be kept in good repair.

Code, s. 2057; 1887, c. 46, s. 2; R. C., c. 101, s. 38; 1798, c. 508, ss. 1, 2, 3; 1834, c. 16, s. 1; 1887, c. 266. **A petitioner who has acquired a right by order of court, to have cartway over land of another, and who has afterwards obtained title to servient tenement, has right to obstruct and discontinue such cartway:** Jacocks v. Newby, 49-266. 15-1

IV. Bridges.

2695. Where footways and hollow bridges maintained. Every overseer of the road, when the township board of supervisors may so direct, shall cause to be made and kept in repair, for the convenience of travelers on foot, good and sufficient footways over all swamps and streams of water that may cross that part of the road allotted to him; and, when the board shall so direct, shall also erect and keep hand-rails on each side of all hollow bridges situate on such part of the road: Provided, that at all places where footways and hand-rails, at hollow bridges or over swamps and streams of water, shall have been commonly used, for the space of ten years next preceding any period within three years before presentment made or indictment found for want of such footways or hand-rails, the same shall be conclusive evidence of an order theretofore made by the board, that they shall be erected and kept up, subject to be rebutted only by producing an order dispensing with them made within three years next before such presentment.

Code, s. 2029; R. C., c. 101, s. 17; 1817, c. 940, ss. 1, 2.

2696. How made and maintained; when connecting two counties; liability of county commissioners. When a bridge shall be necessary, and the overseer with his assistants can not conveniently make it, the board of county commissioners shall contract for the building, keeping and repairing thereof, and the same shall be a charge on the county; and when bridges shall be necessary over any stream which divides one county from another, the commissioners of each shall join in agreement for building, keeping and repairing the same, provided the cost of the same does not exceed five hundred dollars; and the charge thereof shall be defrayed by both counties,

in proportion to the number of taxable polls in each, unless otherwise agreed upon by and between the commissioners of the respective counties, and bridges shall be deemed necessary, as provided for in this section, in all cases where public roads have been regularly laid off in each county according to law to the banks of any stream which divides one county from another, if there be no ford across said stream, so long as said road shall continue to be a public ferry road; and if the commissioners of each county shall not provide their proportionate part of the money necessary for keeping up and repairing the bridges across such stream, then each of said commissioners shall be liable to a penalty of fifty dollars, to be sued for by any taxpayer of the county, one-half of said penalty to go to the party suing for the same and the other half to the school fund of the county.

157-215

Code, s. 2034; 1887, c. 370; 1889, c. 317; R. C., c. 101, s. 22; 1784, c. 227, s. 6; 1907, c. 185. **County commissioners alone have power to determine upon necessity for construction or repair of bridges and to contract for same, and such power can not be delegated:** McPhail v. Comrs., 119-330.

County bridges across county lines must be authorized by both counties and built at joint expense: McPeeters v. Blankenship, 123-651.

Where repairs have been made on a bridge, and work has been accepted by county, contractor may recover therefor on a quantum meruit for reasonable and just value of work and labor done and material furnished, though action was brought on special contract for repairs made with supervisors who had no authority to make contract: McPhail v. Comrs., 119-330.

Where county bridge is a necessity to one county alone, across a boundary stream, and adjoining county refuses to join in construction, an enabling act of the legislature must be obtained: McPeeters v. Blankenship, 123-651.

It is ultra vires for county commissioners to accept a bridge to be maintained at county's cost, where it is not a part of a public road in existence or in contemplation of being made, and they may be enjoined from doing so: Greenleaf v. Comrs., 123-30.

County commissioners ordinarily contract on the part of the county for the construction and repair of bridges: Cotton Mills v. Comrs., 108-694—but board can not contract with citizen to perpetually maintain bridge, Glenn v. Comrs., 139-412.

It is not the duty of the commissioners to take initial steps for repairing bridges; it is only when their co-operation becomes necessary in a movement started by township board of supervisors of public roads for such repairs: State v. Selby, 83-617.

A citizen can not restrain commissioners from erecting bridge across a river at certain point, though there is no public highway leading to such point, where court finds that board has in contemplation the opening of public road to such point, and that arrangements have been made for that purpose: Glenn v. Comrs., 139-412.

Plaintiff in this case is not entitled to a mandamus commanding commissioners to repair bridge: Glenn v. Comrs., 139-412.

The power conferred to build and keep up bridges refers exclusively to public bridges: Glenn v. Comrs., 139-421.

Where contract to build bridge had been entered into by defendants without concurrence of majority of justices of the peace as required in this county: Held, there is no liability imposed on county: Bridge Co. v. Comrs., 111-317.

No one, in the absence of special authority from the legislature or the board of county commissioners, has the right to erect and maintain a bridge or ferry, within such a distance of a duly authorized toll-bridge as will divert from latter the custom which, in the ordinary course of travel, would pass over it, whether that distance be greater or less than five miles: Toll-Bridge Co. v. Flowers, 110-381.

County commissioners under their general powers may bring an action to restrain the use of a non-floatable stream for floatage of logs causing damage to a county bridge over such stream: Comrs. v. Lumber Co., 115-590.

Public bridges and ferries are incidentals of public roads and are not to be established or assumed or maintained as county charges unless as parts thereof in actual existence or in contemplation: Greenleaf v. Comrs., 123-30.

Where citizen, at his own expense, constructed bridge and opened up public roads over his lands leading to bridge on both sides of river and commissioners accepted said bridge as public bridge and have kept it in repair ever since, fact that commissioners paid him only part of cost of its construction did not change its character as part of public highway, subject to control of commissioners, as all other bridges in county: Glenn v. Comrs., 139-412.

County is not liable for an injury to plaintiff occasioned by a defective bridge forming a part of the highway across a stream, in absence of any statutory provision: White v. Comrs., 90-437.

2697. Person constructing ditch across public road to maintain. It shall be the duty of every owner of a water-mill, which is situate on any public road, and also of every person who, for the purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair, all bridges that are or may be erected or attached to his milldam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill, or milldam, ditch, drain or canal. Nothing herein shall be construed to extend to any mill which was erected before the laying off of such road, unless the road was laid off by the request of the owner of the mill. The duty hereby imposed on the owner of the mill, and on the person cutting the drain or canal, shall continue on all subsequent owners of the mill, or other property, for the benefit of which the said ditch, drain or canal was cut. When

any ditch or drain originally constructed across any public road, and bridged for the convenience and safety of the traveling public has been or may hereafter be enlarged by the owner of adjacent lands to drain his lands, it shall be the duty of such owner to keep up and in repair all bridges crossing such ditch, drain or canal, and such charge shall be imposed upon all subsequent owners of the lands so drained. Any person throwing a bank of dirt in the main road shall be compelled to spread the same. When any ditch or drain is cut in such way as to turn water into any public road the person cutting such ditch or drain shall be compelled to cut such other ditch or drain as may be necessary to take the water from said road.

Code, s. 2036; 1887, c. 261; R. C., c. 101, s. 24; 1817, c. 941, s. 1; 1846, c. 95, s. 1; 1881, c. 290. **In an action for failing to keep a sufficient bridge over a canal cut across a public road, plaintiff need not allege that road was laid off before mill was erected in order to negative proviso in statute:** Wadsworth v. Stewart, 97-116.

When public road is made after landowner has cut his ditches for draining, he is not required to keep bridges in repair that are subsequently placed over them: State v. Davis, 143-611.

When proprietor of lands, who, for purpose of draining same, shall construct a ditch, drain or canal across public road, it shall be duty of said proprietor to build a bridge over said ditch, canal or drain and keep same in repair: Nobles v. Langly, 66-287—**and overseer not liable if someone injured by reason of it being out of repair,** Ibid.

A hand regularly assigned to work a certain road, and who has been properly summoned, can not excuse himself from aiding to repair bridge over a ditch across road upon ground that it is duty of person who cut ditch to make bridge over it and keep same in repair: State v. James, 74-393.

2698. When county to erect draws. The county or counties which may erect bridges shall, by their board of commissioners, provide and keep up draws in all such bridges, where the same may be necessary to allow the convenient passage of vessels. When any such draw shall be necessary to be erected for the passage of timber-rafts, said draw may not exceed twenty feet in width.

Code, s. 2053; 1891, c. 168; R. C., c. 101, s. 34.

2699. When owner of, to put in draw. Owners of steamboats or other craft, who may intend to navigate any river or creek over which any person may have a bridge, may give three months' notice thereof in one of the public journals of the state, published nearest the river or creek intended to be navigated, and to the owner of said bridge, to construct a draw of sufficient width to allow the passage of the boat which is to be used; and if the owner of said

bridge shall not, within three months from the date of the notice, construct the required draw, he shall forfeit and pay the person so notifying, if he be thereby prevented from navigating the watercourse, fifty dollars; and shall be further subject to the like penalty, under like circumstances, for every three months' default thereafter.

Code, s. 2052; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2; 1838-9, c. 5. Construction of bridges across navigable stream without draw therein will render wrong-doer liable for special damage to boat owner whose business, in common with other boat owners, requires transportation of material for manufacturing purposes from a point below to a point above obstruction: Mfg. Co. v. R. R., 117-579.

Power to control management of drawbridge over navigable river after its construction, by requiring draw to be kept open at all proper times, the removal of rafts or debris and in all other respects, in which public welfare, interest and safety is involved, is ample in both federal and state governments: Pedrick v. R. R., 143-485.

The obstruction or interference with navigation being a public nuisance, no private citizen may sue therefor, unless he suffers some damage which is not common to public: Pedrick v. R. R., 143-485.

The public have right to use of navigable streams, which are used as highways, in passing up and down it, from one point to another: Broadnax v. Baker, 94-675.

Control of its navigable waters is with the state, authority of general government being only cumulative protection from interference with commerce: Pedrick v. R. R., 143-485.

2700. Railroads keep up, when. Railroad, plankroad and turnpike companies, each, shall keep up, at their own expense, all bridges on or over county, or incorporated roads, which they have severally made it necessary to be built, in establishing their respective roads; and on failure to do so, shall forfeit and pay twenty-five dollars to any person who may sue for the same.

Code, s. 2054; R. C., c. 101, s. 35. See also, section 2568 et seq. A road used as a mill road may, because of its location, be also such a "plantation road" as will impose upon a railroad company the burden of keeping it in repair: Hinkle v. R. R., 109-472.

2701. Railroads keep up draws, when. Railroad, plankroad and turnpike companies, erecting bridges across watercourses, shall attach and keep up good and sufficient draws, by which vessels may be allowed conveniently to pass.

Code, s. 2051; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2. A citizen who owns and operates a sawmill on the banks of a navigable river and procures logs to be sawed in his mill in rafts, coming down the river both above and below a proposed bridge, etc., and is, in that sense, an abutting owner, is entitled to maintain an action to enjoin construction and mainte-

nance of a railroad drawbridge across said river below his mill as an alleged public nuisance, but a citizen who owns and runs sail-boats on said river has no right to sue: Pedrick v. R. R., 143-485.

2702. County orders for, valid. Every contract and order by the board of county commissioners entered into or made as authorized by this paper for or concerning the building, keeping up or repairing bridges, in such manner as to them may seen most proper, shall be valid against the county.

Code, s. 2035; 1887, c. 370 s. 2; R. C., c. 101, s. 23; 1784, c. 227, s. 6.

2703. Penalty for neglect to repair. Every person who shall fail to perform the duties imposed upon him by this chapter, or shall leave out of repair any such bridge, for the space of ten days, unless prevented by unavoidable circumstances, shall be liable for such damages as may be sustained.

Code, s. 2037; R. C., c. 101, s. 25; 1817, c. 941, s. 2; 1876-7, c. 90; 1876-7, c. 211. **Where water was thrown, by erection of mill, upon highway, and former proprietor of mill had built bridge over water, which, during his ownership, he repaired, and which was also repaired by present proprietor, who did no other work on roads; it was held that present proprietor was answerable in damages to an individual who sustained injury by reason of defect in bridge, and that injury was properly left to jury, whether mill or road was more ancient:** Mulholland v. Brownrigg, 9-349.

2704. How expense of maintaining borne. The expense of building and keeping up public bridges in the several counties shall be borne by the whole people of each, and not by the people of the township separately, in which such bridges may be situated; and it shall be the duty of the commissioners to adjust this burden equally among the people of their respective counties, and they shall exercise a due supervision over the action of the respective boards of supervisors of the townships, so as to prevent the board of any township from establishing any unnecessary number of bridges in its respective township.

Code, s. 2060; 1869-70, c. 219.

2705. Solicitor to prosecute for injury to bridges. The solicitors of the superior court are authorized and directed to institute suits in the name of the state, in the counties wherein the injuries may be done, for the recovery of damages, against all persons who shall willfully or negligently injure any public bridge belonging to or situate in any county or counties, by forcibly running any decked vessel, boat or raft against the same; by cutting trees or timber in the rivers or creeks above such bridges, or by any other manner or means whatsoever. In case the injury

is done to two counties, the action may be brought in either for the entire damage; and the damages which may be recovered shall be for the use of the county or counties injured; and if the plaintiff fail, the costs shall be paid by the county or counties for whose use the suit is brought, and in the same proportion in which the recovery would be divided.

Code, s. 2055; R. C., c. 101, s. 36; 1846, c. 11, ss. 1, 2. **For the recovery of damages for injury to county bridges, a remedy is given by this section:** Comrs. v. Lumber Co., 115-590.

V. Toll Bridges.

2706. When commissioners may establish. Whenever, from the rapidity or width of any stream, it may be too burdensome to build and keep up a bridge across the same, at the expense of those who are taxable for that purpose, the board of commissioners of the county, or counties, chargeable therewith, may jointly and severally (as the case may be) contract for the building thereof, by allowing the builder to take tolls, at such rate and for such time, on all persons, horses, carriages and other things passing over the bridge, as may be agreed on between the board of commissioners and the builder; which tolls shall be common to all persons. And such bridges shall be built in the manner the board or boards may direct, and shall be kept in good repair by the builder, his heirs and assigns, during the time the tolls are to be enjoyed.

Code, s. 2045; R. C., c. 101, s. 26; 1784, c. 227, s. 7; 1817, c. 939, s. 2; 1817, c. 940, s. 3. **Quaere: Whether owner of a toll-bridge who claims a penalty for "setting over" persons and property does not have to aver that he was able and ready to carry all persons, etc., offering themselves, with reasonable promptness and safety:** McRee v. R. R., 47-186.

2707. Commissioners may regulate tolls. The board of commissioners of each county shall, once a year, or oftener if necessary, at the meeting to be held next after the first day of January, rate the prices of such ferries as shall be kept within their respective counties. Ferries lying between two counties shall be rated at a joint meeting of the commissioners of the two counties, to be held at such time and place as may be agreed upon by the commissioners of the two counties (this shall not apply to Onslow, Mecklenburg, Halifax, Northampton, Pasquotank, Surry, Camden, Catawba, Iredell, Lincoln and Gaston counties). Any ferry keeper who shall ask, demand, or receive a greater price for ferriage than shall be rated by the board of commissioners, shall forfeit and pay five dollars for every offense to the party aggrieved. And every person who owns a public ferry, and refuses to keep it up at the rates allowed by the board, shall for every such offense forfeit five dollars.

Code, s. 2046; R. C., c. 101, s. 27; 1779, c. 160, s. 2; 1907, c. 221.

A franchise for a toll-bridge is not violated by a railroad company who carried passengers along their road, and as a part of the road over their bridge: McRee v. R. R., 47-186.

2708. Owner of ferry may build. In all cases, where the proprietor of a ferry shall prefer building a good and substantial bridge over any watercourse instead of keeping a ferry, he may do so; and may claim and hold such bridge under the same rights, and in the same manner, by which the ferry is claimed and held, and under the same rules, regulations, restrictions and penalties as other toll-bridges: Provided, that no more toll shall be demanded for passing any such bridge than is granted by law for the ferriage, unless by agreement with the board of commissioners: Provided further, that in all such bridges the proprietor shall erect a draw, where the free navigation of the stream may require it.

Code, s. 2047; R. C., c. 101, s. 28; 1806, c. 706. **This section requires of owner of toll-bridge, not only to erect and keep in good repair a draw sufficient for the purposes of a free navigation of the stream, but also to provide means of raising it, and to have it raised whenever steamboats and other vessels are passing it:** Davis v. Jenkins, 50-291.

2709. Owner of, and ferries to give bond. The board of commissioners of each county shall compel every person that may own a toll-bridge, or keep a public ferry, within the county, to give bond with good surety in the sum of one thousand dollars, payable to the state of North Carolina, conditioned that he will constantly keep such bridge in good repair, or, as the case may be, provide and keep good and sufficient boats, or other proper craft, always to be well attended, for the passing of travelers or other persons, their horses, carriages and effects; and will indemnify and save harmless every person who may be endamaged by reason of any default in his undertaking. And if any person shall receive damage, because such ferryman or keeper of a toll-bridge shall not have complied with the conditions of his bond, he may bring suit thereon in the name of the state, and recover his damages. And if any person shall be detained at any public ferry by reason of the ferryman not having sufficient boats or other proper crafts and hands, or by his neglecting to do his duty in any other respect, he may recover before a justice of the peace, against such ferryman, the sum of ten dollars, as a penalty for every such default or neglect.

Code, s. 2048; R. C., c. 101, s. 29; 1784, c. 227, s. 15.

2710. Penalty on unauthorized ferry. If any unauthorized person shall pretend to keep a ferry or to transport for pay any person or his effects, within five miles of any ferry on the same river

or water, which theretofore may have been appointed, he shall forfeit and pay two dollars for every such offense, to the nearest ferryman: Provided, that any person who may contract for carrying the mail, may keep a boat for the sole purpose of transporting the same, and such passengers as may travel in the coach therewith, across any ferry; but such contractor shall not transport across such ferry any other passengers than such as travel by the coach.

Code, s. 2049; R. C., c. 101, s. 30; 1764, c. 72, s. 1; 1787, c. 273; 1883, c. 381. **For annotations as to ferries, see section 2681.**

VI. Gates Across.

2711. Permission for erection. Any person desiring to erect a gate across a public road may file his petition before the board of supervisors of the township where the road lies; whereupon publication shall be made at the courthouse and on the lands of the person so applying and at three public places in said township until the next succeeding meeting, of such application, specifying the road, the place for the gate and name of the petitioner; and all persons interested in the convenient traveling or transportation on said road shall have leave to appear and defend, demur, or plead to said petition; and if, at that meeting, it shall appear that such publication has been made, the supervisors may, at their discretion, authorize the petitioner, at his cost, to erect a gate as prayed for.

Code, s. 2058; R. C., c. 101, s. 39; 1834, c. 16, ss. 2, 3, 4; 1905, c. 88.

In exercise of their powers over public roads commissioners may grant to a party over whose land any new road ordered by them to be laid out may pass, right to erect gates across such road: Andrews v. Beam, 97-315.

No presumption of a legal authority to erect a gate across a public road can arise in less time than twenty years from actual erection of gate: State v. Marble, 26-318.

Jurisdiction to license erection of gate across public road is conferred on board of supervisors; this applies to roads already established: Andrews v. Beam, 97-315.

Failure to establish cartway according to law is a matter of defense to be pleaded in trial of an indictment for breaking down a gate across it: State v. Combs, 120-607.

By chapter 77, Acts of 1885, this section does not apply to stock law territory: Edwards v. Supervisors, 127-63.

VII. Supervisors.

2712. To meet, when and where. The board of supervisors shall meet at some place in their respective townships to be agreed upon by themselves, or, in the absence of such agreement, to be named by their chairman, on the first Saturday of February and August, for the purpose of consulting on the subject of the condition of

1909 420
1909 12
1909 204

the roads in their township. They shall once in each year, during the week of their meeting in August, go over and personally examine all the roads in their township. They shall annually, at their meeting in February, elect some one of their number chairman: Provided, that no supervisor shall receive any compensation for his services as supervisor of public roads.

Code, s. 2015; 1879, c. 82, s. 2; 1880, c. 30, s. 1. **For compensation of supervisors in Guilford county, see 1907, c. 581.**

152-151

2713. To make annual reports to superior court. The board of supervisors shall annually make report to the first term of the superior court of their county after the first Monday in August of the condition of the roads of their township, and if the meetings provided for in this chapter have been held by said board, the judge holding such term of the superior court shall, after his charge to the grand jury and before they shall retire to their room, call upon the clerk of the court for such reports, and they shall then and there be delivered to the foreman of the grand jury.

Code, s. 2024; 1879, c. 82, s. 10.

2714. To have orders appointing overseers served within thirty days; penalties. The board of supervisors of the township, within ten days after the rise of the board, shall furnish the constable with two copies of each order appointing overseers of roads that may have been made during the sitting of the board. And the constable shall apply at the office of the board, within ten days after the rise of every meeting of the board, for such orders, and, on receiving them, shall, within twenty days, serve each overseer of roads with a copy of the order, or leave the same at his usual habitation; and the other copy shall be returned to the next meeting of the board of supervisors, with the date of its reception by him and the date of the service indorsed thereon, or the date when it was left at the residence of the said overseer. And if either the board or constable shall fail to perform any duty enjoined by this section, he shall forfeit ten dollars to the county, to be recovered at any time, by notice to show cause at the instance of the solicitor, who shall prosecute the same in the name of the state: Provided, the delivery to the overseer of the order appointing him made by the board of supervisors of the township, or any one of them, shall be deemed and held to be a legal service of the same.

Code, s. 2043; 1891, c. 519; R. C., c. 101, s. 8; 1812, c. 845, ss. 1, 2; 1813, c. 859, ss. 1, 2.

VIII. Overseers.

2715. When appointed; when hands allotted. The board of supervisors shall, annually at the meeting in August, divide the

roads of their townships into sections and appoint overseers for such sections at said meeting. They shall at the same time allot the hands to the overseers, and shall also designate the boundaries or points to which each resident shall be liable to work on each section, and shall within five days after such meeting certify to each overseer written notice of his appointment, with a list of the hands assigned to his section. The board of supervisors may at any time alter the sections or allotment, but shall give notice thereof to the overseer. Such overseer shall serve, and be liable as such for neglect of duty, until he shall be relieved by the board, which shall be done only upon his showing that his road is in good condition as prescribed by law. The overseer may resign after the expiration of twelve months, provided his road shall be in good repair and the board of supervisors shall so find; and any overseer so resigning, and whose resignation has been accepted by the board, shall not without his consent be again appointed overseer until after the expiration of two years from the date of his resignation. When a public road shall be a dividing line between townships, the board of commissioners of the county shall determine as to how said road shall be divided, with notice as to the working of said road. The hands may be allotted to a road by allotting all who live or shall live within certain boundaries to be fixed by the board of supervisors, in which event a list of the hands by name need not be given, but the list shall specify the hands living in the prescribed territory.

Code, s. 2016; 1879, c. 82, ss. 3, 7; 1880, c. 30, s. 1; 1887, c. 93, s. 1.

Assignment of one liable to road duty to any particular road rests with board of supervisors of township: State v. Gillikin, 114-832. 152-151

An order issued by township board appointing a person overseer of road is proper evidence of such appointment and admissible: State v. Cauble, 70-62.

An overseer can not free himself from the duty imposed by law by surrendering his order of appointment to clerk of the board of township trustees: State v. Long, 81-563.

An overseer of a public road can require no hands to work on his road, unless they live within a district which has been designated for him by county court, or unless they have been specially assigned by court to work on his road: Woolard v. McCullough, 23-432.

2716. Reports to supervisors. Every overseer shall at each and every meeting of the board of supervisors of his township make report to them of the present condition of his road, of the number of days worked on his section since last meeting, of the number of hands who attended and worked each day, of the number and names of hands who failed to attend and work; whether or not they were legally summoned, and whether or not they paid the one dollar as provided. The said overseer shall, before some person

1409 127

authorized to administer an oath, make written affidavit that the report is true and correct. Upon this report sworn to as aforesaid, if it shall appear that any of the hands, after being legally summoned, have failed to attend and work on said road, and that they did not pay the one dollar, then it shall be the duty of the said supervisors, or any one of them, to issue a warrant for the arrest of any such hand, and shall put him upon trial for the offense: Provided, that nothing herein contained shall prevent the overseer of the road from prosecuting, at any time after the offense has been committed, any hand for failure to work on the road, and such cases of prosecution shall be stated in his report to the board of supervisors, that they may not prefer another prosecution for the same offense.

Code, s. 2021; 1879, c. 82, s. 7; 1880, c. 30, s. 4.

2717. To report money collected and how expended. The said overseers shall, at the meeting of the supervisors in August, make a report of all moneys collected by them from parties excused from work on the road for the preceding year, with a statement as to how the same was expended. In case of failure of any overseer to make any report to the board of supervisors of public roads of his township, as provided in this chapter, it shall be the duty of the chairman of such board immediately upon such failure to make a sworn statement of the fact before some justice of the peace of an adjoining township, who shall immediately issue his warrant for the arrest of the said overseer, and proceed to try him for the offense.

Code, s. 2022; 1879, c. 82, s. 8.

2718. May lay off tasks to hands. The overseer, if requested by a majority of the hands on the road assigned him, may, in his discretion, lay off the road in equal portions for the convenience of the laborers, who shall finish his or their part in a time agreed on between him and each person, and on default of any agreeing party, the overseer shall cause such part to be finished by the labor of other persons, and by warrant may recover the value thereof to his own use: Provided, that the time agreed on shall not exceed six days, and that nothing in this section shall be a defense to the overseer, when prosecuted for default concerning the condition of the road.

Code, s. 2026; R. C., c. 101, s. 13; 1784, c. 227, s. 10.

2719. May use timber and dirt on roads. Overseers may lawfully cut poles and other necessary timber, for repairing and making bridges and causeways. And whenever earth shall be needed on

a public road, and it can not be conveniently procured on either side of the causeway, the overseer may lawfully take the earth from any adjoining land.

Code, s. 2027; R. C., c. 101, s. 18; 1785, c. 256, s. 1; 1818, c. 976, s. 1. **The statute gives overseer of a road (acting in good faith) power to cut poles, etc., on any land adjoining his section, and he is not confined to land immediately adjoining spot where work is to be done:** Collins v. Creecy, 53-333.

2720. Notice to work on road, how served. When an overseer shall not be able to personally notify the hands three days before the day appointed for working the road, he shall leave at the house of each hand a written summons, specifying the day on which they are required to attend, the place of the road to be worked, and the kind of tools to be brought or used; and the said written summons, left as aforesaid, shall be deemed sufficient notice to the hands required to be notified; and all penalties recovered by an overseer, for default of working on the road, shall be applied by him to the repair of the road of which he is, or may have been overseer.

Code, s. 2044; R. C., c. 101, s. 10; 1842, c. 65. **Personal service of summons to work hands means service on him personally, and not service by overseer personally:** State v. Covington, 125-641.

2721. When roads to be worked. The overseer of the road shall, as often as the road shall require, not more than six days in any one year, summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and at least fifteen days shall intervene between workings, except in case of special damage to the road, resulting from a storm. The notice shall be at least three days before the day named for the work, and shall state the hour and the place for the meeting of the hands, and what implement the hand shall bring with him. Every person liable to work on the road who has been so summoned shall appear at the time and place named, and with the implements directed, and shall work on the road under the direction of the overseer until discharged by him: Provided, that no hand shall be required to work for a less time than seven hours nor a longer time than ten hours in any one day. Any person summoned as aforesaid who shall, by twelve o'clock of the day preceding the one appointed for work on the road, pay to the overseer the sum of one dollar shall be relieved from working on the road for one day. The money thus collected by the overseer shall be by him applied on the working and repairing of the road: Provided further, that any person who shall furnish one able-bodied hand as a substitute, with the implement directed, shall be held to have complied with this chapter.

Code, s. 2019; 1879, c. 82, s. 5; 1880, c. 30, s. 3. **A summons to a person liable to road duty need not be in writing:** State v. Telfair, 130-645. **A notice by the supervisor to a person subject to road duty directing him to meet supervisor at time and place designated "to work the road" the place of meeting being a branch crossing road to be worked, is sufficient; especially where it further appeared that such person had under previous notice worked that same road:** State v. Baker, 108-799.

An overseer of a public road has no right, at his discretion, to widen road: Small v. Eason, 33-94.

2722. Sign-posts put up. Overseers shall cause to be set up, at the forks of their respective roads, a post or posts, with arms pointing the way of each road, with plain and durable directions to the most public places to which they lead, and with the number of miles from that place as near as can be computed; and every overseer who shall, for ten days after notice of his appointment, neglect to do so and to keep the same in repair, shall forfeit and pay for every such neglect ten dollars.

Code, s. 2030; R. C., c. 101, s. 18; 1784, c. 227, s. 11; 1812, c. 846. **Overseer of a road is subject to indictment if he neglects to keep signboards:** State v. Nicholson, 6-135.

2723. Mile-posts put up correctly. Every overseer of a road shall cause the same to be exactly measured, where it has not already been done, and at the end of each mile, shall mark in a plain, legible, and durable manner, the number of the miles, beginning, continuing, and marking the numbers in such manner and form as the board of supervisors shall direct; and every overseer shall keep up and repair such marks and numbers of his road. If an overseer shall neglect any of the duties prescribed in this section, for the space of thirty days after his appointment to office, he shall forfeit and pay four dollars, and the like sum for every thirty days thereafter the said marking may be neglected.

Code, s. 2032; R. C., c. 101, s. 20; 1784, c. 227, s. 11.

2724. Penalty for neglecting duty. Every overseer who shall neglect to do any other duty, by this chapter directed to be done, or who shall not keep the roads and bridges clear and in repair, or shall let them remain uncleared or out of repair, during the space of ten days, unless hindered by extreme bad weather, shall forfeit for every such offense four dollars, and be liable for such damages as may be sustained: Provided, that nothing in this section shall excuse any neglect of duty by an overseer, as the same is prescribed in any other part of this chapter.

Code, s. 2033; R. C., c. 101, s. 21; 1784, c. 227, s. 14. **It is duty of overseer to superintend hands and to put and keep roads in order:** State v.

Britt, 118-1255—and he is civilly liable for special damages for injuries arising from road's being out of repair: Hathaway v. Hinton, 46-243.

Any person assigned, when sued for penalty incurred for refusing to work on road, and overseer indicted for not having road in order, may show that in fact there is no such public road: Baker v. Wilson, 25-168.

An order of court directing how road shall be run and opened does not justify an overseer who acts under it without jury's report, and he is liable to an action by party grieved: Welch v. Piercy, 29-365.

IX. Who to Work.

2725. Who liable. All able-bodied male persons between the ages of eighteen years and forty-five years (between twenty-one years and forty-five years in Columbus and Tyrrell countis), shall be required under the provisions of this chapter to work on the public roads, except the members of the board of supervisors of public roads; but no person shall be compelled to work more than six days in any one year, except in case of damage resulting from a storm: Provided, that ten days instead of six days shall be the limit as to the counties west of the Blue Ridge. No person in Vance county shall be required to work on the public roads of said county under the provisions hereof.

Code, s. 2017; 1879, c. 82, s. 4; 1880, c. 30, s. 2; 1826, c. 26; 1905, c. 136; 1907, c. 235.

Legislature can prescribe method of working roads, whether by labor or taxation or by a mixture of two or more of these methods: State v. Holloman, 139-642.

For punishment for failure to work public roads, see section 3779.

Section is very broad in its terms, and exempts no male person who is physically able to perform the requisite work on a road, except members of board of supervisors. If any person is disqualified by disease, infirmity, or any other physical disability, he is not required to perform this duty, and while section is silent as to mode of obtaining exemption, we take it that certificate would have to be obtained from board of supervisors of public roads: State v. Craig, 81-590.

Law providing for working of public roads of Wake county is not unconstitutional because it exacts labor only of "Able-bodied male persons between the ages of 21 and 45," and excepts "residents in incorporated cities and towns and such as are by law exempted or excused:" State v. Wheeler, 141-773.

A statute requiring working of public roads by labor is not unconstitutional as double taxation: State v. Wheeler, 141-773, and cases cited on page 774.

The requirement to work the roads is not a poll or capitation tax: State v. Wheeler, 141-773—it is no tax at all, but the exaction of a public duty: Ibid; State v. Covington, 125-641.

That a person was summoned to work a public road three consecutive

days, the law providing that hands shall not be required to work continuously for longer than two days at any one time, is no defense for failing to work the first two days: State v. Yoder, 132-1111.

Statutory requirement to work public roads is not a tax but a duty, and inability to perform it, through sickness, is a full defense: State v. Covington, 125-641; State v. Craig, 81-590; State v. Sharp, 125-628; State v. Wheeler, 141-773.

Where an able-bodied male person between 18 and 45 years of age resides in this state and pursues a vocation for his income for an indefinite period, he is liable to road duty, although he is a citizen of another state to which he intends to return when he finishes his present employment: State v. Johnston, 118-1188.

A hand regularly assigned to work a certain road, and who has been properly summoned, can not excuse himself from aiding to repair bridge over a ditch across road, upon ground that it is duty of person who cut ditch to make bridge over it, and keep same in repair: State v. James, 74-393.

Where township trustees had failed under a special county road law to lay off new road districts according to strict intention of the act, but had adopted those laid off under general law: Held, that as there was sufficient certainty in location of such districts to fix liability of defendant subject to road duty, he could not, after conviction on an indictment for not working road, take advantage of such failure and irregularity by a motion in arrest of judgment: State v. Baker, 108-799.

Any inhabitant assigned, when sued for penalty incurred for refusing to work on road, and the overseer indicted for not having the road in order, may show that in fact there is no such public road: Baker v. Wilson, 25-168.

Section hands employed on railroads at regular wages are not thereby excused from working on public highways of county: State v. Cauble, 70-62—nor are bar pilots unless employed on same day: State v. Craig, 81-588.

Where a person resides in another state during greater part of year, but has domicile in this state in which he also resides three or four months of year, during which he keeps slaves here, he is liable during time he resides in this state to requisition of overseer for services of those hands: Cantrell v. Pinkney, 30-436—but merely passing through state, or visiting it for purposes of profit or pleasure and remaining for days, weeks, or even months without having any fixed home, are not persons whom overseer of roads are authorized to summon as being within their districts: Ibid.

2726. Who exempt; how exemption obtained. No person between the ages prescribed shall be exempted from working upon the public roads, except such as shall be exempted by the general assembly, or by the board of supervisors of the township, on account of personal infirmity, of which the said board shall be the sole judge. No male student attending any school, college or academy or other institution of learning in North Carolina shall be compelled to perform any road duty or to work on any street or road, or to fur-

nish any person to work in his place, or to pay any sum or sums of money in lieu of work on said road or roads, on or for any road or street in any county, city, town or township in which said school, college, academy or other institution of learning is located: Provided, however, that this shall not exempt any said male person from any road duty or road tax when such student is a bona fide and legally qualified resident of said district and was such prior to becoming a student of said institution of learning.

Code, s. 2018; R. C., c. 101, s. 12; 1784, c. 227, ss. 8, 9; 1826, c. 26, ss. 1, 2; 1907, c. 945. **As to whether general statute as to who liable to road duty repeals special statute exempting certain persons,** see State v. Womble, 112-862.

See State v. Craig, 81-590.

X. General Provisions.

2727. Traction engines allowed on roads. It shall be lawful for any person to run and use traction engines and road steamers upon the public roads.

Code, s. 2061; 1870-1, c. 162.

License tax provided for in Laws 1905, chapter 259, is simply a mode of regulating use of public roads and requiring that those desirous of using them, for extraordinary purposes, as hauling heavy lumber and logs over roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege: State v. Holloman 139-642.

2728. Owners of land or timber used on road, remedy for. The owner of any land or timber used for building or repairing public roads, may file his petition before the board of commissioners of the county wherein the injury is done; and, for damages sustained thereby, the board shall make the petitioner adequate compensation: Provided, that this and section two thousand seven hundred and nineteen shall not apply to the lands adjoining or contiguous to the causeway, or great road leading across Eagle's island to Wilmington.

Code, s. 2028; R. C., c. 101, s. 16; 1818, c. 976, s. 2.

DR. NORMAN A. WIGGINS